Indiana International & Comparative Law Review

Vol.16 No. 2 2006

TABLE OF CONTENTS

ARTICLES

NOTES

LEGAL SYSTEMS AS CULTURAL RIGHTS: A RIGHTS' BASED APPROACH TO TRADITIONAL LEGAL SYSTEMS UNDER THE INDIAN CONSTITUTION

Shubhankar Dam*

I. INTRODUCTION - TRIBALS: THE INDIAN "PRIDE"

Twentieth century discourses on tribals in social history and anthropology have predominantly reflected an approach of impassioned concern. Tribes were classically depicted as an anthropological category,[1] although they were viewed on occasion as evidence of plurality.[2] The dominant conceptual framework, however, has been a metaphor for the victimized fragments of India's national life,[3] as Sunil Janah ironically portrayed when he wrote, "[t]ribes are no longer left isolated."[4] Modern India, with its industries, highways, markets, and merchants, has inexorably moved closer to the tribes, and they too have begun to assimilate.[5] The tribes have been drawn in by the politics of economic development,[6] rapacious "consumerization" of cultural lifestyles,[7] and the allurement of "better" lives in an integrated environment. For the earliest members of the "Indian" family[8] now facing the prospect of extinction, the processes of subjugation, dispossession, and usurpation of traditional rights live in their collective memory.[9] Their inability to fight the invasions of colonial

---

* Felix Scholar, Oxford, B.A., LL. B. (Hons.) The National University of Juridical Sciences, India.

1. See Felix Padel, Forest Knowledge: Tribal People, Their Environment and the Structure of Power, in Nature and the Orient 891, 901 (Richard H. Grove et al. eds., 2000). For an introduction to tribes in India, see Virginius Xaxa, Tribes in India, in Sociology and Social Anthropology 374 (Veena Das ed., 2003).

2. U.N. WORLD CONFERENCE ON HUMAN RIGHTS: VIENNA DECLARATION AND PROGRAMME OF ACTION, U.N. Doc. A/CONF. 157/23 (July 12, 1993), *reprinted in* 32 I.L.M. 1661 (1993).

3. *See* David Hardiman, *Power in the Forest: The Dangs 1820-1940, in* SUBALTERN STUDIES VIII: ESSAYS IN HONOUR OF RANAJIT GUHA 89-90 (David Arnold & David Hardiman eds., 1994). "The history which has emerged has, more often than not, provided a tragic chronicle of uncompensated expropriation of common resources, of arrogant and unsympathetic administration by the colonial state, of loss of livelihood, cultural trauma and great suffering for the forest people." *Id.*

4. *See* Sunil Janah, The Tribals of India 7 (2003).

5. *Id.* at 7-8.

6. *See* Niraja Jayal, Democracy and the State ch. 4 (2001).

7. Janah, *supra* note 4, at 8.

8. *See* A. L. Basham, The Wonder That Was India 193 (3d ed. rev. 1967).

9. *See* Tanika Sarkar, *Jitu Santal's Movement, in Malda, 1924-1932: A Study in Tribal Protest, in* 4 SUBALTERN STUDIES IV: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY 136 (Ranajit Guha ed., 1985).

rulers[10] and, more recently, the monolithic State,[11] has resulted in the denigration of tribal identities and hastened the unfortunate prospect of an India without her "pride."

Discourses on the erosion of tribal rights and cultures generally concentrate on an assimilation-autonomy,[12] development-deference dichotomy.[13] The dichotomy has been analyzed through three principle processes: the colonial-tribal conflict over the usurpation of forest rights,[14] movements by dominant Hindu sections to influence tribal cultures,[15] and the intrusion by the Indian State into tribal areas on grounds of economic "development."[16] The effect of these three processes, however, has been

---

10. This is not to suggest that the tribals submissively accepted colonial power and domination. In fact, much of the tribal history during the colonial period is marked by tribal uprisings against colonial rulers. The success of these uprisings varied Even when successful, however, tribals were rarely able to avoid the consequences of colonial intrusion, either by way of settlement or introduction of foreign legal systems that were incompatible with their way of life. *See, e.g.*, Ramachandra Guha, *Forestry and Social Protest in British Kumaun, c. 1893–1921*, *in* 4 SUBALTERN STUDIES IV: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY 54 (Ranajit Guha ed., 1985); AMIT PRAKASH, JHARKHAND: POLITICS OF DEVELOPMENT AND IDENTITY ch. 2 (2001); Padel, *supra* note 1, at 897. Padel writes:

> The Bhils, Hos and Konds were forced to submit to British rule in the early nineteenth century in similar wars of conquest or 'pacification'. The Munda (*Kol*) uprising of 1831-2 and the Santhal *bul* (rebellion) in the 1850s point to the great increase in exploitation that took place after British rule was imposed in tribal areas: *diku* (foreigner, non-tribal) landlords, merchants and money lenders had established a hold over Mundas and Santhals . . . .

Id.

11. The 1980s and 90s have, however, increasingly seen the organizations of mass tribal movements, especially against large-scale development projects that lead to displacement. *See generally* Pravin N. Sheth, *The Sardar Sarovar Project: Ecopolitics of Development*, *in* CRISIS AND CHANGE IN CONTEMPORARY INDIA 400 (Upenda Baxi & Bhikhu Parekh eds., 1995); Jayal, *supra* note 6.

12. *See generally* J. Milton Yinger, Ethnicity: Source of Strength? Source of Conflict? (1997); Virginius Xaxa, *Empowerment of Tribes*, *in* Social Development and the Empowerment of Marginalised Groups: Perspectives and Strategies 202 (Debal K. Singha Roy ed., 2001).

13. *See* Rita Brara, *Ecology and Environment*, *in* SOCIOLOGY AND SOCIAL ANTHROPOLOGY 141 (Veena Das ed., 2003).

14. *See generally* Suresh Sharma, Tribal Identity and the Modern World (1994); Rucha S. Ghate, Forest Policy and Tribal Development 40 (1992); André Béteille, Society and Politics in India ch. 3 (1991); K. Sivaramakrishnan, Modern Forests: Statemaking and Environmental Change in Colonial Eastern India (1999); Dr. Taradatt, Tribal Development in India (2001). For a history of the gradual infiltration of the English legal system in the tribal areas of North-Eastern India, see S. K. Chaube, Hill Politics in Northeast India (1999).

15. *See* Surajit Sinha, *State Formation and Rajput Myth in Tribal Central India*, *in* THE STATE IN INDIA 1000-1700, at 305 (Hermann Kulke ed., 1997).

16. *See* Dunu Roy, *Large Projects: For Whose Benefit?* ECON. & POL. WKLY, Dec. 10, 1994, at 50; P. SAINATH, *And the Meek Shall Inherit the Earth: The Problems of Forced Displacement*, *in* EVERYBODY LOVES A GOOD DROUGHT 69 (1996); AKHILESHWAR PATHAK, CONTESTED DOMAINS: THE STATE, PEASANTS AND FORESTS IN CONTEMPORARY INDIA 39-49 (1994). In a study of large scale projects with regard to the displacement problem, it was estimated that during the forty years from 1951 to 1991, 185,000 lakhs people have been displaced – an average of 4,600 unfortunates every year. Three out of every four ousted by such

largely similar - an erosion of tribal identity and tribal "integration" into the "civilized" Indian State.[17] The conflict between the development agenda of the State and the principle of substantial deference towards tribal self-governance is obvious.[18] Tribals have the right to live under conditions that allow them to preserve their cultural life – style.[19] The Indian State, however, does have a duty to "eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas ...".[20] To argue that both (i.e., development and deference) can simultaneously triumph is to romanticize the issue. To argue that one may triumph over the other is to concede that the development agenda of the State may sometimes prevail over tribal rights.[21] This conundrum presents a need to move beyond the development-deference dichotomy and explore the viability of a rights-based approach for adjudicating conflicts between the State's duty and tribal rights.

This article addresses the nature of the institutional processes that may be employed for resolving differences within the larger framework of the Indian Constitution. The constitutional polity of India, including tribal communities, has a fundamental right of access to justice.[22] The precise nature of this fundamental right remains unclear, yet it is of critical importance. The extent to which tribes may be made effective partners in resolving the development-deference dichotomy will depend substantially on one's conception of the right

---

dams are tribals and out of the seventy-seven percent of tribal oustees only twenty-nine percent have been rehabilitated. Dunu Roy, *supra.*

17. *See* Micheal M. Cernea, *Impoverishment or Social Justice? A Model for Planning Resettlement, in* DEVELOPMENT PROJECTS AND IMPOVERISHMENT RISKS 42, 54 (Hari Mohan Mathur & David Marsden eds., 2000). "Forced displacement tears the social fabric and the existing patterns of social organization. Communities are fractioned, production systems are dismantled, kinship group and family systems are often scattered, local labor markets are disrupted, and people's sense of cultural identity is undermined." *Id.*

18. *See generally* Anand Kashyap, *Parameters of Tribal Development: Some Key Conceptual Issues, in* TRIBAL SITUATION IN INDIA: ISSUES IN DEVELOPMENT 29 (Vidyut Joshi ed., 1998).

19. There is a growing recognition under international law of the right of tribal populations to a cultural existence in its pristine form. *See* Article 12, *Draft United Nations Declaration on Rights of Indigenous People Resolution* U.N. Doc. E/CN.4/1995/2 (1994), *reprinted in* 34 I.L.M. 541 (1995) (a more detailed discussion of application of the ILO Convention and the U.N. Declaration is found at § 3.3.2).

20. *See* INDIA CONST. art. 38(2). "The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." *Id.*

21. The *Chipko* Movement in India is probably the only example where the community could withstand governmental and commercial pressure. It is rare in India's tribal history that the concerns of the "wild and uncivilized" have prevailed over the "larger good" of the "civilized." *See generally* THOMAS WEBER, HUGGING THE TREES: THE STORY OF THE CHIPKO MOVEMENT (1989); HARIPRIYA RANGAN, OF MYTHS AND MOVEMENTS: REWRITING CHIPKO INTO HIMALAYAN HISTORY (2000).

22. *See* INDIA CONST. art. 21. The right of access to justice under Article 21 is for *every* person; it is not restricted to any group or section of the people. *Id. See* Sheela Barse v. Union of India, 3 S.C.C. 632 (1986); Hussianara Khatoon (I) v. Home Secretary, 1 S.C.C 82 (1980).

of access to justice for tribal communities. It is critical also because the nature of the tribal groups' right of access to justice will have significant implications for the content and constitutionality of current and future legislation relating to the commercial exploitation of traditional knowledge,[23] biodiversity,[24] and other related matters.[25]

In this Article, I argue that the fundamental right of access to justice for tribal groups essentially implies a fundamental right to the customary legal systems of the tribal communities. This interpretation best resolves the development-deference dichotomy because the adjudication negotiation processes are conducted within the framework of a tribe's customary legal system. This enables tribes to become equal and effective partners in ways the National adjudication processes would not.

This Article further argues that the current conception of the fundamental right of access to justice is premised on a positivist framework of the "court system" and that requiring tribes to participate in dispute resolution within these formal structures is to effectively deny them *their* fundamental right of access to justice. In this sense, the tribal communities' right of access to justice may be considered a subset of the fundamental right to conserve culture under Article 29(1) of the Indian Constitution.[26] Finally, I argue that the constitutionality of recent legislation in the areas of plant variety protection, biodiversity rights, and traditional knowledge will depend on the extent to which the enactments incorporate a broad interpretation of this fundamental right of access to justice.

In expounding on the above arguments, the Article is divided into five sections. Section II revisits the debates in the Constituent Assembly on tribal rights and the conception of deference that the founding fathers had envisioned for them. Section III argues that the current judicial exposition of the fundamental right of access to justice is derived from a positivist legal structure, the basic premises of which are not relevant in the context of tribal communities. The jurisprudential basis for a fundamental right to a traditional customary legal system is then located within the Constitutional rights to cultural heritage[27] and protection of cultural institutions.[28] Section IV develops the proposition that the constitutionality of legislation in the area of the commercial exploitation of biodiversity, plant variety rights and traditional

---

23. India has yet to put in place a law regulating the commercial exploitation of traditional knowledge. The argument in this article is based on the various drafts that have circulated and are currently being considered.

24. *See* Biological Diversity Act, ACT NO. 18, INDIA CODE (2003).

25. *See* Protection of Plant Varieties Protection and Farmers Rights Act, Act No. 53, INDIA CODE (2001).

26. INDIA CONST. art. 29(1). "Any sections of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." *Id.*

27. INDIA CONST. art. 21. "No person shall be deprived of his life or personal liberty except according to procedure established by law." *Id.*

28. India Const. art. 29(1).

knowledge depends on the degree to which the legislation employs customary legal system as a mechanism for adjudicating issues of property rights. Lastly, Section V concludes that unless the modern Indian State protects the customary legal systems of the tribal communities, it will have to live with the indictment of having traded a constitutional guarantee for "national development."

II. TRIBAL CONCERNS IN THE CONSTITUTION-MAKING PROCESS: RECONSTRUCTION HISTORY

A. "What Did the Framers Intend?" - The Promises of the Constituent Assembly

Before a compelling argument can be made for the preservation of customary tribal legal systems, it is necessary to understand the approach the framers took towards tribal rights in the Constituent Assembly in 1948 - 49. This section endeavors to reconstruct what the framers intended when they chose to structure the Indian Constitution in the manner they did.[29] The proceedings of the Constituent Assembly went far beyond the basic goal of constitution drafting. The Assembly engaged diverse groups of citizens, including tribal groups, into a negotiation that had the promise of a nation-building exercise. The assurances made by the national leaders and the concessions they granted were important in securing the consent of the tribes. The legitimacy of the subsequent relationship between the Indian State and the tribal communities was dependent upon the implementation of the promises made during the nation-building exercise of the Constituent Assembly.

It would, however, be incorrect to view the efforts of the Assembly as an isolated event of nation-building. Almost one hundred years of formal colonial rule prior to the Assembly infiltrated the social and legal systems of the tribal communities.[30] When the Assembly decided to bring the tribal communities within the larger constitutional framework of the Indian sub-continent, they were pursuing the policies they inherited from their colonial masters.

The Garo Hills Act of 1869 ("Garo Act") vested the colonial administration of significant tribal areas in Northeast India in such officers as the Lieutenant Governor.[31] The Government of India Act of 1870 extended the jurisdiction of the provisions of the Garo Act to the Assam Valley, Hill Districts, and Cachar in 1873.[32] Other tribal areas were designated separately under subsequent legislation. Tribal areas were declared as "Scheduled

29. The model of "intent" developed in this section will be relevant in understanding the nature of the right of access to justice of the tribals under the Constitution. This section prepares the foundation for a more substantive argument in section III of this article.

30. *See generally supra* note 14.

31. Act XXII, INDIA CODE (1869).

32. 33 & 34 Vict., ch.3.

Districts" by the Scheduled Districts Act of 1874;[33] as "Backward Tracts"[34] by the Government of India Act of 1919,[35] and as "Excluded or Partially Excluded Area"[36] by the Government of India Act of 1935.[37] These laws were enforced by intermediaries (agents who administered the law), district administrators, or by the discretionary powers of the Governor. The categorization of the tribal areas as "backward" had already affected parts of the Indian legal system by the time the Constituent Assembly was formed in 1946. The Assembly was not oblivious to the fact that State administration of tribal lands had become "legitimate" through a series of colonial legislations that forced an alien legal system on the tribal communities.[38] When the Assembly began functioning, it was bound by the terms of the Cabinet Mission's Statement,[39] which provided, *inter alia*, that a Committee containing due representation of affected parties be formed to advise on the incorporation of provisions relating to their administration under the new Constitution.[40]

In keeping with the mandate of the Cabinet Mission, the Constituent Assembly set up an advisory committee on fundamental rights, minorities, and tribal areas. In pursuit of this goal, the North-East Frontier (Assam) Tribal and excluded Areas Sub-Committee ("Sub-Committee on Assam") and the Excluded Areas and Partially Excluded Areas (other than Assam) Sub-committee ("Sub-Committee on Excluded Areas") were set up. The reports of these committees are crucial to understanding the nature of the nation-building exercise the Assembly undertook and the purposes underlying the text of the Indian Constitution.[41] The reports and debates thereon also provide valuable insight into the social organization of the tribal communities and the conception of the development-deference model that the framers intended.

In its report, the Sub-Committee on Assam noted the highly democratic character of the tribal village councils, created by general assent and election, and the mechanisms for dispute settlement, usually by the chief or headman or

---

33. Act XVI, INDIA CODE,(1874).

34. *Infra* note 35, at § 52.

35. 9 & 10 Geo. 5, ch. 101.

36. *Infra* note 37 at § 91.

37. 26 Geo. V., 81 Edw. VIII, ch.2.

38. As mentioned earlier, the Scheduled Districts Act of 1874 and the Government of India Acts of 1919 and 1935 introduced state regulation, which considerably eroded tribals' autonomy to organize their social and economic life.

39. Statement by the Cabinet Mission to India and His Excellency the Viceroy, May 16, 1946, *reprinted in* 2 SIR MAURICE GWYER & A. APPADORAI, SPEECHES AND DOCUMENTS ON THE INDIAN CONSTITUTION: 1921-47, at 577-584 (1957).

40. The relevant text in full reads: "[T]he Advisory Committee on the rights of Citizens, Minorities and Tribal and Excluded Areas will contain due representation of the interest affected and their functions will be to report to the Union Constituent Assembly upon the list of fundamental rights, clauses for protecting Minorities, and a scheme for the administration of Tribal and Excluded Areas, and to advise whether these rights should be incorporated in the Provincial, the group or the Union Constitution." *See id.* at 583.

41. For the text of the Report of the Committee and Sub-Committees on Tribal and Excluded Areas, see 3 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 681-782 (1967).

Council of Elders.[42] The Committee added, "[I]n the areas where no right of the chief is recognized, the land is regarded as the property of the clan, including the forests."[43] The Committee concluded:

> In all the hill areas visited by us, there was an emphatic unanimity of opinion among the hill people that there should be control of immigration and allocation of the land to outsiders, and that *such control should be vested in the hands of the hill people themselves.* Accepting this then as the fundamental feature of the administration of the hills, we recommend that the Hill Districts should have the power of legislation over occupation or use of land . . . .[44]

In many ways, this conclusion was driven by the fears of the hill people regarding the unrestrained liberty of outsiders to engage in money lending or other non-agricultural professions.[45]

Conceding that the fears of the tribes were "not without justification," the Sub-Committee on Assam recommended that "if the local councils so decide by a majority of three-fourths of their members, they may introduce a system of licensing for the money lenders and traders."[46] Apprehending the negative effects of imposing an alien legal system, the Sub-Committee on Assam observed:

> Some of the tribals such as the system of the tribal council for the decision of dispute afford by far the simplest and *the best way of dispensation of justice for all for the rural areas* without the costly system of courts and codified laws. Until there is a change in the way of life brought about by the hill people themselves, it would not be desirable to permit any different system to be imposed from outside.[47]

The Joint Report of the Sub-Committees on Minority and Tribal Rights also echoed this sentiment. Conceding that a good number of superstitious and even harmful practices were prevalent among the tribal groups, the Committee observed that the tribes had their own way of life with institutions like the tribal and village Panchayats (or councils), which were more than capable of administering village matters and personal disputes.[48] Moreover, the Committee noted that the disruption of the tribal customs was capable of doing

42. *Id.* at 691-92.
43. *Id.* at 694-95.
44. *Id.* (emphasis added).
45. Id.
46. *Id.* at 701.
47. *Id.* at 693-94. (emphasis added).
48. RAO, *supra* note 41, at 774.

great harm.[49] "Considering past experiences and the strong temptation to take advantage of the tribal communities' simplicity and weakness," the Committee concluded, "it [was] essential to provide statutory safeguards for the protection of the land which [was] the mainstay of the aboriginals' economic life and for his *customs and institutions* which, apart from being his own, contain[ed] elements of value."[50]

The suggestion that tribal administration be vested in the tribal groups themselves is not without importance. It was based on an underlying premise that the tribes had a traditional legal system that was sufficiently developed to deal with the complexities of tribal life. The draft Constitution and the debates thereon also proceeded on the premise that it was important to recognize the right of tribes to be governed by a system that was effectively part of their own culture. The reports of the Sub-Committees clearly highlight the existence and developed nature of the tribal adjudicatory processes and the need to enact provisions on the principle of maximum non-interference.

The debates on tribal rights proceeded within the lines of the common assimilation-autonomy anthropological debate and in its final resolution, the Assembly sought to strike a delicate balance between national development (assimilation) and deference to tribal rights (autonomy).[51] The Drafting Committee accepted the recommendations of the Sub-Committees and created separate schedules for the tribal regions of Assam and other tribal lands throughout the rest of India.[52] The categorization of tribal areas as scheduled regions with substantial autonomy evoked passionate reactions in the Constituent Assembly.[53]

Some argued in favor of the Central Government assuming full responsibility for the administration of these areas,[54] while others argued that the concept of Scheduled Tribes and Scheduled Areas amounted to racism disguised as tribal autonomy.[55] Still others argued that the scope of administrative control was not sufficient and the tribal communities required a greater voice at the state level.[56] Replying to critics who felt that the Government should assume full responsibility for the tribes, K. M. Munshi, a prominent Assembly member, argued that there was a need to protect tribes from the "destructive impact of races possessing a higher and more aggressive culture [and that tribes] should be encouraged to develop their own autonomous

49. *Id.*

50. *Id.* (emphasis added).

51. For the Constituent Assembly Debates on Fifth Schedule, *see* IX CONSTITUENT ASSEMBLY DEBATES, 965-1001 (1950) [*hereinafter* CONSTITUENT ASSEMBLY DEBATES].

52. Fifth Schedule of the draft Constitution was made applicable to tribal regions other than Assam and the Sixth Schedule to tribal areas of Assam.

53. CONSTITUENT ASSEMBLY DEBATES, *supra* note 51, at 977.

54. *Id.*

55. *Id.* at 981.

56. *Id.* at 976.

life . . . ."[57] Refuting the pro-assimilation position of Assembly member R. K. Chaudhuri,[58] Dr. B. R. Ambedkar argued in support of the Autonomous District Councils in Assam finding that the position of the Indian tribes was somewhat similar to the Red Indians in the United States.[59] Justifying autonomy, Dr. Ambedkar noted that tribal roots "[were] still in their civilization and their own culture . . . , their laws of inheritance; their laws of marriage and so on [were] quite different from Hindus."[60]

The debates on the provisions of the draft Constitution make it sufficiently clear that the Constituent Assembly intended to provide the tribes with considerable autonomy in matters pertaining to the administration of justice, thus enabling them to lead lives defined by tribal culture and identity.[61] The draft Constitution rejected the assimilation model in favor of substantial deference to the tribal communities, subject only to a gradual self-involvement with India's national life.[62] The Constituent Assembly recognized the right of tribal communities to decide for themselves what the appropriate pace of "involvement" with "national" life should be. The recognition of this right has implications far beyond the tribes' assimilation decisions and bears directly on their fundamental right to a traditional legal system.

---

57. *Id.* at 977.

58. R. K. Chaudhuri argued that the tribals would, given an opportunity, prefer to get assimilated rather than remain autonomous. From a national perspective, he argued that unless efforts were made by a State to assimilate them, they might prefer to assimilate with other culturally similar States rather than India. For arguments by R. K. Chaudhuri, *see id.* at 1015.

59. *Id.* at 1025.

60. *Id.* A tribal representative, Mr. J. J. M. Nichols Ray said during the debates:

> The people of hills had their own culture which was sharply differentiated from that of plains. The social organization was that of the village, the clan and the tribe and the outlook and structure were generally democratic. India has to rise to that feeling or idea of equality and real democracy which tribal people had. Among the tribesmen is there no difference between class and class. Even the Rajas (kings) and Chiefs work in the fields together with the labourers. They eat together. Is that practised in the plains? The whole of India has not reached that level of equality. Do you want to abolish that system? Do you want to crush them and their culture must be swallowed by the culture which says one man is lower and another higher?
>
> In the plains the women is just beginning to be free now, and is not free yet. But in some of the hill districts the women is the head of the family; she holds the purse in her hand, and she goes to the fields along with the man . . . . In the plains of Assam there are some people who feel ashamed to dig earth. But the Hillman is not so. Will you want that kind of culture to be imposed upon the Hillman and ruin the feeling of equality and the dignity of labour which is exiting among them?

Id. at 1022.

61. *Id.* at 1025.

62. *Id.*

B. Promises Into Provisions: Survey of Constitutional Provisions on Tribal Rights.

What effects did the Constituent Assembly's debates on tribal rights have on the final version of the Indian Constitution? Article 244 (Article 190: Draft Constitution) maintained the applicability of the Fifth and Sixth Schedules to Assam and other tribal regions. The Sixth Schedule was subsequently amended in 1971 to include the tribal regions in the new states formed by the North-Eastern Areas (Reorganization) Act.[63] The Fifth Schedule established Tribal Advisory Councils, which have jurisdiction to advise the Government on matters pertaining to the welfare and advancement of tribes.[64] Additionally, the Governor has the power to limit or modify the applicability of any particular statute to the Scheduled Areas.[65] The Governor also has the authority to consult with the Tribal Advisory Council in promulgating regulations for the allotment or transfer of land and money-lending businesses.[66]

Although these provisions of the Fifth Schedule do not expressly recognize a right to a traditional legal system, it impliedly recognizes customary legal systems as part of the larger deference principle underlying the purpose of these provisions.[67] In contrast, the Sixth Schedule expressly recognizes the right to traditional legal system for the people residing in the tribal areas of Assam or its sister states.[68] The Sixth Schedule vests legislative power in the District and Regional Councils.[69] In pursuit of legislative power the Regional and District Councils may make rules regulating the procedures of village councils and courts, the enforcement of decisions and orders, and all other ancillary measures necessary to carry out the administration of justice.[70] The principle of substantial deference, in which the Constituent Assembly had great faith, is evident from this broad scheme of self-regulation, but this is not the only area in which tribal rights to customary legal systems have been recognized.

Subsequent amendments to the Constitution have expressly recognized the right of some tribal communities to self-governance within the framework of traditional customary legal systems. Article 371A of the Indian Constitution provides that no Act of Parliament with respect to "Naga Customary Law and procedure" and "administration of civil and criminal justice involving decisions according to Naga Customary Law," shall apply to the State of Nagaland unless

---

63. Initially the Sixth Schedule was only applicable in the tribal areas in the State of Assam. However, after the reorganization of North Eastern Areas in 1971, its scope was extended to the State of Meghalaya.

64. *See Fifth Schedule* INDIA CONST. § 4.

65. *Id. at* § 5.

66. *Id.*

67. *See generally id.*

68. *See Sixth Schedule* INDIA CONST. § 4-5.

69. *Id.* at § 3.

70. *Id. at* § 4.

the Nagaland legislature decides so in a resolution.[71] Similarly, Article 371G provides that no Act of Parliament with respect to "religious and social practices of Mizos; Mizo [C]ustomary law and procedure; [and] administration of civil and criminal justice involving decisions according to Mizo Customary law" shall apply to Mizoram unless the Mizoram Legislature decides so in a resolution.[72] These constitutional provisions, though limited to certain states of Northeast India, do expressly confer the right of tribal communities to be governed by the customary practices of the regions. The subsequent section of this Article will argue that these limited provisions are illustrative of the fundamental right of *all* tribal communities with adequate legal systems to be governed by the practices and procedures of those legal systems.

C. *Have We Kept the Promise? - An Afterthought*

Despite the constitutional protections of tribal autonomy, confrontations between the Indian State and the tribal communities have marked the post independence decades.[73] The development agenda has increasingly triumphed over the right of tribes to lead a cultural life, and the "consumerization" of the cultural lifestyle has hastened the process of tribal marginalization.[74] National elites have converted natural resources, including land, minerals, forests and water, into profit-making commodities.[75] "The wider goals of state and nation have overridden the particular interests of such poor populations on the assumption that wider gains far outweigh local costs."[76]

"In the name of development, people have been pushed off land; [and] their forests and water have been taken over by the state," leaving them no alternative but wage labor to sustain their communities.[77] Still, the "alienation cannot be adequately described in terms of the loss of a material livelihood alone; it is most profoundly a wider loss of cultural autonomy, knowledge, and power."[78] The constitutional safeguards have been contemptuously disregarded, and the promises of the Constituent Assembly readily forgotten, all as part of the price paid for "national development." This loss of cultural autonomy has been devastating and has resulted in the degeneration of

71. *See* INDIA CONST. art. 371A (Thirteenth Amendment Act, 1962), § 2.

72. *See* INDIA CONST. art. 371G (Fifty-third Amendment Act, 1986) § 2.

73. *See* Jayal, *supra* note 6 at 151.

74. *See id.* "Finding development was an integral and even non-negotiable part of the modernizing agenda of the Indian State at Independence." *Id.*

75. *See* AMITA BAVISKAR, IN THE BELLY OF THE RIVER: TRIBAL CONFLICTS OVER DEVELOPMENT IN THE NARMADA VALLEY 36 (2000). This appropriation has occurred through the institution of the state and the market, often in collaboration with foreign capital. *Id.*

76. *See* David Marsden, *Resettlement and Rehabilitation in India: Some Lessons from Recent Experience, in* DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS 22 (Hari Mohan Marthur & David Marsden eds., 2000).

77. BAVISKAR, *supra* note 75, at 36.

78. *Id.*

traditional legal systems, infringing on the fundamental right to culture guaranteed by the Indian Constitution.

The fundamental right to culture has also been infringed upon in less direct ways. In particular, tribal property rights have been disregarded. Interestingly, the Government of India did not have a "Rehabilitation Policy" for displaced persons until 1997. Thus, it is not surprising that every instance of large-scale development generates massive displacement and often a sordid tale of *no* rehabilitation. The Hirakud Dam,[79] Rengali Dam,[80] National Thermal Power Corporation,[81] Tehri Dam, and, most recently, the Sardar Sarovar Dam[82] have all turned countless tribal communities into cultural refugees in their own homeland. The Hirakud Dam, built in the Sambhalpur district of Orissa, was one of India's first large dams.[83] Modeled after the Tennessee Valley Dam in the United States, the Hirakud Dam flooded approximately 247 villages and displaced at least 100,000 people.[84] These "temples of modern India"[85] have achieved development, but not without substantial human cost.[86] Displacements due to "national projects" are not the only causes of cultural alienation.

Almost all States in India have passed laws prohibiting the transfer of tribal lands to non-tribal people. Yet, despite these legislative protections, transfer continues unabated. In Bihar, in an area of 76,411 acres, 52,127 cases of land transfers of tribal land to non-tribal people have been registered. In just over half of those cases, the decision has been in favor of restoration of tribal lands.[87] The area that remains in question amounts to 32,636 acres. Still, even when a court agrees that the land should be restored, actual restoration often does not happen. Only 1,774 acres have been physically restored.[88] The continuing tribal experiences of dispossession, displacement, and discrimination bring into question the government's success at living up to the promise of the Constituent Assembly.

---

79. *See* Padel, *supra* note 1, at 908.

80. *See* A.B. Ota, *Countering Impoverishment Risks: The Case of Rengali Dam Project, in* DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS 125 (Hari Mohan Marthur & David Marsden eds., 2000).

81. *See* Dinesh Agarwal, *Preventing Impoverishment from Displacement: The NTPC Experience, in* DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS 155 (Hari Mohan Marthur & David Marsden eds., 2000).

82. *See* Padel, *supra* note 1, at 908.

83. *Id.*

84. *Id.*

85. *Id.* Former Indian Prime Minister J. L. Nehru used this phrase to describe dams in India. *Id.*

86. *Id.* To date, approximately 1,000,000 people have been displaced through the process of dam creation. *Id.*

87. *See* Government of India, Report of the Commission for Scheduled Castes and Scheduled Tribes, Fifth Report, Apr. 1982-Mar. 1982 (New Delhi: Government of India Press, 1984) [*hereinafter* Report of the Commission]; *see generally* ROSS MALLICK, DEVELOPMENT, ETHNICITY AND HUMAN RIGHTS IN SOUTH ASIA 211-228 (1998).

88. *See* Report of the Commission, *supra* note 87.

While the accounts of tribal displacement reiterate the development-deference dichotomy alluded to earlier, they are also indicative of the mechanisms that have been employed to address the grievances of tribal communities in general. These struggles demonstrate, in more ways than one, that the institutions that have been employed to address tribal grievances against increasing state intrusion are both inappropriate and wholly inadequate. The problem has been confounded by inequitable decision making and grievance redressal processes. The formal structures of justice administration in India have failed to adequately protect the tribal communities' right of equal access. The statistics of land restoration in Bihar and the absence of any counter measures by the tribal communities to secure justice suggests an incompatibility between India's formal institutions of justice and their appreciation of justice administration.

Interestingly, Part III of the Indian Constitution recognizes a fundamental right of access to justice.[89] However the right rests on limitations that make it wholly incompatible with tribal understanding of justice dispensation. The literal text is unclear as to whether the right of access to justice is limited to the formal structures of justice administration or includes variants of justice administration including traditional tribal legal systems. [90] However, the framers did intend that tribes have a right to a socio-cultural existence based on the principle of substantial deference, including the right to administer justice within the parameters of traditional customary legal systems. Thus, in order for the framers' intent to be achieved, the right to a traditional customary legal system must be recognized. However, the formal structures of justice administration are limited vis-à-vis the tribes' right of access to justice and an alternative conception of the right of access to justice within the fundamental right to culture must be developed to ensure the realization of this right.

---

89. The Constitution does not directly expressly recognise any such right. Only article 32(1) may partly be said to have recognised a form of right to access to justice. The right has, however, more generally been read into the "right to life" in article 21. The entire Social Action Litigation (SAL) movement in India has been premised on an implied recognition of a right to access to justice. For an introduction to SAL Clark D. Cunningham, *Most Powerful Court: Finding the Roots of India's Public Interest Litigation, in* LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83 - 96 (eds. S. P. Sathe & Sathya Narayan 2003). *See also* Upendra. Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in *Fifty* YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156 -209 (S. K. Verma, Kusum eds. 2000).

> If the right to access to justice is limited to the conception of right provided in article 32(1); arguably the right is only limited to access to the Indian Supreme Court. However, if one prefers to use the conception of right that has been read into the "right to life" in article 21; arguably the right to access to justice may be said to include non-positivistic structures of dispute resolution.

Id.

III. TRIBALS AND THE FUNDAMENTAL RIGHT OF ACCESS TO JUSTICE: APPRECIATING THE NUANCES

A. The Quiet Premises: A Positivist Explanation of the Fundamental Right of "Access to Justice"

One of the consequences of the voluminous expansion of the scope of the right to life and personal liberty[91] has been the inclusion of the right of access to justice under Article 21 of the Constitution.[92] While the Court has never spelled out in explicit terms the nature of the right of access to justice, the expanding body of jurisprudence on the boundaries of the right now allows a fuller discussion of the nature and scope of the right.[93] The commentary demonstrates that the right of access to justice is fundamental to any system of justice; it allows the fruitful realization of all other rights.

The right of access to justice, in its existing scope under Article 21, may be said to include the right to access the court,[94] the right to a fair trial,[95] the right to a speedy trial[96] and the right to legal assistance.[97] While the right to access the court is "fundamentally" protected under Article 32,[98] it is not difficult to conceive of a right to access courts independent of the right to remedy under Article 32. The right to access the court, whether for the enforcement of a fundamental right or otherwise, is a right to a judicial remedy. It is the most elementary of all rights; a right that gives meaning to all other rights. In a way, the right to a fair trial is the substantive actualization of this right to a judicial remedy. It includes such rules as the presumption of

---

91. By a process of "creative" interpretation, judges of the Indian Supreme Court have extended the right to life and personal liberty under Article 21 of the Constitution to include a wide range of rights as part of "right of life and personal liberty." For a historical analysis of this "activist" functioning of the Indian Supreme Court, see S. P. SATHE, JUDICIAL ACTIVISM IN INDIA (2001); H. S. Mattewal, *Judiciary and the Government in the Making of Modern India*, 1 S.C.C. (Jour) 19 (2002), *available at* www.ebc-india.com/lawyer/articles/2002v1a4.htm.

92. *See* Sheela Barse v. Union of India 3 S.C.C. 632 (1986).

93. For a more complete discussion on the various aspects of the fundamental right to access to justice in the Indian Constitution, see Shubhankar Dam, *Breaking Barriers: A Socio-Legal Analysis of the Right to Access to Justice*, 1 SCHOLASTICUS: THE JOURNAL OF NATIONAL LAW UNIVERSITY (2) 132 (Jan. 2004).

94. *See generally* Fertilizer Corp. Kamgar Union v. Union of India (1981) 1 S.C.C. 568.

95. *See* State of Punjab v. Baldev Singh (1999) 6 S.C.C. 172; State of Punjab v. Sarwan Singh (1981) 1 S.C.A.L.E. 619.

96. *See* Babu Singh v. State of U.P., (1978) 1 S.C.C. 579; *See also* Hussainara Khatoon (I) v. Home Sec'y, State of Bihar, (1980) 1 S.C.C. 81; *See also* A. R. Antulay v. R. S. Nayak, (1988) 2 S.C.C. 602.

97. *See Hussainara Khatoon*, 1 S.C.C at 108; *See also* Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 S.C.C. 401; *See also* M. H. Hoskot v. State of Maharashtra, (1978) 3 S.C.C. 544.

98. *See* INDIA CONST. art. 32(1). "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." *Id.*

innocence,[99] the right to a public trial,[100] the right to appeal,[101] and the permissibility of evidence in trials.[102] "Speedy justice," Judge Krishna Iyer wrote, "is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable [sic] and the innocent being absolved from the inordinate ordeal of criminal proceedings."[103] Speedy justice can be seen as the essence of criminal justice, an inordinate delay in the conclusion of a trial is a travesty of justice.[104] The right to a speedy trial is protective in nature; it ensures that delay does not deny the substantive realization of the right. Furthermore, in *Hussainara Khatoon v. Home Secretary, State of Bihar*, the Indian Supreme Court saw the right to legal aid as an element of any "reasonable, fair and just" procedure.[105] The Court explained that judicial justice, with its procedural intricacies, legal arguments and critical examination of evidence, requires professional expertise.[106] Further, the absence of equal justice under the law is always a possibility when one side lacks specialized skills.[107] Therefore, the right to legal aid ensures that a person in the formal legal system is not denied his substantive rights because of want.

While the broad canvas of the right of access to justice, at least in theory, is sufficiently impressive, the fruitful actualization of the right rests on several presumptions that taint its effectiveness for tribal groups. The most obvious presumption is the basic use of the formal legal system; these rights may only be utilized when persons are part of the system that confers and actualizes them. It presumes an interaction within the system of courts established and maintained by the Codes of Civil[108] and Criminal[109] Procedure. The right of access to justice necessarily implicates an impressive repertoire of fundamental rights, but they are premised on a basic level of cultural knowledge about the procedural technicalities and scope of substantive law that many tribal communities do not have. The right assumes a cultural homogeneity among all Indian citizens, and it fails to recognize that a significant part of the population lies outside the positivist framework of justice administration.

As certain provisions of the Constitution demonstrate,[110] tribal justice systems are not always assumed to exist within this homogeneity. Quite the opposite is true - the Constitution recognizes their claims to a separate

99. *See* Kali Ram v. State of Himachal Pradesh, (1973) 2 S.C.C. 808.
100. *See* Chatisgarh Mukti Morcha v. State of M. P., (1996) 1996 Cr.L.J. 2239.
101. *See M. H. Hoskot*, 3 S.C.C. at 544.
102. *See* State of Punjab v. Baldev Singh (1999) 6 S.C.C. 172.
103. *Babu Singh*, 1 S.C.C. at 579.
104. *See* Hussainara Khatoon v. State of Bihar, (1980) 1 S.C.C. 81.
105. See Hussainara Khatoon, 1 S.C.C. at 108.
106. *See M. H. Hoskot*, 3 S.C.C. at 544.
107. *Id.*
108. *See generally* INDIA CODE Act V (1908).
109. *See generally,* INDIA CODE Act II (1974).
110. *See, e.g.,* INDIA CONST. arts. 371A, 372G (*Sixth Schedule*).

conception of justice administration in both substance and procedure that is fundamentally divorced from the nature of the "mainstream" legal system. The customary nature of tribal laws and a vastly different system of enforcement do not necessitate a right to fair trial or a right to legal aid. The right of access to the court, the most elementary element of the broader right, for example, is of little value unless people actually attempt to access the established legal system. This limitation of the largely positivist structure of justice administration, even if obvious, highlights an important point - the content of fundamental rights under the Constitution may be intended to be homogenous in application but is culture-specific in practice. Beyond this obvious limitation, there are other, more subtle, limitations that reinforce the argument that the right of access to justice has no homogenous content.

Navigating the "mainstream" system requires basic language proficiencies, the consequences of which are not always appreciated.[111] The system's complex technicalities, explained from the perspective of an "outsider" who is ignorant about its inherent dynamics, are often a mystery to people who are a part of the dominant culture. They are understandably alien to most tribal groups. The failure of the right of access to justice to provide any meaningful help to the tribal communities is almost indisputable.

In almost all states, laws have been passed prohibiting alienation of tribal lands to non-tribe members. As mentioned above, the prohibition against land acquisition has meant little in practical terms.[112] In Kerela, an official inquiry in 1976 revealed that a total of 9,859 acres of tribal land were alienated to non-tribe members "through various means of borrowing for domestic expenses, debt clearance, marriage, treatment of disease, encroachment, cheating, [and] disput[e]."[113] The 1975 Act could not provide relief to the dispossessed tribals. "Virtually no land [was] restored to the erstwhile tribal owners [even though] [t]he Act had provided for restoration of all lands alienated since 1960."[114] The tribes' failure to effectively use the positivist "mainstream" mechanism of justice administration in many ways illustrates the limitations of the fundamental right of access to justice unless it is construed in a culturally specific way.

---

111. Except in trial courts across India, English is the first language of the Court. Specifically, the Supreme Court and the various High Courts accept writ petitions only in English unless a translation is agreed by both parties or a translation is certified to be true translation by a translator appointed by the Supreme Court. This limitation is itself a significant language barrier and makes accessibility for the tribal an issue. *See e.g.* Order X (2) SUPREME COURT RULES, 1966, *available at* http://supremecourtofindia.nic.in/new_s/rules.htm (last visited April 9, 2006).

112. *See generally* Cernea, *supra* note 17, at 81.

113. *See* P. Sivanandan, *Indigenous People's Rights: Struggle for Survival in Kerela, in* HUMAN RIGHTS 2000: INSTITUTE OF HUMAN RIGHTS, VIGIL INDIA MOVEMENT 55, 57 (Matthew George ed., 2002).

114. *Id.*

If we concede that tribes, just as any other members of the Indian polity, have a fundamental right of access to justice, a question arises as to the nature of that right. Given the assumptions on which the meaningful realization of the right rests, clearly it cannot mean access solely within the "mainstream" legal system. In the tribal context, it must mean something more than the right to an utterly foreign legal system; it must encompass the broader right to a customary legal system that can be utilized effectively.

B. Highlighting Cultural Differences: The Dichotomy of Parallel Legal Systems

1. Culture and Legal Systems: A Sociological Perspective

"Culture is one of the [most] basic theoretical" sociological terms, and yet it is inherently indefinable.[115] Both in terms of its specific meaning and broad content, the understanding of "culture" has defied consensus among sociologists.[116] E. B. Taylor's omnibus definition asserts that culture is "that complex *whole* which includes knowledge, belief, arts, morals, law, custom and any other capabilities and habits acquired by a man as a member of society."[117] B. Malinowski expressed a similar conception of culture as "the handiwork of man and as the *medium* through which he achieves his ends."[118] Both of these definitions tacitly emphasize the "evolutionary" nature of culture in the sense of culture being a "whole" or a "medium" that enables the attainment of the objectives of human life. The definitions are also end-driven; they refer to those acquired traits that fulfill human social ends. "In this sense, [culture] includes knowledge and methods of explanation, symbolic elements and beliefs, elements of social structure, sentimental elements or social value, and even material objects inasmuch as they are bearers of meaning and value"[119] that enable human beings to live meaningful lives.

Apart from this end-driven quality, culture also has a communal, as opposed to individual, conception.[120] It has been referred to as a "configuration

---

115. *See* Roy D'Andrade, *Culture*, *in* THE SOCIAL SCIENCE ENCYCLOPEDIA 161, 163 (Adam Kuper et al. eds., 1996).

116. *See generally id.*

117. *See* PASCUAL GISBERT, FUNDAMENTALS OF SOCIOLOGY 342 (Orient Longman 3d ed. 1973) (1957) (emphasis added).

118. Bronislaw Malinowski, A Scientific Theory of Culture and Other Essays 67 (University of N.C. Press 1942) (1944) (emphasis added).

119. GISBERT, *supra* note 117, at 341.

120. The distinction may be illustrated as follows: An individual may need to drink coffee every morning to perform his work better. That is a pattern of *individual* behavior that is neither shared nor common. The "behavior" is end driven: the individual seeks to work better. If all individuals in a community need to drink coffee to work better, then it may be regarded as part of culture of the entire community. Individual behavior may be regarded as a habit, while community behavior is an expression of culture. *See generally* GUY ROCHER, A GENERAL

of learned and *shared* patterns [of] behavior: including ideas, emotions and actions."[121] It refers to the "whole" or the "handiwork" that enables the realization of *shared* ends. Undoubtedly, whether specific "shared ends" are an expression of culture will depend on the degree of consensus about the purposes of those ends. If one were to presume that all communal existences are motivated by at least some shared ends, one may then recast Taylor's inclusive expression of "knowledge, belief, arts, morals, law, custom and any other capabilities and habits" as the process of attaining shared ends. In this sense, culture is a continuously determining, not just determined, part of social activity. It may be taken as constituting the "way of life" of an entire society that includes codes of manners, dress, languages, rituals, norms of behavior, and systems of belief.[122]

However, as mentioned earlier, there is no unanimity among sociologists about the scope of the process; does it include both the mental and physical, the cognitive and the affective?[123] Roy D'Andrade argues that "since the cultural process necessarily involves [both] mental and physical, cognitive and affective, representational and normative phenomena, it can be argued that the definition of culture should not be restricted to just one part of the social heritage."[124] If our understanding of culture is rooted in the process of attaining shared ends of communities, it follows that there is not *a* culture but rather *multiple* cultures. However, even disparate communities or culturally different communities share some similar processes of shared ends. Therefore, the sociological study of culture must concern itself not with all aspects of the "way of life" but with only those *distinguishing* or *dissimilar* processes of shared ends between communities. In other words, it consists of those "elements which are defined and differentiated in a particular society as representing reality – not simply social reality, but the total reality of life within which human beings live and die."[125] Culture, in this sense, is exclusive: it involves a process of defining oneself by defining what one is *not*. It includes references to the social and institutional processes of achieving shared ends in a way other communities do not. The protected aspect of culture that may be secured within the broad right to culture must therefore take its content from this "exclusivist" conception of culture.

The proponents of the historical school of law have vigorously argued that a culture's legal system is a defining attribute of the processes for attaining

---

INTRODUCTION TO SOCIOLOGY: A THERETICAL PERSPECTIVE 90 (Peta Sheriff trans., MacMillan 1968) (1972).

121. GISBERT, *supra* note 117, at 341 (emphasis added).

122. *See* ROCHER, *supra* note 120, at 90 ("Patterns of behaviour, values and symbols which comprise culture include knowledge, ideas and thought, and expand to include all forms of expression of feelings as well as the rules which regulate action and which are objectively observable."); *see generally* RAYMOND WILLIAMS, THE SOCIOLOGY OF CULTURE (1981).

123. D'Andrade, *supra* note 115, at 163.

124. *Id.*

125. *See* David Schneider, *Notes Toward a Theory of Culture*, *in* MEANING IN ANTHROPOLOGY 197, 206 (K. Basso et al. eds., 1976).

shared ends in jurisprudence.[126] Legal systems as cultural institutions are themselves evidence of a distinguished process, but they simultaneously evidence the distinguishing characteristics of a community. The unchallenged founder of historical jurisprudence, Friedrich Karl Von Savigny, posited an interesting relationship between a culture and its legal system.[127]

Writing against the universalist approach of the natural school of law, Von Savigny asserted that peculiar relationships exist between the law and the experience of various groups in society.[128] To Savigny, a legal system was part of the culture of a people.[129] "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality."[130] Savigny explained this through his analysis of *Volkgiest*, in the tradition of the German legal system and its substantive differences from Roman law.[131] Law, as he saw it, was not a self-contained collection of verbal formulae, rather it was part of the complex makeup of a people's experience and character, manifest in the "common feeling of inner necessity" with which it was regarded by the people.[132] The norms develop unconsciously in tandem with other facets of culture, like family, religion, and the economy.[133] Because of the law's intrinsic relationship to culture, legal systems develop based on the history, traditions, and institutions of different cultures and societies.[134] The advancement of society and its consequent complexity, however, make the law, as manifested in the "popular consciousness," imperfect. The historical school's assertions recognize the important truth that law is not an abstract set of rules simply imposed on society, but rather is an integral part of it, having deep roots in the social and economic habits and attitudes of its past and present members.[135]

---

126. The writings of Friedrich Karl Von Savigny's are said to have led to the development of the historical school. Some of the other seminal contributors of the school are Henry Maine, William Graham Sumner, Paul Vinogradoff and Johann Herder. Maine's major works include: ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861); VILLAGE COMMUNITIES (1880); LECTURES ON THE EARLY HISTORY OF INSTITUTIONS (1878). Sumner's major works include FOLKWAYS (1906). Vinogradoff's works include: OUTLINES OF HISTORICAL JURISPRUDENCE (1922); VILLAINAGE IN ENGLAND (1892). A description of Herder's works may be found in ISSAUAH BERLIN, VICO AND HERDER (1976). *See generally* H. Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q.R. 326 (1937).

127. *See* Julius Stone, The Province and Function of Law: Law as Logic, Justice, and Social Control 421 (Harvard Univ. Press 1950) (1961).

128. *See* VON SAVIGNY, VOM BERUF UNSRER ZEIT FUR GESERZGEBURG UND RECHTSWISSENCHAFF, [Law of a People as an Emanation of its Common Consciousness] (Hayward trans., 1831) (1985).

129. *See* M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 785 (1985).

130. *See* Edgar Bodenheimer, Jurisprudence 72 (1962).

131. SAVIGNY, *supra* note 128.

132. *Id.*

133. *See* Bodenheimer, *supra* note 130, at 72.

134. BERLIN, *supra* note 126, at 147.

135. *See* Bodenheimer, *supra* note 130, at 73.

As previously discussed, depending on the nature of difference, a legal system could itself be a cultural institution illustrative of the "process of shared ends." In this sense, the legal system is a structure. On the other hand, a legal system may be a part of culture in the sense that it is a process; a process that sustains the continuity of culture. In the latter sense, the legal system is reinforcing; it reinforces and maintains the "process of shared ends." The underlying theme, however, is that a *distinguished* legal system *is* a part of culture, whether in the sense of a structure or a process that in turn sustains other processes. The question that follows is whether Indian tribal legal systems are sufficiently distinguished to fall within this broad conception of "culture."

2. Traditional Tribal Legal Systems: Illustrating the Tribal "Culture"

Before a legal system can be encompassed within the meaning of "culture," it must be sufficiently distinguished from the other legal systems surrounding it. This section illustrates the nature and distinguishing traits of traditional tribal legal systems within the structure-process model discussed above. It argues that customs based traditional legal systems perform a dual role for the Indian tribal communities; they are an expression of tribal attitudes towards dispute settlement and they are an instrument for "enforcing" tribal culture.

The Indian Constitution recognizes 12,000 tribes in its schedule.[136] Not all are separate and distinct tribes; some are sub-tribes or isolated forest communities.[137] Accordingly, the discussion of the legal systems as part of tribal culture that follows is only illustrative of the many tribes that exist in India.

The Pangi tribe in the east Siang district of Arunachal Pradesh is an individual landholding community.[138] "Their traditional village council (kebang) and the inter-village council (dapung) settle all disputes. The village headman (gaonbura) is the decision-maker for both these bodies, but often he does so in consultation with other prominent persons of the community."[139] The Ramo tribe in the Tuting areas of Arunachal Pradesh similarly exercises social control through "the village council (kebang) which consists of a headman (gam), assistant headman (lampo) and some village elders who settle minor disputes by imposing a fine on the offender."[140] The Baigas of Madhya Pradesh exercise social control "though an informal panchayat in the form of a council of elders."[141] The body is empowered to punish a person who goes

136. *See generally* K.S. Singh, The Scheduled Tribes (1994).
137. *Id.*
138. *Id.* at 42.
139. *Id.*
140. *Id.* at 45-46.
141. *Id.* at 80. A "panchayat" literally means a group of five.

against the rules either in cash, kind, or physical torture.[142] "State" institutions are involved "only when there is a need to obtain a jural category certificate or for a loan."[143] In contrast, the Andh tribe in Maharashtra has no judicial process except a "village tribal council consisting of the heads of the families [who] act as [] mediator[s] to solve social or economic disputes."[144]

The Bathudi of the Mayurbhanj and Keonjhar districts in Orissa "have their own community council (jati samaj) controlled by the hereditary heads like pradhan, desh chatia, chowkia, dakua and dehri."[145] The jati samaj exercises its jurisdiction in both internal matters and intercommunity social affairs.[146] "Excommunication is the major punishment and the offender is admitted only after a community feast (samaj bhoj) is hosted by him."[147] The Bharia of Madhya Pradesh, a forest dwelling community, "have a community council (panchayat) to maintain law and order within the community;" it "consists of a head (mukhiya), five members (panch) and one messenger (kotwal)."[148]

The Bhils of southern Rajasthan and northern Maharashtra, the second largest tribe in India, have their traditional system of social control exercised and enforced by men.[149] "Most issues are referred to the village headman, the gameti, mukhi or patel. In large multi-phala villages, there are phala gametis to sort out intra-phala disputes."[150] "A gameti commands a position of supremacy among the Bhils; he is their leader, guide and philosopher."[151] While the power of decision making is vested in a gameti, he "may consult a few elderly persons to seek their opinion when necessary."[152] Similarly, the Mavchi Bhils of Maharashtra maintain social order through an elderly member (karabari) "along with the village council sarpanch [head of the panchayat], police patel, and other office bearers."[153] The Pauri Bhuniya of Orissa "have their own tribal council consisting of the village headman (pradhan), religious priest (dehuri) and older members of the community."[154] The post of the pradhan and dehuri are, however, hereditary.[155]

In contrast to these tribes, the Biar of northern Madhya Pradesh ensure social control "by a two tier political system, in the village and at the regional

142. *Id.*
143. *Id.*
144. *Id.* at 63.
145. *Id.* at 97.
146. *Id.* at 98.
147. *Id.* at 98.
148. *Id.* at 111.
149. *Id.* at 118, 121.
150. *Id.* at 121.
151. *Id.* at 122.
152. *Id.*
153. *Id.* at 134-35.
154. *Id.* at 163-64.
155. *Id.*

level."[156] "Most of their disputes are settled by imposing a penal feast or a fine on the offender."[157] Similarly, the Bhinjhal in the Satpura and Aravalli hills of Madhya Pradesh have "community councils at the village level (gram jati panchayat) and at the regional level (Bhinjati jati mahasabha)."[158] These councils deal with "intracommunity disputes and issues like divorce, adultery, rape, elopement, land ownership, disrespect towards traditional norms, insult to the traditional council, and theft."[159] "Punishment in the form of a fine or excommunication is inflicted upon the guilty."[160]

Among the Naga tribes, justice is administered by the village court or village council, which is comprised of the elderly male representatives of all clans/families, including the chief in the village.[161] The Nagas have a republican type of village polity in which village administration is run by the village council that performs both administrative and judicial functions.[162] Any kind of dispute is settled in the village court. "In the same way, the office of the village chief is the highest court of appeal among the Kuki-Chin-Mizo" tribal group.[163] "When it is difficult to determine the guilt, the tribal people leave the matter to the divine" will, which is revealed through the performance of oath and ordeals.[164] "The most common methods of ordeal are dipping the parties involved into water to determine guilt," "oaths with fire and water, [and] consuming iron (metal) powder."[165]

The Bodh tribe of the Zanskar and Nurba regions in Jammu and Kashmir has a community of village elders, headed by the "goba," that exercises social control and settles family disputes, issues relating to divorce, sharing of water, collection of live stock tax, and inter-community disputes.[166] The Gond Gowari in the Bhandara, Amravati, and Garhchirol districts of Maharashtra have a traditional council known as the *shandhya* that performs both sacred and secular roles.[167] The decision making is not limited to the temporal matters of social existence but extends even to religious aspects of life. Similarly, the Kandra Gond in the Durg, Raipur, and Bastar districts of Madhya Pradesh have a traditional council headed by a king (or "raja") and assisted by office bearers (dewan, panch) who resolve social disputes[168] and are empowered to punish by

156. *Id.* at 175-76.
157. *Id.* at 176.
158. *Id.* at 178.
159. *Id.*
160. *Id.*
161. *See* Ninglu, *Customary Practices of the Tribals in Manipur*, THE IMPHAL FREE PRESS, April 2005, *at* http:// manipuronline.com/Features/May2002/tribalpractice05_1.htm.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. Singh, *supra* note 136, at 193-94.
167. *Id.* at 321.
168. *Id.* at 322.

imposing fines or enforcing a social boycott.[169] The Kolbhata Gond in the Balaghat districts of Madhya Pradesh has a community council headed by an elected head (the "mukhiya")[170] that is empowered to impose fines or excommunicate the offender.[171] The Jhareya tribe in the hill tracts of Maharashtra has a traditional structure of a community council, village council, and chieftainship.[172] These bodies are arranged hierarchically, with one serving as an appellate forum for the council below it.[173]

A closer reading of these illustrations of tribal dispute resolution/adjudication mechanisms suggests substantial differences from that of the "mainstream" process we saw earlier. Structurally, the tribal systems may be classified as single- and multi-tiered processes. Typically, tribal legal systems do not incorporate an "appellate" forum for a reassessment of the decision. This is at least partially attributable to their conception of justice based on the "wisdom" of the elderly in contradistinction to the systems that have an elected "judiciary." While the former typically is single tiered, the latter often has a multi-tiered process of dispute resolution. Since the source of legitimacy in the tribal systems comes from hereditary wisdom, there is clearly great faith in the ability of the wise and elderly to arrive at the "just" decision. In the case of an elected judiciary, where legitimacy is premised on the consent of community members, there is no element of divinity in their decision making, and, therefore, in tribal understanding, their decisions are more susceptible to errors.

The manner of adjudication differs substantially between tribal systems. Some recognize "adjudication," while others emphasize the "negotiation" character of their resolution process. What underlies this process of resolution is the involvement of judges. Tribal judges are not seen as unbiased, "external" authorities seeking to adjudicate a dispute. They are wise people who share the same culture, are part of the same societal values, and share the consciousness of the tribal community. In a way, they are "involved" arbitrators rather than disinterested, withdrawn adjudicators. They do not simply decide which side "wins" in a particular dispute; they are active participants in the resolution process that we inaptly refer to as "dispute adjudication."

The process of dispute negotiation suggests an interesting distinction. While in most cases the persons involved are the "elderly," who rely on their wisdom and experience, the "judges" in other cases are elected to the village or community councils. The "elderly" appointed as judges often inherit the position, as if wisdom is an ethereal endowment passed on to a select few. In almost all cases, however, it would be fallacious to look at these people as involved solely in dispute resolution, whether by way of adjudication or

169. *Id.*
170. *Id.* at 325.
171. *Id.*
172. *Id.* at 346.
173. *Id.* In the first instance, the matters are heard by the community council. *Id.*

negotiation. Judging is a welfare function they perform as part of tribal governance. They do not merely apply laws to a given factual situation; they seek more flexible solutions that bring harmony to the tribe. In many cases this is illustrated by the absence of a distinction between the religious and secular matters that affect tribal existence. There is neither any "separation of state from religion" nor any obligation on judges to avoid religious determinations. As in the case of the Naga tribe, a "divine" role in justice administration is as much a part of the process as anything else.

The procedures of dispute resolution are completely oral. Neither is the law nor the evidence required to be in writing; nor are judgments given in writing. The law (i.e., customary law) is part of social consciousness which partly explains why the experienced and the elderly have an authoritative say in resolving matters. In almost all single tiered processes of resolution, the task is solely entrusted to village headmen, although they have the "consultative" power of involving other wise men. The process is an informal one with ample community involvement. These systems are premised on values wholly different from the hierarchical, disinterested, and secular processes of dispute adjudication commonly found in the Anglo-Saxon practices of "mainstream" India.

The fundamental right of access to justice rests on positivist premises that do not make sense for tribal communities that are largely outside the framework of such a legal process, and inasmuch as culture, as a sociological discourse, is concerned with the study of the distinguished processes towards the development of shared ends, this paper argues that the customs-based traditional legal system satisfies that definition. The tribal dispute resolution processes are impressively holistic, with vastly differing adjudication processes. The customary nature of the laws and the wholly different processes clearly make traditional tribal legal systems distinguished processes. Therefore, it would seem that the fundamental right of access to justice would mean something different for tribal communities than it does for "mainstream" Indian citizens. If the fundamental right of access to justice is to be realized for the tribal communities, it can mean nothing less than a right to adjudication under the customs-based traditional legal system. However, this construction of the right of access to justice has the potential to interfere with the relationship between the tribes and mainstream communities.

C. *The Status of Tribal Legal Systems under the Indian Constitution: A Cultural Explanation*

1. The Fundamental Right to Culture: Interpreting Customary Legal Systems.

Article 29(1) of the Indian Constitution confers on "[a]ny section of the citizens . . . having a *distinct* language, script or culture of its own" the right to conserve the same.[174] One may note the emphasis on the "distinct" condition for the enjoyment of the right to culture. In other words, unless the language, script, or culture is "distinct," it does not enjoy protection as a fundamental right under Article 29(1). This precondition is a constitutional recognition of the "distinguished" conception of culture in sociology discussed earlier.[175] The traditional customs-based legal system is a distinct aspect of tribal culture and also a vehicle for protecting the distinctness of tribal culture. It would, therefore, follow that the legal system may be conserved as part of a tribe's fundamental right to culture under Article 29(1). Indeed, the mainstream judiciary, in its decisions, has formally recognized the traditional customs-based legal system as an integral part of tribal culture.

For a State that prides itself on its cultural diversity, judicial pronouncements on the nature and scope of the fundamental right to culture under Article 29(1) are surprisingly few. In *Jagdev Singh v. Pratap Singh*,[176] explaining the nature of the right to conserve language under Article 29(1), the Supreme Court held:

> The Constitution has thereby conferred the right, among others, to conserve their language upon the citizens of India. Right to conserve the language of the citizens includes the right to agitate for the protection of the language. . . . Unlike Article 19(1),177 Article 29(1) is not subject to any reasonable restrictions. The right conferred upon the section of the citizens residing in the territory of India or any part thereof to conserve their language, script or culture is made by the Constitution absolute 178

---

174. INDIA CONST. art. 29(1) (emphasis added).

175. *See* discussion *infra* Part III.B.1.

176. Jagdev Singh v. Pratap Singh, (1965) 6 S.C.R. 750.

177. INDIA CONST. art. 19. All citizens shall have the right to freedom of speech and expression. *Id.* The freedom is, however, subject to reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence under Art. 19(2). *Id.* at art. 19(2).

178. *Jagdev Singh*, 6 S.C.R. at 769 (emphasis added).

This "absolute" status of the right to conserve culture under Article 29(1) has far reaching constitutional implications.[179]

In *Madhu Kishwar v. State of Bihar*,[180] a petition was filed under Article 32 challenging the constitutionality of the Chotanagpur Tenancy Act of 1908[181] on grounds that the provision in favor of male succession to property is discriminatory and unfair against women and, thus, violates equal protection guaranteed by Article 14 of the Constitution.[182] Rejecting the prayer in the petition and noting the exemption enjoyed under law by the tribes of Mundas, Oraons, and the Santhals in the State of Bihar, the Supreme Court held that "[i]n the face of . . . visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort."[183]

The customary laws of a tribe not only govern its culture, but also succession, inheritance, marriage, worship of Gods, etc.[184] In addressing the question of whether conversion to another religion amounts to repudiation of the tribal status,[185] the Supreme Court noted that "[i]f by conversion to a different religion a long time back, he/his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the tribe and even had not been following the customary laws of succession, inheritance, marriage[,] etc. he may not be accepted to be a member of a tribe."[186] Thus, the Courts have left it up to the tribes to determine for themselves who can and cannot be a member of their tribe.

In *Sardar Syedra Taher Saifuddin Saheb v. State of Bombay*[187] an interesting question on tribal legal systems was contested in the Supreme Court. The 51st Dai-ul-Mutlaq[188] and the head of the Dawodi Bohra community challenged the constitutionality of the Bombay Prevention of Excommunication Act of 1949.[189] The petitioner, as the Head Priest of the Dawoodi Bohra,

---

179. For the consequences of the "absolute" status of the right to conserve culture, see *infra* Part IV.A.

180. Madhu Kishwar v. State of Bihar, (1996) 5 S.C.C. 125.

181. INDIA CODE Act VI (1908).

182. INDIA CONST. art. 14. The State shall not deny to any person equality before law or equal protection of the law. *Id.*

183. *Madhu Kishwar*, 5 S.C.C. at 125, para 4.

184. *See* State of Kerela v. Chandramohan, (2004) 3 S.C.C. 429, 434.

185. *Id.*

186. *See id.* at 435.

187. *Sardar Syedna Taher Saifuddin Saheb*, (1962) 2 S.C.R. Supl. 496.

188. *Da'i-ul-Mutlaq* is both the spiritual and political leader of the Dawoodi Bohra community. The leader exercises considerable powers over the community members and is as such considered as the representative of God on earth. For a description of the qualities and nature of authority of the *Da'i* see Asghar Ali Engineer, *Da'i* and his Qualifications, *available at* http://www.dawoodi-bohras.com/issues/qualifications.htm (last visited 8th April, 2005)

189. *Id.*

claimed to be the vicegerent of Imam[190] on Earth in seclusion.[191] In his status as the Imam in seclusion, the Dia had not only civil powers as head of the sect, but also ecclesiastical powers as a religious leader of the community.[192] In his capacity as the religious leader, as well as trustee of the property of the community, he had the power of excommunication.[193] The petition claimed that the Dia-ul-Mutlaq, as the religious leader of the community, was entitled to excommunicate any member of the Dawodi Bohra community for an offense which, according to his religious sense, justified expulsion. Therefore, he argued, any infringement on his right to excommunicate was beyond the permissible scope of Bombay's authority to legislate.[194]

The counsel for the petitioner argued the matter under Article 26(b), which confers upon every religious denomination, or any section thereof, the right to "manage its own affairs in matters of religion."[195] The petitioner argued that every religious denomination is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure continued acceptance by its adherents to certain essential tenets, doctrines and practices and that the right to continuity involves the right to enforce discipline, if necessary, by taking the extreme step of excommunication.[196] While agreeing to the submission made by the respondent that the effect of the excommunication would be to deprive the person of his civil rights, the majority of the Court upheld the petition on the ground that the "fundamental right under Article 26(b) [was] not subjected to preservation of civil rights"[197] and, therefore, it was of no consequence that the excommunicated person would lose his civil rights.[198] Judge Ayyangar, in his concurring opinion, observed that "the identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community."[199] Defining excommunication as a "*judicial* exclusion from the right and

190. Like the Da'I, the Iman is also a spiritual leader of the Bohra community. The Iman, however, is superior in hierarchy and enjoys spiritual appeal beyond the Bohra community.

191. *Id.*

192. *Id.*

193. *Id.* It was claimed that the power of excommunication was not arbitrary, absolute or untrampelled or had to be exercised and had to be exercised according to the usage and tenets of the community. *Id.* In other words, there were customary limitations on the exercise of the power even by the religious head. *Id.*

194. *Id.* at 856.

195. *Id.*; INDIA CONST. art. 26(b). "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion." *Id.*

196. *Sardar Syedna Taher Saifuddin Saheb*, 2 S.C.R. Supl. at 502.

197. *Id.* at 497.

198. *Id.*

199. *Id.* at 543.

privileges of the religious community to whom the offender belongs,"[200] he held the impugned legislation as *ultra vires* on the ground that it denied the religious head the right of punishment as a measure of community discipline.[201]

While the Supreme Court did not address the question from the perspective of the right to culture under Article 29(1), the court could have reached the same conclusion through an interpretation of that right. The right to culture may not have been put forth in the instant case because of the criterion of "religious denomination" that the Dawoodi Bohra community enjoys under Article 26.[202] However, where legislation seeks to take away the power of excommunication from any community not distinguishable on grounds of religious denomination, it seems quite possible to protect the practice under Article 29(1). The *Sardar Syedna Taher Saifuddin Saheb* Court, even without a discussion of the scope of the right to culture, tacitly recognized the status of distinct legal systems as being protected by provisions of Part III of the Constitution. The protection under Article 29(1) can only be more secure in the light of the "absolute"[203] nature of the right, especially when Article 25 and the protection therein is "[s]ubject to public order, morality and health . . . ."[204]

Quite clearly, in recognizing the customs and traditions of the tribal communities in Bihar or that of the Dawoodi Bohra community, the Supreme Court impliedly acknowledged the institutions that sustain and enforce these customs and traditions. For without recognition of the customary legal system, the right to tribal custom may not mean much. As discussed above, there are fundamental differences between the positivist legal system practiced in "Courts" and the tribal traditional legal systems. To require the tribal communities to enforce their customs within the "mainstream" framework of law may effectively deny them their right of access to justice. These judicial pronouncements, in other words, recognize the right of tribals to have both their spiritual and temporal disputes resolved within systems that are a part of tribal culture.

2. *International Law and Cultural Rights*

It is now well settled by a series of Court decisions that international law which is not contrary to the provisions of the Constitution or other enacted law may be considered part of Indian jurisprudence and enforceable in Indian

200. *Id.* at 549 (emphasis added).

201. *Id.*

202. CONST. INDIA, art. 26 Subject to public order, morality and health, every religious denomination or any section thereof shall have the right— (*a*) to establish and maintain institutions for religious and charitable purposes; (*b*) to manage its own affairs in matters of religion; (*c*) to own and acquire movable and immovable property; and (*d*) to administer such property in accordance with law. *Id.*

203. *See* Jagdev Singh v Pratap Singh, (1964) 6 S.C.R. 750, 769.

204. *See* CONST. INDIA, art. 25.

courts.[205] On many occasions, the Supreme Court has interpreted the scope of rights under Part III in light of the provisions of the international conventions and declarations to which India is a party. In *Neelabati Behera v. State of Orissa*,[206] the Court used Article 9(5) of the International Covenant on Civil and Political Rights[207] to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under Article 32 of the Indian Constitution.[208] Similarly, in *Vellore Citizens Welfare Forum v. Union of India*,[209] the Supreme Court interpreted Articles 47, 48-A, and 51-A(g) of the Constitution as implicitly incorporating the precautionary principle and the "polluter-pays" principle as mentioned in the Stockholm Declaration[210] and the Rio Declaration.[211] In the light of these pronouncements, in elucidating the nature of the right to culture under Article 29(1) of the Constitution, it may be appropriate to use the body of international law that recognizes cultural rights, either generally or specifically for indigenous people.

The I.L.O. Convention, No. 169 of 1989, expressly guarantees specific cultural rights of indigenous people.[212] Article 4 of the Convention provides that "[s]pecial measures shall be adopted as appropriate for safeguarding the persons, *institutions*, property, labour, cultures and environment" of the indigenous people in accordance with their own "freely expressed wishes."[213] It clearly takes a narrow approach to an understanding of "culture," the content of which is separate and distinct from institutions, property, labor, or environment. However, traditional legal systems may either be construed as legal institutions in and of themselves, which enforce and sustain cultural values like customary law, or they may be looked upon as evidence of indigenous culture itself. Therefore, even a restricted view of culture as separate institutions, property, labor, or environment does not derogate the argument that traditional legal systems may be interpreted as part of indigenous culture. Thus, it seems that in interpreting the scope of "culture" in Article 29(1) of the Indian Constitution,

---

205. *See* Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 246.

206. Neelabati Bahera v. State of Orissa (1993) 2 S.C.C. 746; *see also* D. K. Basu v. State of West Bengal, (1997) 1 S.C.C. 416. .

207. G.A. Res. 2200 A (XXI), U.N. Doc. A/6316 (1966). 999 U.N.T.S. 171 (Mar 23, 1976).

208. *Id.*

209. Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.C. 647; *see also* A. P. Pollution Control Board v. Prof. M. V. Nayudu, (1999) 2 S.C.C. 716.

210. *U.N. Conference on the Human Environment: Final Document*, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1972), *reprinted in* 11 I.L.M. 1416 (1972).

211. *U.N. Conference on Environment and Development: Rio Declaration on Environment and Development*, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874 (1992).

212. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), Jun. 27, 1989, Int'l Labor Org., 76th Sess., *at* http://www.ilo.org/ilolex/english/convdispl.htm.. 3.

213. *Id.* at art. 4 (emphasis added).

the additional criteria mentioned under Article 4 of Convention 169 must be regarded as relevant factors. Article 5 of the Convention reiterates that "the integrity of values, practices and institutions of these peoples shall be respected;"[214] while Article 8 specifically recognizes "the right [of tribal groups] to retain their own customs and institutions."[215] These rights over their institutions are supplemented by Article 7 that recognizes their right to control to the extent possible, "their own economic, social and cultural development."[216]

The Draft United Nations Declaration on Rights of Indigenous People expressly recognizes that "[i]ndigenous peoples have the right to maintain and strengthen their *distinct* political, economic, social and cultural characteristics, as well as their legal systems . . .."[217] Article 7 recognizes, *inter alia,* the right of indigenous peoples to have "the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for . . . [a]ny form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures . . . ."[218] The emphasis on "distinct" characteristics in Article 4 is crucial. As argued above, tribal traditional legal systems fundamentally vary from their "positivist" counterparts.[219] Enforcing the "mainstream," Anglo-Saxon-based justice system with its vastly different substantive and procedural rights for *any* purpose shall amount to a legislative intervention and, consequently, an interference with the free enjoyment of the right to culture.

Similarly, under Article 19 of the Draft Declaration, "[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making . . . through representatives chosen by themselves in accordance with their own procedures, as well as to *maintain* and develop their own indigenous decision-making institutions."[220] The scope of the right to maintain indigenous decision-making is further explained in Article 39 as including the "right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes[,]"[221] taking into account "the customs, traditions, rules and legal systems of the indigenous people concerned."[222] Article 39, read in conjunction with Article 19, recognizes the right of indigenous peoples to have their disputes with non-

214. *Id.* at art. 5.
215. *Id.* at art. 8.
216. *Id.* at art. 7.
217. U.N. Comm. Hum. Rts., Sub-Comm. On Prevention of Discrimination and Protection of Minorities, *Draft U.N. Declaration on the Rights of Indigenous Peoples*, Aug. 26, 1994, U.N. Doc. E/CN.4/1995/2, at art. 4 (1994), *reprinted in* 34 I.L.M. 541, 549-50 (1995) (emphasis added) [hereinafter *Draft Declaration*].
218. *Id.* at art. 7.
219. *See* discussion, *supra* Part III.B.2.
220. *Draft Declaration*, *supra* note 217, at art. 19.(emphasis added)
221. *Id.* at art. 39.
222. *Id.*

indigenous groups decided within the precincts of the traditional customs-based legal system. This assertion has profound importance in analyzing the constitutionality of legislations, including the Protection of Biological Diversity Act of 2002, the Plant Varieties Protection and Farmers' Rights Act of 2000, and similar such legislation under the Indian Constitution.

Apart from these international documents specifically dealing with indigenous rights, Article 22 of the Universal Declaration of Human Rights recognizes that "[e]veryone, as a member of society" is entitled to cultural rights,[223] while Article 27 reaffirms that "[e]veryone has the right to freely participate in the cultural life of the community . . . ."[224] Article 27 of the International Covenant on Civil and Political Rights recognizes that "minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture . . . ." [225] Taken together, the international law conventions and draft declaration provide a sufficient basis for analyzing the consequences of recognizing a fundamental right to a traditional customs-based legal system as part of the larger right to culture under Article 29(1) of the Indian Constitution.

IV. THE CONSEQUENCES OF RECOGNITION: TRIBALS, CULTURES AND CLAIMS

A. *Constitutional Consequences: Is Culture Constant?*

If Article 29(1) of the Indian Constitution guarantees a fundamental right to a traditional legal system as part of the fundamental right to culture, what is the nature of the consequences that flow from the recognition of that right? The Supreme Court has held right to conserve language under Article 29(1) to be absolute.[226] Accordingly, the fundamental right to conserve culture must be granted the same status as the right to conserve language. Thus the nature of the right to a traditional legal system must, likewise, be absolute. Additionally, the text of the Constitutional provision does not qualify or circumscribe the right in any manner. Unlike the right to equality,[227] the freedom of speech and expression,[228] the right to life and personal liberty,[229] the right to religion,[230] or

223. G.A. Res. 217 A (III), at art. 22, U.N. Doc. A/811, (1948).

224. *Id.* at art. 27.

225. G.A. Res. 2200 A (XXI), 21 U.N. GAOR, at art. 27, U.N. Doc. A/6316 (1966).

226. *Jagdev Singh*, 6 S.C.R. at 750, 769.

227. INDIA CONST. art. 14. "The State shall not deny to any person equality before law or the equal protection of the laws . . . ." *Id.*

228. INDIA CONST. art. 19(1). "All citizens shall have the right to freedom of speech and expression. . . . ." *Id.*

229. INDIA CONST. art. 21. "No person shall be deprived of his life or personal liberty except according to procedure established by law." *Id.*

230. INDIA CONST. art. 25(1). "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the

the right to manage and administer religious denomination,[231] the right to conserve culture has not been made subject to any reasonable restrictions. To read Article 29(1) as importing an understanding of reasonable restriction on the right to conserve culture would amount to a rewriting of a constitutional provision - a task not quite within the limits of judicial functioning. Interpreted harmoniously with other provisions of the Constitution and other governing documents, the fundamental right to conserve culture must be interpreted as absolute. However, three distinct consequences flow from this conclusion, which must be taken into account.

First, the provisions contained in Articles 37(1)(A) and 37(1)(G) of the Indian Constitution exclude the applicability of any law made by Parliament to customary law and procedure or the administration of civil and criminal justice involving decisions according to customary law of Nagaland and Mizoram. They must, therefore, be read as merely illustrative. In other words, all scheduled areas wherein tribes that have their customary law and a *distinct* traditional legal system are exempt from the applicability of such laws made by the Parliament. Accordingly, the provisions relating to Nagaland and Mizoram must be read as merely illustrative of the general exemption rule for all tribal areas with a distinct legal system. It also follows that the power of the State Legislative Assembly to extend the application of such laws by a resolution must be interpreted to mean "a resolution with the consent of the tribal community." In other words, the power of extending the application of these laws would then be appropriately dependent on the consent of the tribal communities to be governed by such enacted laws.

Second, if the right is conceptualized as absolute, social reform of tribal cultural institutions by legislative enactments would not be possible. Interfering with the customary system on grounds of introducing social reform would, in effect, amount to a denial of the right. Exception in favor of "social welfare and reform" as a ground for legislative intervention has been made only in Article 25 (the right to religion), and there can be no rational basis for importing the same limitation under Article 29(1) where none exists. This prohibition on social welfare and reform is crucial because of the practices often found in tribal communities. For example, in the *Sardar Syedna Taher Saifuddin Saheb* case, the Supreme Court held the legislative prohibition on the power of excommunication by the fifty-first Dai-ul-Mutlaq unconstitutional on grounds that it interfered with the religious practices of the Dawoodi Bohra community.[232] It is important, however, to note that there are tribal communities wherein the power of excommunication is recognized as a temporal power of the "judges" in their traditional legal system. The power is purely a custom with no basis in religion. Without a prohibition on social

---

right to freely profess, practise and propagate religion." *Id.*

231. INDIA CONST. art. 26(a). "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes . . . ." *Id.*

232. Sardar Syedna Taher Saifuddin Saheb, (1962) 2 S.C.R. 496.

reform by legislative intervention, a law banning excommunication as a valid punishment would not be struck down since the defense of religious practice would not be available to the community. That would render meaningless the "absolute" fundamental right to conserve culture.

Similarly, any legislation purportedly based on grounds of promoting gender equality cannot be sustained. The various tribal communities have differing ownership qualifications; women are not always entitled to own property. To allow legislative reform of such apparently discriminatory practices would amount to reforming the very institution of the traditional legal system that the right to culture seeks to protect.

The recognition of this collective right to a traditional legal system does not necessarily imply that all civil rights of all tribal persons would be protected. Not all discrimination between men and women would be regarded as invalid. Neither does the recognition of a traditional legal system, in its absolute form, guarantee every individual minimum human rights. On the contrary, the recognition of such a right includes a tacit recognition of the position that the objective truly is to sustain and promote plurality, whether or not the plural process promotes what is commonly perceived as basic human rights. However, neither does "mainstream" India, with its eloquent Constitution and wide repertoire of fundamental rights, ensure basic human rights in all instances.[233] Laws relating to marriage, divorce, and inheritance among Hindus,[234] Muslims,[235] and Christians[236] still recognize wide disparities between men and women.[237]

Underlying this argument for prohibition on reform by legislative

---

233. *See* S. P. Sathe, *Gender, Constitution and the Courts*, *in* ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR 117, 120 (Amita Dhanda & Archana Parashar eds., 1999); B. Sivaramayya, *Towards Equality: The Long Road Ahead*, *in* ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR 387 (Amita Dhanda & Archana Parashar eds., 1999).

234. *See* Madhu Kishwar, *Codified Hindu Law – Myth and Reality*, 29 ECONOMIC AND POLITICAL WEEKLY 2145 (1994).

235. *See* KHAN NOOR EPHROZ, WOMEN AND LAW: MUSLIM PERSONAL LAW PERSPECTIVE (Rawat Pub. 2003) (interpreting Islamic law with an unusually progressive approach and asserting that Muslims have been the most conservative community in terms of introducing reforms in their personal laws). Most legislative and judicial efforts to eradicate discriminatory practices have been met with stiff, if not violent, resistance. *Id.*

236. *See* Alice Jacob, *Uniform Civil Code: Reforms in Christian Family Law*, *in* ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR 375, 377 (Amita Dhanda & Archana Parashar eds., 1999).

237. It is interesting to note that these disparities in customary laws remain notwithstanding the grand proclamation of equality under Article 14 of the Indian Constitution and a "fundamental" obligation on the part of the State to enact a Uniform Civil Code under Article 44. Discriminatory practices, even within statutory laws, are profound. *See* INDIA CODE (1869), v.2; INDIA CODE (1937); The Indian Divorce Act, 1869, No. 4 of 1869; The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937; The Dissolution of Muslim Marriages Act, 1939, No. 8 of 1939; *see generally* Ratna Kapur & Brenda Cossman, *On Women, Equality, and the Constitution: Through the Glass of Feminism*, *in* GENDER AND POLITICS IN INDIA 197 (Nivedita Menon ed., 1999). For a judicial comment on these discriminations, see Rajamani v. Union of India (1982) 2 S.C.C. 474; Diengdeh v. Chopra, (1985) 3 S.C.C. 62.

intervention is the need to allow tribal communities to decide the pace of reform for their own institutions without outside intervention. As argued earlier, this is in consonance with a harmonious interpretation of Articles 5, 7 and 8 of Convention 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries). [238] The tribal communities must independently decide the rate with which they want to assimilate. The right to conserve culture in any meaningful sense must include the right to reform culture without "external" interference. Without this right, the process would be little different than coerced assimilation - a process rejected by the constituent framers during the process of negotiations. Inclusion of legislative authority of social reform may require us to question the legitimacy of the consent that was procured from the tribal groups during the drafting of the Indian Constitution. But does the denial of authority to socially reform tribal communities lead to a stagnant culture? In other words, would communities reform themselves without legislative intervention?

If the evolution of tribal communities is any indication, there could indeed be reforms without any legislative intervention. The traditional legal system of the Minijong tribe, for instance, recognized slavery in earlier times but has since abolished it.[239] Similarly, economic resources like land and forests that have traditionally been under community control are gradually coming under individual proprietorship.[240] Furthermore, although child marriage was a common tradition in the past, the Minijong now practice adult marriage.[241] Additionally, the *Padam* tribe, although formally requiring male primogeniture, now allows daughters to inherit immovable property if there are no sons.[242]

Additional examples of progressive tribal-initiated social and cultural change abound. One of the best known communities of Arunachal Pradesh Apatani traditionally had a relationship marked by feuds with its neighbors, the Mishing and the Nishi. Since the 1950s, the feuds and punitive raids between the different tribes have diminished. At present they maintain a relationship of co-operation which has been enhanced by the development of the territory.[243] The respective tribes have taken to business and have displayed remarkably successful business acumen. The Bir Asurs of Bihar have similarly ceased practicing child marriage and now practice only adult marriage.[244]

All of these changes in social norms and customary laws have occurred over time as a result of an evolutionary process without legislative intervention. Some changes may have been driven by the necessity of changed social

238. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 212.

239. *See* K.S. SINGH, THE SCHEDULED TRIBES 35 (The Oxford Press 1994).

240. *Id.*

241. *Id.*

242. *Id.* at 37.

243. *Id.* at 68.

244. *Id.* at 72.

conditions, while other changes may be due to increasing awareness and recognition of mainstream notions of progress. The pace of all of these social changes, however, has been dictated by the tribal communities themselves, which is crucial to the retention of the distinguished attributes of tribal culture. It is crucial that in each of these instances, the communities themselves have decided the nature and extent of the change. Accordingly, an approach of non-interference achieves dual goals - it legitimizes reform without rendering the right to culture meaningless.

The third potential consequence of the recognition of a fundamental right to a customary legal system is that tribal communities would have a right to settle their disputes with non-tribal actors within the precincts of their own system. This right follows from Article 39 of Convention 169, which recognizes the right to use such customary institutions in dealings with non-indigenous tribes. With the increasing consumerization of culture and the recognition of intellectual property protection over intangible things, such as traditional knowledge and biological diversity, interaction with tribal communities has increased tremendously. The constitutionality of such legislation will depend substantially on the extent to which the legislation recognizes the traditional customary legal system in use in a particularly scheduled area. This possibility is explained further in the following section.

B. "Consumerizing" Traditions: Do Tribal Communities Have an Effective Right of access to Justice in Protecting Culture?

How does the right to a traditional legal system affect legislation dealing with the expropriation of cultural property? Until recently, it was almost inconceivable that "traditional knowledge," including arts and folklore, could be the subject of intellectual property.[245] However, as part of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, matters that were part of the cultural lives of people have increasingly found a place within the scope of intellectual property and, consequently, is increasingly the subject of commercial exploitation.[246] In accordance with the international mandate, India has enacted and is contemplating further legislation that affects tribal culture in significant ways.[247] Therefore it follows from the fundamental right to a

245. Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 2 (1997) (critique of the current intellectual property regime for protection of traditional knowledge).

246. For differing approaches of TRIPs and the Convention of Biological Diversity 1992 to traditional knowledge, see Darrell A. Posey, *Protecting Peoples' Bio: Indigenous Rights to Diversity* 38 ENVIRONMENT 6 (1996); Edgar J. Asebey & Jill D. Kempenaar, *Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention*, 28 VAND. J. TRANSNAT'L L. 703, 717 (1995).

247. *See, e.g.*, The Geographical Indications of Goods (Registration and Protection) Act, 1999, No. 48 of 1999, INDIA CODE (1999); The Protection of Plant Varieties and Farmers' Rights Act, 2001, No. 53 (2001), INDIA CODE (2001); The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE (2000); N. S. Gopalakrishnan, *Protection of Traditional Knowledge: The*

traditional legal system that consent of tribal groups must be sought within the structures of the traditional legal systems and not through the formal "positivist" structures created by the State.

There is no current legislation in India that directly addresses the issue of traditional knowledge or provides a mechanism for its protection. The Biological Diversity Act of 2002[248] makes only incidental references to traditional knowledge.[249] While not wholly unrelated to TRIPs, the Biological Diversity Act was enacted with an eye toward the mandate of the United Convention on Biological Diversity.[250] The Act's Statement of Objects and Reasons notes that the Central Government, after an "extensive and intensive consultation process," has decided to bring legislation, *inter alia,* "to respect and protect knowledge and information of local communities related to biodiversity . . . [and] to secure sharing of benefits with local people as conservers of biological resources and holders of knowledge and information relating to the use of biological resources."[251] The Act establishes a National Biodiversity Authority[252] with plenary powers to administer the Act.[253]

Any person who is not a citizen of India, a non-resident citizen or a corporate body not registered in India, or registered under law having non-Indian participation in its share capital or management, is not authorized to obtain any biological resource or knowledge[254] without the previous approval of the National Authority.[255] Furthermore, no one is authorized to transfer the results of any research relating to biological resources to any person without the previous approval of the National Authority.[256] Any person falling within the categories mentioned in Section 3 of the Act, intending to obtain biological resources in India or any knowledge associated therewith, must make an application in the manner prescribed,[257] and the National Authority "after making such enquiries as it may deem fit and if necessary after consulting an expert committee constituted for this purpose, by order, grant approval subject to any regulations . . . including the imposition of charges by way of royalty . . . ."[258] It is interesting to note that the provision, while empowering the National Authority to grant approval, does not in any way refer to the necessity of

---

Need for Sui Generis Law in India, 5 J. WORLD INTELL. PROP. 725, 725 (2002) (commenting on current legislative developments).

248. The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE (2000).

249. *Id.* An Act "to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto." *Id.*

250. *Id.* at para. 2 ("whereas India is a party to the United Nations Convention on Biological Diversity signed at Rio de Janeiro on the 5th day June, 1992 . . . .").

251. *Id.* at para. 5.

252. *Id.* at ch. III, § 8 (1).

253. *Id.* at ch. IV, § 18.

254. *Id.* at ch. II, § 3.

255. *Id.* at ch. V, § 19.

256. *Id.* at ch. V, § 20.

257. *Id.* at ch. V, § 19(1).

258. *Id.* at ch. V, § 19(3).

consent of the communities whose resources are being approved.

The National Authority's discretion to grant approval is limited by a necessity to ensure "equitable sharing of benefits . . . in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers."[259] The limitation contained in this provision is of little consequence though because it does not address the issue of consent of the communities *per se.* On the contrary, the provision presumes the existence of a standing consent and imposes an obligation on the National Authority to evolve a formula for "equitable sharing of benefits." By not allowing communities, tribal or otherwise, to decide whether to allow aspects of their cultural life to be made subject matter of commercial utilization, the provision infringes the communities' fundamental right to culture.

While the National Authority has been authorized to regulate matters relating to non-citizens or non-resident citizens, State Biodiversity Boards have been created[260] to "regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilization of any biological resource by *Indians* . . ."[261] Any citizen of India or corporate body registered in India intending to obtain any biological resource for commercial utilization must initiate the State Board, and

> [the Board] may, in consultation with local bodies concerned and after making such enquiries as it conservation, [sic] may deem fit,, by order, prohibit or restrict any such activity if it is of opinion [sic] that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity . . . .[262]

Below the National Authority and the State Boards, the Act does permit local bodies to create a "Biodiversity Management Committee . . . for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, [and] folk varieties . . . ."[263] However, The National Authority and State Boards are only required to consult these Management Committees while making a decision relating to the use of biological resources and knowledge associated therewith.[264]

It is instructive to note that local bodies have been relegated to a

259. *Id.* at ch. V, § 21(1).
260. *Id.* at ch. VI, § 22.
261. *Id.* at ch. VI, § 23 (emphasis added).
262. *Id.* at ch. V, § 24(2).
263. *Id.* at ch. X, § 41(1).
264. *Id.* at ch. X, § 41(2) (emphasis added).

consultative entity, both with reference to the National Authority and State Boards, and they have been given no authority to veto decisions permitting the commercial utilization of cultural knowledge. The actual consent of a community to commercial utilization of its cultural property has been made irrelevant by the presumption of consent. By presuming a standing consent, the Biological Diversity Act effectively denies tribal communities any meaningful realization of their fundamental right to culture. The authority of these statutory bodies is, therefore, unconstitutional. By not allowing communities to effectively decide the manner in which cultural property may be used, the provisions unreasonably infringe on their absolute right to culture.[265] But these provisions are also unconstitutional because they do not recognize any traditional dispute resolution mechanism to resolve differences arising from decisions permitting the commercial utilization of such cultural property.

The National Biodiversity Authority is required to give public notice of every approval granted by it under section 19.[266] Similarly, public notice must be given when approving transfer of any biological resource or knowledge associated therewith.[267] It is pertinent to note that public notice, even assuming it is accessible to the proprietors of the cultural properties, is required for "every approval" but there is no requirement for notice before approval has been given. In other words, public notice under section 19 would be preceded by a grant of approval, making the consent of the communities even more irrelevant.

More importantly, the Act does not provide any mechanism for dealing with objections raised in pursuance of such public notices. Even in the unlikely event that a community objects to the grant of approval to commercially utilize property, the mechanisms that would be used to resolve the problem are wholly missing. Section 50 is the only provision in the Biodiversity Act that refers to dispute settlement,[268] but interestingly it refers only to disputes between the National Authority and a State Board or between State Boards *inter se*.[269] In case of the dispute between the National Authority and a State Board, an appeal may be made to the Central Government,[270] and such appeal should be disposed of in such form as prescribed by the Central Government.[271] And in case of disputes among the State Boards themselves, they shall be referred to the National Authority.[272] For the purposes of discharging its functions, the National Authority has been given the same powers as a civil court under the Code of Civil Procedure.[273] Finally, any person aggrieved by any determination of benefit-sharing or order of the National Authority or State Boards may

265. For an argument on the nature of the right to culture, see *supra* Part III.C.
266. The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE ch. V, § 19(4), (2000).
267. *Id.* at ch. V, § 20(4).
268. *Id.* at ch. XII, § 50(1).
269. *Id.* at ch. XII, § 50(4).
270. *Id.* at ch. XII, § 50(1).
271. *Id.* at ch. XII, § 50(3).
272. *Id.* at ch. XII, § 50(4).
273. *Id.* at ch. XII, § 50(6).

approach the High Court within thirty days of such determination.[274]

It is clear from these provisions that the Act does not recognize in any way the traditional institutions for dispute resolution in tribal communities, and it requires any disputes relating to commercial utilization to be resolved within the mainstream structures of dispute resolution. Thus, compulsion to use state institutions in resolving matters squarely within the domain of cultural lives of tribal communities violates tribals' right of access to justice.[275] The provisions of the Act are, therefore, unconstitutional. First, not providing for any mechanism to withhold consent prevents communities from effectively preserving their cultural property. Second, the Act violates the fundamental right of access to justice of tribal communities.

The Biological Diversity Act does not take into account the possibility of a dispute between the National Authority, State Boards, and tribal communities. Consequently, the Act does not recognize the availability of traditional dispute resolution mechanisms already in place in such communities. This leads to a two pronged conclusion. First, if traditional tribal legal systems are seen as evidence of culture *per se*, the fundamental right to culture, if it means anything to tribal life, must include the right to a traditional legal system as the dispute settlement mechanism for all conflicts between the tribes and non-tribe members and institutions. Second, if such a system is seen as a cultural "enforcement" process, the fundamental right of access to justice for the tribal communities, if it means anything, must mean the right of access to justice in the form of the customary practices of their traditional system.

V. CONCLUSION

Customs-based traditional legal systems are part of the inherited wisdom of India's tribal communities and, in this sense, do not constitute "renewable" knowledge. The last century has seen a increasingly marked attack by formal law and policy on tribals' customary law than has probably been the case before. Recognition of traditional legal systems will enable tribal communities to revive their practices, determine their pace of integration, and, most importantly, enable them to exercise meaningful control over their cultural resources. Unless a sincere effort is made to maintain these traditional systems, forthcoming generations of tribal populations may find their traditional customary legal systems as alien as their "mainstream" counterparts.

The process of degeneration is a real threat - one that calls for immediate attention. Constant legislative intrusion into the customary practices of the tribal communities and the denial of traditional systems a rightful place within the national constitutional scheme will only hasten their attrition. The deference-development dichotomy may be looked upon as a far less inequitable

274. *Id.* at ch. XII, § 52.

275. For a discussion on right to access to justice of tribal communities, see *supra* Part III.A.

process if the State values the customary practices of the tribal communities and their cultural importance. To deprive affected communities any say in the process of "national development" is to shame the preambular values of equality and fraternity in the Indian Constitution. Tribe members are also a part of the nation, and development that totally disregards the effect on its constituent parts cannot be, even in the most liberal sense, "national development." The fundamental right to culture is a tacit recognition of India's diversity, and is a right that the framers of the Constitution found worth fundamental protection. More importantly, tribals' consent in the national building process included a promise of substantial autonomy. To recognize traditional legal systems is not only to keep alive the diverse cultural tradition of the Indian polity but also to honor the "historical" promise of cultural autonomy.

Traditional legal systems, as the process for enforcing tribal practices and values, are themselves expressions of indigenous culture. "National development," "integration," and every such process necessarily cause a gradual diminution of this identity. Traditional legal systems, as part of the fundamental right to culture, provide an effective voice in this diminutive process and thereby legitimize it. Unless India acts to recognize traditional legal systems, the continuing dispossession, displacement, and discrimination of tribal groups will leave India without her "pride." Subsequently, posterity in the Indian polity may have to live with the indictment of having disregarded a constitutional promise as a price for "national development."

CONSTITUTIONAL AUTHORITY AND SUBVERSION: EGYPT'S NEW PRESIDENTIAL ELECTION SYSTEM

Kristen A. Stilt*

INTRODUCTION

It is no surprise that Egyptian President Hosni Mubarak won the September 7, 2005 elections under the new presidential election system he created.[1] Many observers noted at the time that while Mubarak and his National Democratic Party (NDP) would most likely still win in 2005, at least the new system established the principle of multi-candidate presidential elections and thus the possibility of a different election result in the future.[2] Mubarak started the constitutional amendment process on Feb. 26, 2005, giving the legislature very detailed instructions to prepare the text of an amendment in order to change the presidential selection system from a single-nominee referendum to a multi-candidate election. The legislature prepared and adopted the text of the amendment and submitted it to a national constitutional referendum on May 25, 2005, amidst protests ranging from objections over the

---

* Assistant Professor, University of Washington Law School. I thank the University of Washington Law School for funding that allowed me to conduct research for this article in Cairo, Egypt, in Summer 2005. I am grateful to my colleagues at the University of Washington Law School for the opportunity to present this work at a faculty colloquium and the faculty workshop facilitated by Professor Louis Wolcher and for the helpful comments made at these forums. Professors Ellis Goldberg, Joel Ngugi, and Dongsheng Zang of the University of Washington and Professor Tamir Moustafa of the University of Wisconsin were invaluable in discussing the comparative and Egyptian constitutional issues. I am grateful to Joanna Wilson for her superb research assistance. Finally, I thank the students in my Spring 2006 Comparative Constitutional Law course at the University of Washington Law School for their enthusiastic participation in conversations about the issues addressed in this article.

Note on transliteration: I am using a simplified version of the standard Library of Congress transliteration system, such that long vowels are not indicated nor are the dots under the consonants that require them. The hamza and 'ayn are transliterated. Spellings of Egyptian names that have a conventional English spelling, such as "Hosni," will be spelled as such. For Egyptian authors who have adopted a modified transliterated form of their names in English, such as Awad al-Morr and Adel Sherif, their names will be spelled herein according to the spellings the authors have themselves chosen.

1. According to official reports, Mubarak was elected with 88.57% of the votes. Twenty-three percent of registered voters voted. *Mubarak yu'adi al-yamin al-qanuniya li-wilaya jadida yaum al-thalatha' 27 sibtambir* [*Mubarak Takes the Oath for a New Term of Office on Tuesday, September 27*], AL-AHRAM, Sept. 11, at 1; Michael Slackman, *Egypt Holds a Multiple-Choice Vote, but the Answer is Mubarak*, N.Y. TIMES, Sept. 8, 2005, at A1. For an analysis of the conduct of the elections from a prominent unofficial monitoring group, see Press Release, Arab Center for the Independence of the Judiciary and the Legal Prof., *Free, Partial and Unfair Presidential Elections* (Sept. 11, 2005) (on file with author).

2. *See, e.g.*, Michael Slackman, *In Egypt, Mixed Views of Politics with a Field of Choices*, N.Y. TIMES, Sept. 4, 2005, at 14. The next presidential elections will be held in 2011.

content of the amendment to the lack of an independent monitoring body for the referendum voting process.[3] According to the official results, fifty-four percent of the nation's registered voters voted in the referendum and eighty-three percent of the voters approved the amendment.[4] There have, however, been allegations of fraud in the voting process.[5]

The Egyptian constitutional amendment is an excellent example of constitutional politics in a legal system that is in the crucial and vulnerable phase of determining power allocations among the executive, legislative, and judicial branches. While the most recent Egyptian constitution, adopted in 1971, specifies the rights and responsibilities of these three branches, the country is still heavily engaged in the process of filling out the meaning of this text in practice. The amendment that restructured the presidential election system is truly a major development in this process, but it does not represent "one step in the march towards . . . full democracy,"[6] nor does it mean that the government wants to provide candidates and voters with greater access to the presidential election process. The new system is authoritarian. While on the surface it looks as though it opens the presidential elections to multiple candidates, its actual goal and effect thus far is to perpetuate the rule of the NDP. Further, by entrenching the new election system through a detailed constitutional amendment, the Egyptian regime has subverted the powers of the Supreme Constitutional Court (SCC) to score a significant victory for the executive and legislative branches in their ongoing cold war with the SCC.

Most recent scholarship on constitutional change is grounded in an evolutionary model of legal development in which nations proceed from authoritarian forms of government to democracy and economic liberalism. This kind of scholarship analyzes the role a new constitution plays in the process of transition, and evaluates the constitution according to whether, and how, it impedes or assists the country's progress.[7] The countries that have undergone

---

3. *See infra* note 74 and accompanying text.

4. *Al-muwafaqa 'ala ta'dil al-dustur bi-aghlabiya kasiha* [*Approval of the Amendment to the Constitution by a Sweeping Majority*], AL-AHRAM, May 27, 2005, at 1.

5. Hassan M. Fattah, *World Briefing Middle East: Egypt: Multicandidate Vote Approved*, N.Y. TIMES, May 27, 2005, at A1.

6. Press Release, Condoleezza Rice, Secretary of State of the United States, (Sept. 10, 2005), *available at* http://www.state.gov/secretary/ rm/2005/52966.htm. In addition to disagreeing with the conclusions of this statement, I contest that there is a concept of "full democracy" that can be used to measure the progress of the Egyptian or any other political system.

7. *See, e.g.*, Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997) [hereinafter *Transitional Jurisprudence*]. "The 'transitional' period begins right after the revolution or political change; thus the problem of transitional justice arises within a bounded period, spanning two regimes. In the contemporary period, the use of the term 'transition' has come to mean change in a liberalizing direction[.]" *Id.* at 2013 (footnote omitted). *See also* THE CONSTITUTION AS AN INSTRUMENT OF CHANGE 15 (Eivind Smith ed., 2003) (noting that "the different forms of constitution-making that took place in the early 1990s can only be understood as expressions of these countries' will to rid themselves of the past and enter a new era"); RUTI TEITEL, TRANSITIONAL JUSTICE (2000)

or are undergoing these kinds of changes typically are called "transitional," with the normative assumption that they are transitioning *from* a repressive regime *to* a liberal, democratic political system.[8] The transition may be accompanied by what Ran Hirschl sees as a global trend of the transfer of "an unprecedented amount of power from representative institutions to judiciaries. Most of these polities have a recently adopted constitution or constitutional revision that contains a bill of rights and establishes some form of active judicial review."[9]

The new constitutions of central and Eastern Europe are popular subjects for studies of constitutional change.[10] South Africa's recent history is also marked by a new political and constitutional structure as a product of its transition to a post-apartheid society.[11] The renewed scholarly interest in foreign constitutions, however, has not extended very far beyond these types of constitutional contexts.[12] Constitutional scholarship has not yet been able to

---

[hereinafter TRANSITIONAL JUSTICE]. "Transitional constitutions are simultaneously backward- and forward-looking, informed by a conception of constitutional justice that is distinctively transitional." *Id.* at 191.

8. *E.g.*, Teitel, TRANSITIONAL JUSTICE, *supra* note 7.

9. Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 71 (2004) [hereinafter *New Constitutionalism*].

10. *See, e.g.*, Vicki C. Jackson & Mark Tushnet, INTRODUCTION TO DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, xi, xiii (Vicki C. Jackson & Mark Tushnet, eds., 2002).

> The present generation's interest in comparative constitutional law has been fueled, we think, by the confluence of the great wave of constitutional reform that flowed around the world—from Central and Eastern Europe to South Africa and Latin America—in the 1980s and 1990s, with the development of a strong community associated with international human rights.

Id.

The most recent new constitutions that have received extensive attention are those of Iraq and Afghanistan. For a discussion of Iraq's constitutional progress, see Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695 (2004).

11. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 93 (2000) [hereinafter *Constitutional Revolutions*].

12. H.W.O. Okoth-Ogendo laments that the scholarly community has generally disregarded African constitutions. H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY 65, 66 (Douglas Greenberg, et. al. eds., 1993). His main explanation is the general belief that constitutions must be part of a constitutional structure in order to be meaningful; they must "limit governmental authority" and "regulate political processes in the state," or in other words, display "constitutionalism." *Id.* He also criticizes scholars for "a totally inadequate conception of law and its relationship to power in Africa." *Id.*

> The dilemma is whether to abandon the study of constitutions altogether on the ground that no body of *constitutional law or principles of constitutionalism* appears to be developing, and might, in all probability fail to do so; . . . or to continue teaching and pontificating upon those liberal democratic values in the hope that state elites in Africa will eventually internalize and live by them.

Id. (emphasis in original). One recent exception to this lack of literature is Mirna E. Adjani, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence*, 24 MICH. J. INT'L L. 103 (2002).

address adequately constitutional change that moves in non-linear patterns, when the sources of political power within the particular country are engaged in a struggle over issues particular to the local context *by means of the constitution*.[13] As Ruti Teitel has noted, in such cases "[w]here the prior regime has not collapsed, and where the political shift occurs only as a result of negotiations, constitutions play a role not well accounted for within prevailing constitutional theory."[14] Indeed, constitutional change that does not fit the prevailing models of transition has been neglected in legal scholarship for a number of reasons, including that the country's constitutional politics are unenlightened and not worth attention and that the change fails to exhibit enough stability or clear trajectory to make constitutional study meaningful or possible.

Since studies of "transitional" constitutions have dominated the field of non-traditional constitutional scholarship, there remains a large category of unexamined constitutions that have undergone change and emendation but in less clear directions. In these contexts of ambiguity, legal scholars are generally unable to account for, analyze, or productively discuss the role of the constitution in the shaping of a country's legal system and national existence more generally. Instead, doctrinally-focused and positivist approaches are often used as a deeply unsatisfying default option.

This article urges study of constitutional change in under-examined constitutional settings, taking the recent developments in Egypt as a prompt to undertake just such a study. This article demonstrates that sociological, anthropological, historical, linguistic, and political science approaches must be brought to the study of constitutional change in order to gain meaningful insights. This article also challenges an evolutionary model of transition as the standard by which to choose which constitutions receive scholarly attention, and it shows the value of attempting to explain constitutional change on its own terms and in its own context. As a comparative law scholar, I believe my range of perspective and inquiry should be broad, from the internal perspective of the Egyptian actors involved, a perspective which I have attempted to access

---

13. Recognizing a related lacuna, Noah Feldman called upon comparative constitutional law scholars to "promote conceptual clarity by finding a way to talk about partial rule of law and partial constitutionalism." Noah Feldman, *Review: Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government*, 1 INT'L J. CONST. L. 390, 391 (2003) (reviewing Nathan J. Brown (2002)).

14. Teitel, *Transitional Jurisprudence*, *supra* note 7, at 2059. Scholars have dealt with the reasons for the promulgation of constitutions in countries that lack "constitutionalism." *See, e.g.*, Nathan J. Brown, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD (2002). Brown presents "various nonconstitutionalist motives for writing constitutions" in the Arab world. *Id.* at 3. His main explanations for the purpose of producing constitutions that "are not meant to limit governments" are (1) sovereignty: a "country proclaims its independence (or a revolutionary regime proclaims its triumph) by writing a constitution"; (2) "constitutions may serve the purpose of proclaiming basic ideology"; and (3) "a constitution may serve to make lines of authority clear without restricting the actions of senior leaders." *Id.* at 10-11. Brown's significant work helps to explain the initial impetus for constitutions such as the Egyptian one.

through extensive research in Egypt, to the external perspective of a scholar analyzing and writing about the events from the distance of a U.S. university campus. Comparative legal scholars must strive to attain multiple perspectives in order to bring as much clarity of meaning as possible to a legal event and its larger social contexts.[15]

Egypt's constitution is currently being used to express legal authority and to subvert legal authority. On one hand, the SCC has over the past twenty-five years developed as a strong and independent institution and, while upholding the administration's position in many areas of the law, particularly economic, has also not refrained from striking legislation as unconstitutional.[16] The executive, and the legislature it dominates, have generally been willing to tolerate some losses before the SCC in exchange for its larger support of the regime's agenda.[17] In the process of more than two decades of jurisprudence that has been taken seriously by the executive, legislative, and judicial branches, the SCC has not only established itself as a strong authority but also established the constitution as a meaningful text.[18]

A prime example of Egypt's dueling constitutional authority and subversion is the new presidential election system. In fashioning the legal mechanisms to implement this system, the administration constitutionally entrenched the legal provisions in an attempt to protect them from later review or invalidation by the SCC. Thus, the regime introduced the new election system as a lengthy constitutional amendment that contains a level of detail unprecedented in the Egyptian constitution. The administration's motives are clear and, in defense of the constitutional amendment, Fathi Sorour, Speaker of the lower legislative house, commented that part of the constitution cannot be declared unconstitutional.[19] The amendment also dictated the SCC's actions by requiring that it review a draft of the amendment's implementing legislation in

15. The benefits of understanding such changes accrue on many levels, depending on the particular position of the user of the knowledge. Even if the goal is to encourage "transition" in Egypt in the Eastern European sense of the word, policy makers still must begin with understanding the developments in Egypt on their own terms.

16. *See infra* note 38 and accompanying text.

17. The connection between President Mubarak's ruling National Democratic Party (NDP) and the almost complete domination of the legislature by the NDP is discussed *infra* note 61 and accompanying text. The regime's losses before the SCC are minor compared to the dramatic changes that dismantled the regimes of Eastern Europe in the 1990s. The Egyptian administration has no intention of introducing or allowing significant reforms, and it is relying on the United States to not insist on such dramatic reforms on the basis that the United States would not want an Islamist-dominated government to come into power, which is what is widely expected to happen if there were genuinely free and fair elections in Egypt.

18. The reasons for executive and legislative respect for, or tolerance of, the SCC is discussed *infra* notes 29-41 and accompanying text.

19. *See* Noha El-Hennawy, *The Race is On*, EGYPT TODAY, June 2005, *available at* http://www.egypttoday.com/article.aspx?ArticleID=5234 [hereinafter *The Race is On*]. This issue was recently presented to the SCC. *See infra* notes 166-170 and accompanying text.

a pre-promulgation abstract review, a power not otherwise provided to the SCC.[20]

Part One of this Article introduces Egypt's constitutional protagonist: the SCC. The SCC's position is central in the discussion of the election system amendment. Due to the important role that the SCC has gained over the past twenty-five years, the Egyptian administration used a detailed constitutional amendment to attempt to prevent the SCC from reviewing the constitutionality of the election system. Ironically, the regime feared the SCC's power and independence, which has developed over time with the regime's acquiescence. Otherwise, the regime could have implemented the election change through a short constitutional amendment and expanded upon it through lengthy legislation.

In Part Two, this Article discusses the constitutional amendment and its political and legal context. For the constitutional referendum, reformist movements had to choose between the remote possibility that another candidate could have won in the 2005 election under the new system versus the long-term damage of the amendment to the cause of free and fair multi-candidate presidential elections. Delving into more detail, Part Three discusses the two main aspects of the amendment and its concomitant implementing legislation: first, access by potential presidential candidates to inclusion on the ballot; and second, monitoring of the elections. This part will show that the amendment and implementing laws make it very difficult for a non-NDP candidate to run for president in light of current political realities. The major obstacle to non-NDP candidates obtaining a listing on the presidential ballot is the NDP's tight control of the legislature, which can be changed only by a thorough reform of the political party system. In addition, the election monitoring system put in place by the amendment and accompanying laws is troubling. Egypt has a history of election irregularities and outright fraud, which were extensively documented for the 1995 and 2000 legislative elections and have been reported with regard to the 2005 legislative elections.[21] Until the issue of the fairness of the electoral process is adequately resolved, the conduct of presidential elections undoubtedly will be subject to criticism.[22]

In Part Four, the Article investigates the tension between constitutional authority and subversion by discussing the two largest issues surrounding the amendment: legislating through the amendment and tampering with the SCC's power of judicial review. Both are efforts to subvert the power of the SCC; they recognize the SCC's power, and harness that power to essentially tie the SCC's hands.

The article concludes with an urging to constitutional scholars to work in new, complex, and confusing areas. This challenging work yields a range of

---

20. *See* judicial review and interpretation powers, *infra* notes 33-37 and accompanying text.

21. *See infra* Part III.B.1.

22. *See* discussion of election monitoring standards *infra* Part III.B.2.

benefits. New problems produce new approaches, and new approaches can then be used in more familiar contexts to bring fresh perspectives to what may have formerly seemed like well-studied and understood home territory.

I. EGYPT'S CONSTITUTIONAL ANCHOR: THE SUPREME CONSTITUTION COURT

The SCC in its present form is a relatively new institution. The Supreme Court, established in 1969 by a presidential decree of President Nasser, was the SCC's predecessor.[23] In contrast to the extensive powers that would be given to the SCC, Nasser structured the Supreme Court so that the executive heavily controlled it and it served Nasser's socialist policies. He granted the Supreme Court the exclusive power of judicial review and abolished the previous system of abstention, whereby any court could abstain from enforcing a law it found to violate the constitution. The weakness of the abstention system from the perspective of judicial power was that a law that a court failed to apply was not considered unconstitutional and was still in effect; it just was not applied in that particular case. For the legislature and the executive, the system of abstention created a lack of legal uniformity and subjected state policy to the decisions of every judge in the country.[24] Consolidating the power of judicial review in one institution made it easier to control, and Nasser's Supreme Court was a tool of the regime. The President appointed justices for three-year terms.[25] Not surprisingly, the decisions of the Supreme Court were uniformly pro-state.

Nasser's death in 1970 led to profound changes in Egypt's economic and legal systems. Nationalizations and socialist policies had caused investor flight. As Nasser's successor, President Anwar Sadat attempted to reverse this nationalist economic policy, and one of his first major actions was to propose the drafting of a new constitution that would protect private property rights along with continuing to recognize the importance of the public sector. The new constitution was adopted in 1971 and Arts. 174-178 provided for a new Supreme Constitutional Court to replace the former Supreme Court.[26] Despite the new constitution and new legislation, Sadat discovered that attracting foreign capital required more than textual assurances that Nasser's policies had

---

23. Presidential Decree enacting Law 81 (1969), AL-JARIDA AL-RASMIYA [Official Gazette] No. 35 Supp., 678-680 (Aug. 31, 1969). *See also* Awad Mohammad El-Morr, Abd El-Rahman Nossier, & Adel Omar Sherif, *The Supreme Constitutional Court and its Role in the Egyptian Judicial System*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 37 (Kevin Boyle & Adel Omar Sherif eds., 1996) [hereinafter HUMAN RIGHTS AND DEMOCRACY]. The Court of Cassation predated the Supreme Court and served, and still serves, as the highest court of appeals in Egypt.

24. *See* Awad Mohammad El-Morr & Adel Omar Sherif, *Democratic Participation*, *in* HUMAN RIGHTS AND DEMOCRACY, *supra* note 23, at 75, 78.

25. Presidential Decree enacting Law 81, *supra* note 23.

26. AL-DUSTUR AL-MISRI [Egyptian Constitution] (amended 2005) [hereinafter Egyptian Constitution].

been reversed.[27] The SCC needed the power to guarantee the property rights contained in the constitution and legislation.[28]

Thus, President Sadat introduced Law 48 of 1979 as the implementing legislation to launch the SCC.[29] As part of Law 48, the SCC obtained the power of judicial review and the members of the SCC are not subject to removal.[30] The SCC is composed of a President, considered the chief judge, and an appropriate number of members; no specific number is given in Law 48 nor the criteria for what constitutes an appropriate number.[31] The President of Egypt appoints the President and the other members of the SCC to life terms.[32]

The SCC has the power of judicial review of laws and regulations in two ways.[33] First, in the course of deciding a case on the merits, if a court or any judicial forum views *prima facie* that a provision of a law or regulation upon which the settlement of the dispute depends is unconstitutional, the court suspends the proceedings and forwards the case to the SCC for the adjudication of the constitutional issue.[34] Secondly, when the constitutionality of a provision in a law or regulation is contested by a party to a case before a court or other

---

27. *See* Tamir Moustafa, Law Versus the State: The Expansion of Constitutional Power in Egypt, 1980-2001, at 68 (2002) (unpublished Ph.D. dissertation, University of Washington) (on file with author) [hereinafter Moustafa, Law Versus the State]. A revised version of Moustafa's dissertation is forthcoming from Cambridge University Press. The concept of providing additional reassurances to investors is referred to as a "credible commitment." *See* Douglass C. North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. OF ECON. HIST. 803, 803 (1989).

> The more likely it is that the sovereign will alter property rights for his or her own benefit, the lower the expected returns from investment and the lower in turn the incentive to invest. For economic growth to occur, the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them.

Id.

28. According to then Prime Minister Mustafa Khalil:

> There were efforts to encourage foreign investment in Egypt at the time because we were dealing with a fiscal crisis. One major factor that was impeding investment was the lack of political stability—both foreign and domestic. We issued a number of laws aimed at guaranteeing private investment .... But a major problem was that the NDP, having the majority in the People's Assembly, could push through any legislation it wanted and change the previous laws. This was at the forefront of Sadat's thinking when he created the Supreme Constitutional Court. He primarily wanted to make guarantees [to investors] that laws would be procedurally and substantively sound.

Moustafa, Law Versus the State, *supra* note 27, at 72-73 (conducting personal interview with Mustafa Khalil (June 14, 2000)).

29. Law 48 (1979), AL-JARIDA AL-RASMIYA [Official Gazette] No. 36, 530-538 (June 9, 1979).

30. *Id.* at arts. 11, 28.

31. *Id.* at art. 3.

32. *Id.* at arts. 5, 11.

33. *Id.* at arts. 25-27.

34. *Id.* at art. 29(a).

judicial forum, and the grounds of the contestation are found to be plausible by the court, the court must postpone the case and grant the party a delay of three months, during which time the party petitions for the SCC to hear the constitutional claim. If the SCC does not decide the constitutional issue within the three-month period, the case resumes without resolution of the constitutional question.[35]

As a separate matter, the SCC also has the power of statutory interpretation.[36] The Prime Minister, the Speaker of the lower legislative house, or the Supreme Council of the Judiciary may ask the Minister of Justice to make a request for statutory interpretation to the SCC. The request for interpretation must state the legislative provision at issue, the divergent points of view surrounding its application, and the degree of importance of its uniform application.[37]

The SCC indeed has invalidated laws on constitutional grounds and has become the most significant institution in Egypt for challenging the executive and the NDP-dominated legislature.[38] Despite this, neither Sadat nor Mubarak has attempted to abolish the SCC, although Mubarak has continually made efforts to undermine its power when it has been in the regime's interest to do so. In general, the expansion of judicial power is commonly perceived as an accompaniment to liberal values.[39] Yet Sadat, and Mubarak after him, did not embrace these values nor establish, and then tolerate, the SCC as part of a larger democratic package.[40] Rather, the "expansion of judicial power has occurred in Egypt *despite* its authoritarian system. Moreover, the judiciary became the main engine of political reform and for some time this role was paradoxically facilitated by the executive branch of the government itself."[41] The enduring power of the SCC has been somewhat of an enigma, for why would an entrenched authoritarian regime that has already distanced itself from the policies of the Nasser period continue to allow an independent constitutional court empowered to perform judicial review?[42]

---

35. *Id.* at art. 29(b).

36. Egyptian Constitution, *supra* note 26, at art. 175.

37. Law 48 (1979), *supra* note 29, at art. 33.

38. Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 883-84 (2003) [hereinafter Moustafa, *The Judicialization of Politics in Egypt*].

39. *See New Constitutionalism*, *supra* note 9, at 72 (recognizing and criticizing this commonly-held view).

40. Hirschl is skeptical of the notion that a trend toward constitutionalization is "driven by politicians' genuine commitment to democracy, social justice, or universal rights." *Id.* at 72. He proposes that "it is best understood as the product of a strategic interplay among hegemonic yet threatened elites, influential economic stakeholders, and judicial leaders." *Id.* While this is helpful in rejecting the march to democracy concept of constitutionalization, it is only the first step towards explaining the Egyptian case.

41. Moustafa, Law Versus the State, *supra* note 27, at 3.

42. *See* Moustafa, *The Judicialization of Politics in Egypt*, *supra* note 38, at 883.

While serving the ongoing function of providing guarantees to investors that property rights will be respected, the SCC has also gained enough power to challenge the regime on non-economic issues. In particular, opposition parties and human rights activists turn to the SCC for relief and are often successful. The government created a double-edged sword in the SCC, and on balance is willing to tolerate its losses before the court in exchange for the SCC's protection of private property that allows the government to attract desperately needed investments.[43] Further, the SCC's rulings throughout the 1990s helped to advance the regime's domestic economic liberalization policies.[44] Thus, the government had to work within the context of the SCC's power and authority when devising the new presidential election system.

II. MUBARAK'S PROPOSALS, THE CONSTITUTIONAL AMENDMENT, AND REFERENDUM

A. *Mubarak's Proposals*

On February 26, 2005, Egyptian President Hosni Mubarak issued a dramatic correspondence to the two houses of the Egyptian Parliament, the lower People's Assembly (PA) and the upper Consultative Assembly (CA). He requested that the two bodies initiate a process to amend the constitution to establish presidential elections in which the voting populace would elect the president in secret, general, and direct elections.[45] His statement was widely printed the following day in the major newspapers in Egypt.[46]

This announcement called for the most significant change in the Egyptian political process since the coup led by Nasser in 1952. At the time of the announcement, the presidential election process was prescribed by Article 76 of the Constitution:

> The PA nominates the president of the Republic, and presents the nominee to the citizens to vote on the candidate in a referendum.

---

43. See *id.*

44. See *id.* Policies such as liberalization of the housing market were not popular with Egyptians other than the wealthier classes, and the government wanted another body to take responsibility for unpopular decisions.

45. Egyptian Constitution, *supra* note 26, at art. 189 (stating the constitutional amendment process).

46. *Nass kitab Mubarak ila ra'isay majlisay al-sha'b w-al-shura bi-ta'dil al-mada 76 min al-dustur [Text of the Speech of Mubarak to the Presidents of the PA and CA Regarding the Amendment of Article 76 of the Constitution]*, AL-AHRAM, Feb. 27, 2005, at 1 (AL-AHRAM is the major government paper and is widely read).

> The nomination in the PA for the position of President of the Republic is achieved on the basis of the proposal of at least one-third of the PA's members, and the candidate who gains the votes of two-thirds of the members of the PA is presented to the citizens to vote on the candidate in a referendum. If no candidate receives a two-thirds vote in the PA, then the nomination process is repeated two days later from the date of the first vote, and the candidate who receives votes from an absolute majority of the members of the PA is presented to the citizens to vote on the candidate in a referendum.
>
> The candidate is considered the President of the Republic with the receipt of an absolute majority of [positive] votes from those who voted in the referendum. If the candidate does not receive a majority of votes, the PA nominates a different candidate and follows the same procedures with regard to the nomination and public vote.[47]

As indicated by the original Article 76, the lower house, the PA, which has been heavily dominated by the ruling NDP, tightly controlled the process.[48] Since taking office upon the assassination of Anwar Sadat in 1980, Mubarak has succeeded in this referendum process four times with "yes" votes in the mid to high ninety percent range.[49] The presidential term of office is six years, and the constitution does not provide for a limit on the number of terms.[50]

Mubarak's February 26, 2005, letter was carefully crafted to explain the impetus and need for the amendment and to suggest a substantial amount of detail for the PA to include in the amendment, which it faithfully did. Mubarak's statement touched on many key aspects of Egyptian political and legal history, and he was sending clear signals to the NDP while also attempting to convince the population of the genuineness of his desire for reform. After explaining that his remarks were part of proposing a procedure for amending the constitution, he stated:

> For the purpose of strengthening our democratic future which we are fervently striving for, and out of our desire to carry out the choice of the President of the Republic, for which the

47. Egyptian Constitution, *supra* note 26, at art. 76 (prior to amendment of May 25, 2005).

48. *See* note 61 and accompanying text.

49. In 1999, according to official results, Mubarak received ninety-four percent positive votes. U.S. Dept. of State, *Egypt, Country Reports on Human Rights Practices - 2004, at* http://www.state.gov/g/drl/hrrpt/ 2004/41720.htm (Feb. 28, 2005) [hereinafter *Egypt Country Reports*].

50. Egyptian Constitution, *supra* note 26, at art. 77.

election date is approaching, with that which will achieve development and support for the democratic system and raise the role of the people, who possess the power, therefore, I have viewed my responsibility to include requesting an amendment of article 76 of the constitution and adding a new article to its text at the end of article 192.

I would like to place in front of the representatives of the people some basic principles that I view as guaranteeing the achievement of the goal of the amendment:

1. The election for the President of the Republic [should be] conducted by direct, general, and secret vote by all individuals who have the right to vote.

2. All of the guarantees to provide for the presentation of more than one candidate to the people [should be] established so that the people can choose from them according to their free desire.

3. A pledge of the necessary measures to respect the serious nature of the nomination of candidates for president, including that whoever desires to be nominated [should] achieve the support from the elected representatives of the people in institutions recognized by the constitution and in regional parliaments.

4. Granting the opportunity to the political parties to nominate one of their leaders according to the rules that you deem appropriate in order to enter the first presidential elections to take place in light of this amendment.

5. Formation of a high commission, which will be guaranteed complete independence and neutrality and which will provide all of the procedures, and undertake supervision over the electoral process from the submission of the names of the candidates to the announcements of the results of the election, provided that included in its formation is a number of presidents of the judicial bodies and a number of general personalities.

6. The voting in the elections for the President of the Republic [should take place] on one day.

7. Laying down guarantees for the establishment of judicial monitoring over the process of voting.[51]

These suggestions for the new presidential election system and the constitutional amendment are very detailed and are all designed to protect the dominance of the NDP. First, Mubarak's statement that candidates for president should have the ability to serve the nation and should have support from members of constitutional and elected popular institutions is self-serving.[52] By stressing that candidates should have the support of elected members of the legislatures, he intended to sideline candidates who may not belong to a political party or enjoy wide support in the NDP-dominated elected bodies.

Second, Mubarak also called for the formation of an independent election commission to supervise the electoral process, from the presentation of the candidates' names to the announcement of the results. This commission should include a number of leaders of "judicial bodies." The role of "judicial bodies" in Egyptian elections has been a contentious issue and will be explained in detail below. By using this term, Mubarak was sending a message to judges that they would have some role in election monitoring, without specifying the details of that role, with the intent to appease judges who have demanded complete supervision over the entire election process.[53]

Mubarak had to justify his proposed constitutional amendment to his citizenry. Coming soon after President Bush's February 2, 2005 State of the Union address, in which he called upon Mubarak to lead the Middle East to democracy, Mubarak had to make clear that he was not merely succumbing to American pressure.[54] Accordingly, Mubarak was careful to place his proposal in the context of a national narrative in which these changes would be the obvious next step. He described the work of the drafting committee for the 1971 Constitution and the choices they made in structuring presidential elections. According to Mubarak, they considered two options: direct presidential elections or allowing the legislature to choose the president. As he described the events, the drafters chose to blend these two options, such that the legislature chooses the candidate whom the people then accept or reject.

---

51. *Text of the Speech of Mubarak to the Presidents of the PA and CA Regarding the Amendment of Article 76 of the Constitution*, *supra* note 46, at 1.

52. *Id.*

53. *See infra* notes 123-128 and accompanying text.

54. President George Bush, State of the Union Address (Feb. 2, 2005), www.whitehouse.gov/news/ releases/2005/02/print/20050202-11.html. "And the great and proud nation of Egypt, which showed the way toward peace in the Middle East, can now show the way toward democracy in the Middle East." *Id.*

Mubarak stated that the process chosen by the drafters in 1971 was a typical process for countries undergoing democratic transition. He further clarified that the system provided Egypt with security and stability until she was able to completely free her soil of the enemy who invaded her. This is clearly an illusion to the perceived need to maintain tight control at home in the face of tense relations with Israel.[55] Further, Mubarak produced internal justifications to ward off allegations that his actions were at the urging of the U.S. administration or as a preventive measure to protect Egypt from an American imposition of democracy in Egypt.[56]

Mubarak's letter to the PA and CA specified his ideas for the content of the constitutional amendment and then later the implementing legislation. The result was to allow the president to dictate the rules under which he would run for re-election, and then give those rules constitutional protection.

B. The Constitutional Amendment

This section describes the content of the amendment in preparation for the discussion of the implementing legislation in Part Three and then the larger argument in Part Four that the amendment represents constitutional authority and subversion. The overall content of the amendment is discussed here with the key issues clustering around two topics, which will also be the organization used in Part Three: access of candidates to inclusion on the ballot and the monitoring of the elections. These are two of the main areas of concern surrounding legislative elections, and the SCC has heard a number of claims seeking to invalidate legislative elections on these grounds. Accordingly, it is to be expected that these are the two main areas in which the President wanted to incorporate his presidential election rules into the amendment in order to protect them from later invalidation by the SCC.

A detailed analysis of the amendment is necessary because the amendment is itself detailed and lengthy. Unlike the original Article 76,[57] the amended version looks far more like legislation than an article from the Egyptian constitution. While constitutional provisions generally are of dramatically varying lengths, as are constitutions themselves, the style of the amended article is completely different from the original article or any other article of the Egyptian constitution.[58] This amendment was carefully crafted

---

55. *Text of the Speech of Mubarak to the Presidents of the PA and CA Regarding the Amendment of Article 76 of the Constitution*, *supra* note 46, at 1.

56. *See, e.g.*, *al-Tarshih lil-intikhabat al-ra'isiya nihayat al-usbu' al-muqbil* [*The Nomination Process for the Presidential Elections Takes Place at the End of Next Week*], AL-AHRAM, July 13, 2005, at 1 (citing the Egyptian ambassador to the United States as stating that Mubarak was not under any American pressure to undergo a democratic transformation). The historical backdrop of this speech, of course, was the 2003 American invasion of Iraq.

57. *See supra* note 47 and accompanying text.

58. Some U.S. state constitutions, for example, are notoriously lengthy and detailed, but they are internally consistent in this style. For examples, see Christian Fritz, *Constitution*

and the level of detail strategically chosen to entrench as much of the presidential election system as possible in the constitution.

1. Access to the Ballot by Candidates

According to the amendment, there are two ways to become a candidate. First, political parties that have been in existence for five consecutive years prior to the beginning of the presidential election period, and that in the last election received at least five percent of the seats in both the PA and the CA, may nominate one of their leaders as a candidate.[59] However, prior to the 2005 presidential elections, only the NDP met the five percent rule.[60] At that time, the PA was dominated by 402 NDP members out of a total of 454 seats. Four opposition parties held a total of 16 seats: New Wafd Party had seven; Tajammu' held six; the Nasserists held two; and the Liberal Party held one. Independent candidates known to be affiliated with the Muslim Brotherhood held 17 seats, independent Nasserist candidates held five seats, and unaffiliated independent candidates held 14 seats. Ten seats were filled by presidential appointment and thus those appointees were loyal to Mubarak's NDP.[61]

Since the constitutional amendment was supposed to change the presidential selection process into a multi-candidate election, it would have reflected very poorly on Mubarak if he were the only candidate in the first election under the new system. Consequently, the constitutional amendment contained a waiver of the minimum seat requirement for party-sponsored candidates for the first election under the new system.[62] The amendment provided that for the first election, each political party was permitted to nominate one member of their leadership body, provided the leadership body was formed prior to May 10, 2005.[63] Mubarak hinted at this type of waiver in point four of his Feb. 26, 2005 statement when he suggested that the rules should facilitate the entry of the leaders of political parties into the *first* presidential elections to take place after the adoption of the amendment.[64]

Making in the Nineteenth-Century American West, in LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 292 (John McLaren, et. al., eds., 1992) (citing speeches from the North Dakota constitutional convention for the point that the drafters rejected the idea of a brief constitution).

59. Amendment to the Egyptian Constitution, AL-JARIDA AL-RASMIYA [Official Gazette] No. 21 Supp. A, 2-6 (May 26, 2005) [hereinafter Text of Amendment].

60. The Nov.-Dec. 2005 PA election results and the current composition of the CA are discussed *infra* notes 83-85 and accompanying text.

61. Moustafa, Law Versus the State, *supra* note 27, at 249-250.

62. Text of Amendment, *supra* note 59, at 4.

63. *Id.* Thus, nine opposition party candidates were on the ballot along with Mubarak. *Lajnat intikhabat al-ri'asa tu'alinu qa'imat man taqaddamu lil-tarshih ghadan* [*The Presidential Election Committee Will Announce Tomorrow the List of Those Who Applied for Candidacy*], AL-AHRAM, Aug. 4, 2005, at 1.

64. *Text of the Speech of Mubarak to the Presidents of the PA and CA Regarding the Amendment of Article 76 of the Constitution*, *supra* note 46, at 1.

The second option in the amendment pertains to independent candidates or candidates whose party does not have the required number of seats in the assemblies. Such candidates must have the support of at least 250 members from the PA, CA, and regional parliaments combined, provided that at least sixty-five signatures are from the PA, at least twenty-five are from the CA, and the candidate has the support of at least ten members from at least fourteen of the twenty-six regional parliaments. Any one member of any of these parliaments may endorse only one candidate.[65] No independents were able to meet these candidacy requirements in the 2005 presidential elections.[66] The independent candidates in the PA were not enough, even if they had agreed on one candidate, to provide the minimum number of PA signatures.

According to the amendment, the winner of the presidential election is the candidate who receives votes from an absolute majority of voters. If no one individual receives this number, a run-off election is held seven days later between the two candidates who received the highest vote counts. If a third ties with the second, all three partake in the run-off, and the individual who receives the highest number of votes wins.[67]

2. *Monitoring the Elections*

The monitoring of PA elections has been a significant issue in the past, and the constitution requires under Article 88 that PA voting take place under the supervision of members of a "judicial body." The SCC has ruled on the conformity of monitoring systems with Article 88 and has invalidated an entire PA election, as discussed below. While the constitution did not provide for monitoring of the former presidential referenda, growing popular desire for transparency in legislative elections and in particular demands by judges that they form the monitoring bodies were strong indicators to Mubarak that it would be prudent to include a monitoring system in the constitutional amendment. Thus, he could show that the elections were subject to monitoring but could also, as with the other elements of the new scheme, control the content of the monitoring plan and keep it out of the public and judicial arenas as much as possible.

The constitutional amendment created the Presidential Election Commission (PEC), which is composed of ten members. The President of the SCC is the President of the PEC, and four more members are also judges: the President of the Appeals Court, the Senior Deputy President of the SCC, the

65. Text of Amendment, *supra* note 59, at 3. The current status of elections to the regional parliaments is discussed *infra* notes 87-88 and accompanying text.

66. Nine independents applied for inclusion on the ballot, but none had the requisite signatures and the Presidential Election Commission, *see infra* notes 68-71 and accompanying text, rejected their applications. *Al-lajna istaba'adat 9 talibat li-'adm istifa'iha al-shurut* [*The Committee Disqualified Nine Applications Due to Non-fulfillment of the Conditions*], AL-AHRAM, Aug. 5, 2005, at 1.

67. Text of Amendment, *supra* note 59, at 5.

Senior Deputy President of the Court of Cassation, and the Senior Deputy President of the Council of State.[68] The other five members are individuals without political affiliations and they serve for a term of five years. Three of them are chosen by the PA and two are chosen by the CA.[69] While these last five members are supposed to be neutral, it is important to remember that since NDP members dominate the PA and CA, their party affiliation likely influences these choices.

The PEC has a broad jurisdiction that includes all matters related to the presidential elections. Furthermore, decisions of the PEC are not subject to appeal. The PEC's areas of competency are:

> 1. Announcing the opening date in which individuals can seek recognition as a candidate for President, supervising the procedures for this process, and announcing the final list of candidates.
>
> 2. General supervision of the procedures of voting and vote counting.
>
> 3. Announcing the results of the elections.
>
> 4. Deciding all of the complaints, appeals, and all matters related to the PEC's duties, even if it is a dispute over the PEC's own jurisdiction.
>
> 5. Drafting procedures for organizing the manner of its work and method of exercising its duties.[70]

The amendment provides that the presidential voting shall take place on a single day and under the general supervision of the PEC. The one-day rule is not a benign practical matter, but it relates to a long history of PA elections in which the SCC required real judicial supervision of each polling station and the regime responded with a proposal to hold elections in phases so that each judicial monitor could conduct monitoring at a different location at each

68. This is the *majlis al-dawla* (the administrative court). For more information, see M. Rady, *Administrative Law*, *in* EGYPT AND ITS LAWS 221 (Nathalie Bernard-Maugiron & Baudouin Dupret, eds., 2002).

69. Text of Amendment, *supra* note 59, at 4.

70. *Id.* at 5.

phase.[71] Apparently wanting to avoid this level of judicial scrutiny, Mubarak instead proposed a vertically organized system of monitors. The PEC should establish two types of commissions: general supervisory commissions (GSCs) and technical commissions. The GSCs are composed of members of judicial bodies and they supervise the work of technical commissions, which actually conduct the practical electoral work. The amendment does not seem to guarantee judicial supervision at each polling station since the amendment did not require that technical commissions include members of judicial bodies.

The amendment specifies that after adoption of the constitutional referendum, the President and the PA should prepare implementing legislation, which would then be submitted to the SCC for constitutional review prior to promulgation. The SCC would have fifteen days to review the legislation, evaluate the constitutionality of it, and communicate its results back to the President so that the PA could revise the text accordingly before adopting it.[72] The troubling issue of pre-promulgation SCC review is discussed in detail in Part IV.C.

C. *The Constitutional Amendment Referendum*

Egyptian constitutional procedure requires that a majority of voters adopt an amendment in a nationwide referendum.[73] The public announcement of the proposed presidential election amendment and forthcoming referendum was greeted within Egypt and internationally by exuberance, caution, and outright skepticism. Reformist organizations such as human rights NGOs and opposition political parties realized not only the lack of progress but also the significant negative consequences of the amendment and took to the streets in some of the most daring rallies and protests Egypt had ever seen. The three main opposition political parties opposed the amendment. Opposition more generally gathered around the grassroots coalition called Egyptian Movement for Change, which is better known by its slogan "*kifaya*" (literally, "enough").

The PA submitted the referendum to nationwide vote on May 25, 2005. The referendum was boycotted by the three main opposition parties, the coalition *kifaya*, and many others on the basis that it did not create genuine presidential elections.[74] According to the Ministry of Interior, fifty-four percent of the nation's registered voters participated in the referendum, which involved marking either "I agree" or "I do not agree" on the ballot. Official figures reported that eighty-three percent of the voters accepted the amendment.[75]

---

71. *See infra* note 124 and accompanying text.

72. Text of Amendment, *supra* note 59, at 5.

73. Egyptian Constitution, *supra* note 26, art. 189.

74. The three parties issued a joint statement that the amendment "sanctifies the permanent monopoly of the ruling party over the post of the republic's president." *The Race is On*, *supra* note 19.

75. *See Approval of the Amendment to the Constitution by a Sweeping Majority*, *supra* note 4, at 1.

However, there have been reports of violent intimidation against opponents of the referendum.[76]

III. IMPLEMENTING LEGISLATION

The constitutional amendment specifies that the legislature should draft a law on the organization of the presidential elections. Law 174 on the Presidential Elections was promulgated on July 2, 2005 and expands on the constitutional amendment.[77] The related laws passed along with Law 174 are: Law 173 on the Exercise of Political Rights;[78] Law 175 on the PA;[79] Law 176 on the CA;[80] and Law 177 on Political Parties.[81] In conjunction with the amendment and Law 174, these laws create a package of legislation that entrenches the NDP's control over the presidency and the legislature. This part discusses the implementing legislation relevant to the presidential elections, focusing on the process and criteria for becoming a presidential candidate and the monitoring mechanisms for the conduct of presidential elections.

A. *Who is on the Presidential Ballot?*

Because the amendment itself was so specific regarding access of candidates to the ballot, Law 174 added little to the qualifications for office, but essentially reiterated the rules established in the amendment for the two kinds of candidates: political party leaders and independents.

PA membership prior to the 2005 presidential elections was discussed above to illustrate the ramifications of the rules for gaining candidacy.[82] At that time, no party other than the NDP met the five percent rule, and the number of independents was not enough to nominate a candidate. Hence, the lifting of the five percent rule for the first presidential elections under the new system was necessary in order to have the promised multi-candidate elections. Further examination of these candidacy rules shows the challenges non-NDP candidates will face in future presidential elections.

A political party needs to hold five percent of the seats in both the PA and

---

76. Hassan M. Fattah, *World Briefing Middle East: Egypt: Multicandidate Vote Approved*, N.Y. TIMES, May 27, 2005, at A1.

77. Law 174 (2005), AL-JARIDA AL-RASMIYA [Official Gazette] No. 26 Supp., 11-24 (July 2, 2005). The SCC's review of a draft of this law is discussed *infra* note 157 and accompanying text.

78. Law 173 (2005), AL-JARIDA AL-RASMIYA [Official Gazette] No. 26 Supp., 3-10 (July 2, 2005) (amending Law 73 (1956)).

79. Law 175 (2005), AL-JARIDA AL-RASMIYA [Official Gazette] No. 26 Supp., 25-27 (July 2, 2005) (amending Law 38 (1972)).

80. Law 176 (2005), AL-JARIDA AL-RASMIYA [Official Gazette] No. 26 Supp., 28 (July 2, 2005) (amending Law 120 (1980)).

81. Law 177 (2005), AL-JARIDA AL-RASMIYA [Official Gazette] No. 26 Supp., 3-10 (July 7, 2005) (amending Law 40 (1977)).

82. *See supra* notes 60-61 and accompanying text.

CA to nominate a presidential candidate. There are 264 seats in the CA, and two-thirds (176) of them are elected and one-third (88) are appointed by the President. Members serve six-year terms, and half of the members are replaced every three years. The composition of the CA is nearly exclusively NDP members.[83]

The 2005 PA elections, held in three phases on November 7 and 10 and December 1, 2005, did result in substantial losses for the NDP and equivalent gains for independent candidates. The changes, however, still offer non-NDP members little hope of becoming presidential candidates in the 2011 elections. In the 2005 PA elections, the NDP won 311 seats; al-Ghad won one; Tajammu' won two; the New Wafd Party won six; and 112 independent candidates won seats.[84] Of the winning independents, it is estimated that 88 of the candidates are affiliated with the Muslim Brotherhood. Since the Egyptian government has deemed the Muslim Brotherhood an illegal organization, Muslim Brotherhood members must run as independents. However, it is generally known which candidates are Muslim Brotherhood members and the government has generally tolerated this constructed independent status.[85] Thus, it is still the case that no party other than the NDP meets the threshold of holding five percent of the seats in the PA.

The hope for non-NDP candidates seems to be with the independent nominee option. Law 174 reiterates the rules for independent candidates accessing the ballot: they must have the support of at least 250 members from the PA, CA, and regional parliaments combined, provided that at least sixty-five signatures are from the PA, at least twenty-five are from the CA, and they also must have the support of at least ten members from at least fourteen of the

---

83. Gamal Essam El-Din, *NDP versus NDP—Yet Again*, AL-AHRAM WEEKLY, May 6-12, 2004, *available at* http://weekly.ahram.org.eg/print/2004/689/eg6.htm. CA elections are considered by the opposition to be a "no-contest battle." *Id.* Since the CA is only a consultative body, opposition groups prefer to put their energy and money into contesting the more significant PA elections. *Id. Al-Ahram Weekly* is an English-language weekly newspaper published in Cairo. While is it related to the daily official Arabic-language newspaper *Al-Ahram*, the journalists for *Al-Ahram Weekly* are generally more willing to write articles that criticize aspects the state, and the state allows them to since the majority of Egyptians are not able to read the English-language paper and thus are not exposed to these views. The English-language *Al-Ahram Weekly* and its French counterpart are mainly for the consumption of foreigners in Egypt.

84. Mohamed Sid-Ahmed, *After the Elections*, AL-AHRAM WEEKLY, Dec. 15-21, 2005, *available at* http://weekly.ahram.org.eg/print/2005/773/op3.htm.

85. *Id.* One interpretation of the gains made in the 2005 People's Assembly elections by candidates known to have affiliations with the Muslim Brotherhood, for example, is that the NDP allowed these candidates to increase their seats in the People's Assembly—although not enough to challenge the NDP's control—to show Egypt and the rest of the world on a small scale what might result in completely free elections. Neil MacFarquhar, *Stirrings in the Desert*, N.Y. TIMES, Dec. 8, 2005, at A18. "Some analysts argue that the [Egyptian] government's strategy was to let the Brotherhood win just enough seats to force critics both here and in Washington to confront the fact that the choice comes down to the governing party or the abyss." *Id.*

twenty-six regional parliaments. Any one member of any of these parliaments may endorse only one candidate.[86]

Regional elections were scheduled for April 2006, but on February 12, 2006 the CA approved the postponement of these elections until April 2008.[87] The President of the CA stated that the purpose was to allow time for the drafting of a new local administration law. Commentators persuasively speculated that the postponement was due to the success of the independent candidates in the PA elections in December 2005 and the regime's fear that if they did as well at the regional level, an independent presidential candidate in 2011 might become a possibility. The Muslim Brotherhood opposed the postponement, and they were the ones who would presumably have done well in the regional elections given their success in the PA elections.[88]

Since the number of supporters needed by independent candidates to gain candidacy far exceeds the number of seats a political party must hold in order to nominate a candidate, it would seem logical for groups of the independent members of the PA and CA to form a party in order to gain more nominating power. However, party registration and the requisite maintenance of registration status is burdensome. The registration and activities of political parties are regulated by the Law on Political Parties, which was amended by Law 177 of 2005.[89] The Political Parties Committee (PPC) is responsible for implementing the legislation. The PPC is composed of nine members: the President of the CA, Minister of Interior, Minister of PA Affairs, three former members of judicial bodies who are not affiliated with a political party, and three individuals also unaffiliated to a political party. These last six individuals are appointed by the President for renewable terms of three years.[90] Since the President also appoints Ministers, and the President of the CA is a member of the NDP, the executive essentially controls the PPC.

The regulations for forming a political party are strict and include, for example, the requirement that the program of the party must represent an addition to the political life of the country according to the party's specified goals and methods.[91] Of the twelve political parties formed since the 1970s, the PPC initially denied registration to eleven of them. The leaders of the proposed parties each filed a complaint in the courts, which uniformly overturned the PPC's decision.[92] There are clear parameters in the law for the perspectives that a party might represent. A party may not be formed on the basis of

86. Text of Amendment, *supra* note 59, at 3.

87. United Nations Development Programme, Programme on Governance in the Arab Region (POGAR), *Elections: Egypt*, *available at* http://www.pogar.org/countries/elections.asp?cid=5 (last visited April 26, 2006).

88. AP, *World Briefing Middle East: Egypt: Parliament Postpones Elections*, N.Y.T., Feb. 15, 2006, Section A.

89. Law 177, *supra* note 81.

90. *Id.* at art. 8.

91. *Id.* at art. 4(3).

92. United Nations Development Programme, *supra* note 87.

religion, whether in its fundamental principles, program, activities, or choice of leaders or members.[93] The Muslim Brotherhood, for example, would not be permitted to register as a political party under these rules, even if it were not otherwise considered an illegal organization by the administration.[94]

In order to apply for party registration, the group must have at least 1,000 signatures from its founding members, and of these, there must be at least fifty signatures from individuals residing in at least ten provinces.[95] The PPC has ninety days to issue its decision, and if it denies party registration it must give its reasons for the rejection.[96] A rejected party may appeal within thirty days to the first level of the Council of State, which is the administrative court.[97]

Once a party is registered, it must abide by the rules established by the PPC, and its registration may be dissolved or suspended for infractions. The President of the PPC, with the approval of PPC members, may request the Council of State to issue a judgment dissolving a party for violating any of the registration criteria, and the Council of State will hold a session to consider the request for dissolution.[98] If required by the exigencies of the national interest and in a situation of need for expedited action, the PPC may itself temporarily suspend a party's activities, one of its leaders, or any decision or action taken by the party instead of requesting that the Council of State take the steps to dissolve the party. The suspended party may appeal the suspension within seven days to the Council of State. If the suspension is not overturned, the party may petition the Council of State to lift the suspension after three months. If the Council of State refuses, the party may attempt again after three months.[99] This suspension option seems to have no time limit. For example, the Labor Party lost recognition in 2000 and has not yet regained it.[100]

As this discussion has shown, the ability for a political party to nominate a presidential candidate, or for an independent to succeed in becoming a candidate, is closely tied to the composition of the PA, CA, regional parliaments, and to the authority of the executive. The representative nature of these bodies, and the possibility for candidates other than from the NDP to be elected to them, is in turn dependent on the fairness of the elections to these bodies. As will be discussed in the following section, election supervision is crucial for fair presidential elections, but non-NDP candidates will not even be able to run for president if the PA, CA, and regional parliaments remain NDP-

93. Law 177, *supra* note 81, at art. 4(4).
94. *See Egypt Country Reports*, *supra* note 49.
95. Law 177, *supra* note 81, at art. 7.
96. *Id.* at art. 8.
97. *Id.*
98. *Id.*
99. *Id.*
100. The PPC suspended the Labor Party and its affiliated newspaper, *al-Sha'b*, after the Labor Party led a campaign against the Minister of Culture for publishing a novel that the Islamist-oriented Labor Party claimed insulted Islam. Khaled Dawoud, *Party in Distress*, AL-AHRAM WEEKLY, July 19-25, 2001, *available* at http://weekly.ahram.org.eg/2001/543/eg5.htm.

dominated. Thus, the fairness of the PA, CA, and regional parliament elections is essential.

Below, I first provide an overview of the election supervision scenario in Egypt for purposes of background. Next I will address the definition of "free and fair" elections. Then I will outline the new presidential election supervision system. Finally, I will conclude with the new general (*i.e.*, other than presidential) election supervision system, promulgated as Law 173 on the Exercise of Political Rights on the same day as Law 174 on the Presidential Elections. While Law 173 deals with all elections other than the presidential elections, the tight relationship between the composition of the PA, CA, and regional parliaments and the presidential election process explains why the government considered these laws interrelated and necessary to promulgate as one legal package.

B. Who Monitors the Elections?

1. The Troubled History of Egyptian Elections

While both the PA and part of the CA are elected, the PA elections are more significant because the body has legislative power. PA elections are held every five years and fairness in these elections had been a serious issue for several decades. Only in recent years have opposition parties and human rights groups been able to bring this issue to public light and seek recourse through public pressure and the courts for fraudulent behavior in elections. The 1990 elections were highly problematic, and a significant court case resulted, which is discussed below. However, the opposition community was not sufficiently organized at that time to mobilize and document the widespread abuses.[101]

In the months prior to the 1995 PA elections, opposition parties sought to prevent a repetition of past election irregularities by calling upon the administration to allow international observers access to polling stations. The regime refused. In response, the opposition parties, human rights organizations, and professional syndicates joined forces to conduct their own monitoring, and they formed the Egyptian National Commission to Monitor the 1995 Legislative Elections (the "1995 Commission").[102]

In the days before the 1995 election, the 1995 Commission received over 1,000 complaints from candidates about harassment from government officials

---

101. For a discussion of the 1990 elections, *see* EBERHARD KIENLE, A GRAND DELUSION: DEMOCRACY AND ECONOMIC REFORM IN EGYPT 59-88 (2000).

102. The history of the formation of the 1995 Commission and their detailed findings are documented in IBN KHALDUN CENTER ET AL., SHAHADAT LIL-TARIKH: TAQRIR AL-LAJNA AL-WATANIYA AL-MISRIYA LI-MUTABI'A AL-INTIKHABAT AL-BARLAMANIYA 1995 [WITNESS TO HISTORY: REPORT OF THE EGYPTIAN NATIONAL COMMISSION TO MONITOR THE 1995 LEGISLATIVE ELECTIONS] (1995) [hereinafter WITNESS TO HISTORY]. Dr. Sa'd El-Din Ibrahim of the Ibn Khaldun Center was the Secretary General of the 1995 Commission.

and irregularities in the voter registration lists. In investigating these reports, the 1995 Commission found that sixty-nine percent of the confirmed complaints dealt with voting lists in which an individual was listed more than once.[103] For one polling station in Helwan, on the outskirts of Cairo, the Commission received a complaint that at least 750 voters were listed more than once, for a total of more than 2,000 duplicate names out of a voting list of 14,000.[104]

The 1995 Commission also documented the Mubarak regime's crackdown on opposition candidates in the months prior to the elections. Between November 15 and December 12, 1995, 1,392 Islamists and opposition party members were detained. Most of the detentions occurred just days before the first round of elections to hamper the ability of opposition candidates to send their supporters to the polling stations to watch for government orchestrated election fraud.[105]

The 1995 Commission recorded a substantial amount of irregularities in the voting process itself. Over 1,000 complaints were filed from candidates and voters on the first day of the election, most coming from the Islamist-oriented Labor Party.[106] One hundred forty-nine complaints alleged that the managers of the polling stations refused to open ballot boxes to confirm that the boxes were empty before voting began.[107] As a result of the 1995 parliamentary elections, the NDP further strengthened its dominance in the PA, controlling ninety-four percent of the seats.[108] Four opposition parties combined won a total of only thirteen seats.[109]

The 1995 elections were considered the most corrupt and violent up to that time, resulting in sixty deaths and over 800 injuries.[110] Following these elections, opposition parties searched for a forum to present their complaints, and turned to the SCC to challenge the constitutionality of then-existing election procedure.[111] Specifically, they focused on Article 88 of the Constitution.[112] Article 88 provides that for PA elections and referenda, voting must take place under the supervision of members of a "judicial body."[113] Opposition activists challenged the 1995 elections on the grounds that members

---

103. *Id.* at 35.

104. *Id.* at 40-41.

105. Moustafa, Law Versus the State, *supra* note 27, at 190 (citing Egyptian Organization for Human Rights, DEMOCRACY JEOPARDIZED: NOBODY PASSED THE ELECTIONS (1996)).

106. WITNESS TO HISTORY, *supra* note 102, at 35.

107. *Id.* at 35.

108. Moustafa, Law Versus the State, *supra* note 27, at 193.

109. *Id.*

110. *Id.*

111. *Id.* at 195.

112. *Id.*

113. Egyptian Constitution, *supra* note 26, art. 88. The article states: "The qualifications for membership in the People's Assembly will be established by a law that will also explain the rules for selection [of the members] and for referenda, provided that the voting process is conducted under the supervision of members of a judicial body." *Id.*

of judicial bodies did not supervise every polling station in the country, which includes main stations and branch stations. State employees were permitted to, and in fact in large numbers did, supervise branch polling stations, where the majority of electoral forgery allegedly occurred.[114] Because a constitutional issue was implicated in these claims, the constitutional matter was transferred to the SCC. A similar claim had been filed by defeated opposition candidate Kamal Khalid from the 1990 elections, and by 1995 this claim was making its way through the court system but had not yet been decided by the SCC.[115]

Leading up to the 2000 elections, the interests of opposition leaders, NGOs, and judicial personnel converged.[116] Opposition party leaders in the PA submitted legislation to amend Law 73 on the Exercise of Political Rights to provide election supervision and administration by a supreme election commission composed of nine high-ranking judges from the Court of Cassation and Court of Appeals, rather than allowing the elections to be operated as usual by the Ministry of Interior. The legislation also called for an updating of existing voter lists, full judicial supervision of all polling stations, and general safeguards to reduce the possibility of fraud in the voting process.[117] Egyptian judges and NGOs announced their support for the amendment. However, since the opposition in the PA proposed this amendment and it did not serve the interests of the NDP members of the PA, it had no chance of adoption.

This combined pressure from judges, NGOs, and opposition parties, however, did cause the Egyptian administration to initiate its own amendment in hopes of quieting the opposition without fully giving in to their demands.[118] The administration claimed that with only 5,661 judges available to monitor elections, these judges simply could not supervise the nation's total of 42,000 polling stations.[119] In response, the PA adopted an amendment to the Law on the Exercise of Political Rights to assign one judge six to eight polling stations to supervise.[120] This was a largely meaningless amendment because one judge could not adequately supervise multiple polling stations on the same election day.

Judges were particularly concerned about this new scheme. By playing a more extensive, yet still inadequate, monitoring role, they feared that they would be used to legitimize an election that they expected to be rife with electoral fraud. The Judges' Club subsequently announced that judges would either be continuously present at all polling stations or they would abstain

114. Moustafa, Law Versus the State, *supra* note 27, at 196.
115. *See* discussion *infra* notes 122-123 and accompanying text.
116. Moustafa, Law Versus the State, *supra* note 27, at 234-35.
117. *Id.* at 235.
118. *Id.* at 236.
119. *Id.*
120. Law 13 (2000), AL-JARIDA AL-RASMIYA [Official Gazette] No. 15 Supp., 5-7 (April 15, 2000) (amending Law 73 (1956)).

completely from monitoring the elections. The administration refused to accept this demand.[121]

The dispute over judicial supervision of the voting process was unexpectedly settled by a significant ruling from the SCC on July 8, 2000, just a few months after the PA's amendment to the Law on the Exercise of Political Rights.[122] As mentioned above, defeated opposition candidate Kamal Khalid filed a constitutional claim in 1990 alleging fraud in the electoral process. The SCC held that the 1990 PA elections violated Article 88 because each polling station was not supervised by a member of a judicial body. The SCC stated that Article 88's requirement of judicial supervision means that the supervision must be actual, not superficial or nominal.[123] This decision clearly affected the ongoing debate over monitoring of the upcoming 2000 PA elections. Opposition parties and NGOs saw a victory in the SCC's ruling.

In response to the SCC's ruling, Mubarak issued a presidential decree ordering that the 2000 PA elections take place in three phases, and in each phase elections would be held in about one-third of the nation's governorates. Some branch voting stations were consolidated to reduce the number of voting stations nationwide.[124] Thus, each voting station on its particular election day could be supervised by a member of a judicial body.

The Judges' Club was concerned that their monitoring involvement was limited to a narrow window of supervisory activity on election day. They also objected to continuing executive involvement in the electoral process, since ultimate oversight of the elections remained with the Ministries of Interior and Justice, both Presidential appointees.[125] Some judges began to focus on another issue, which would figure more prominently in subsequent elections: the meaning of the phrase "judicial body" in Article 88. The phrase is not defined in the Constitution itself but is used in the 1972 Law 46 on Judicial Authority.[126] Based on its use in Law 46, the meaning is very broad and includes not only judges but also lawyers for the state, including public prosecutors and state defense lawyers.[127] Some judges opposed accepting them

---

121. Moustafa, Law Versus the State, *supra* note 27, at 237. The Judges' Club was initially a mainly social club, but throughout the 1990s it began to take positions on matters of judicial politics and it remains very active in judicial and electoral affairs. The leadership of the Judges' Club is elected from among the membership. The official supervisory body of the judiciary is the Supreme Judicial Council, composed of appointees of the executive and headed by the Minister of Justice.

122. Supreme Constitutional Court of Egypt, Case No. 11, Judicial Year 13 (July 8, 2000), AL-JARIDA AL-RASMIYA [Official Gazette] No. 29 Supp., 47-59 (July 22, 2000).

123. *Id.* at 55.

124. Presidential Decree 372 (2000), AL-JARIDA AL-RASMIYA [Official Gazette], No. 37 Supp., 2-3, (September 17, 2000).

125. Moustafa, Law Versus the State, *supra* note 27, at 241-42.

126. Law 46 (1972), AL-JARIDA AL-RASMIYA [Official Gazette], No. 40, 586-609 (Oct. 5, 1972) (most recently amended by Law 159 (2003), AL-JARIDA AL-RASMIYA [Official Gazette] No. 38 Supp., 2-3 (Sept. 25, 2003)).

127. *See id.*

as judicial monitors on the grounds that they owe their loyalty to the state and its ruling party.

Following the three-stage 2000 PA elections, Egyptian NGOs concluded that the election was cleaner inside the polling stations, but they complained that coercion occurred outside the stations in the days and weeks prior to the elections.[128] None of these contentious issues were resolved in the aftermath of the 2000 PA elections. Since members of "judicial bodies" oversaw the balloting in the polling stations, the administration was technically in compliance with the SCC decision of July 8, 2000.

2. *A Standard for Free and Fair Elections?*

While reports of Egypt's legislative elections clearly indicate severe voting irregularities, a standard is necessary to determine what level of irregularities will make an election unacceptable. Egyptian human rights organizations and opposition parties have documented cases of what appears to be outright fraud, as well as more subtle vote tampering, and these may be the best definitions to work with for the Egyptian context.[129] Nevertheless, before turning to the 2005 Egyptian presidential elections, it is important to assess the standard the international community uses to determine free and fair elections.

International election monitoring organizations have recognized that no country has pristine election practices; rather, the question is whether the election is *good enough*.[130] This section briefly reviews current standards used by international monitoring organizations in order to provide some measure with which to evaluate the Egyptian election system. International election observers generally consider as fundamental "independent electoral authorities, separate from the government or political parties, to oversee election administration and the interpretation and implementation of applicable election laws."[131] According to former U.S. President Jimmy Carter, "[t]he consolidation of democracy requires that the institutions that manage the electoral process be independent, competent, and perceived as completely fair by all the candidates participating in the process."[132]

---

128. Moustafa, Law Versus the State, *supra* note 27, at 244.

129. *See* WITNESS TO HISTORY, *supra* note 102, at 41.

130. Jimmy Carter stated that "[i]f we were invited to go into a foreign country to monitor the election and they had similar election standards and procedures [as did Florida], we would refuse to participate at all." Interview by Bob Edwards with former U.S. President Jimmy Carter, *Morning Edition* (National Public Radio broadcast, Jan. 9, 2001).

131. ERIC C. BJORNLUND, BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY 4 (2004).

132. Carter Center's Council of Freely Elected Heads of Government and National Democratic Institute for International Affairs (NDI), *quoted in* 1990 ELECTIONS IN THE DOMINICAN REPUBLIC: REPORT OF AN OBSERVER DELEGATION 20 (Washington, D.C.: Council of Freely Elected Heads of Government and NDI, 1990). In the United States, state and local elections are run by local political officials. BJORNLUND, *supra* note 131, at 4.

Independent electoral monitors are only effective in identifying irregularities and fraud to the extent that they employ a methodology that allows them to witness and document electoral problems. Domestic and international observers typically use different approaches and, as a result, can achieve different goals. While domestic observers are far more familiar with the local terrain, international observers are better funded and attract high-profile news coverage. Yet, by not having a long term attachment to the site of the elections and lengthy experience with the region, international monitors have been criticized for "plac[ing] too much emphasis on election mechanics and election day itself," with the result that the observation can be superficial.[133] In the face of international scrutiny, authoritarian governments will often hold "Potemkin village" elections in an attempt to control the substance while still putting up a front of a true election to please the international community, especially donor nations.[134] In any case, international observers require the permission of the host government to monitor elections, and the Egyptian administration has consistently refused to allow any outside monitoring.[135]

International monitoring organizations recognize the potential power of domestic election monitoring and often the two types of groups cooperate in the monitoring process. Non-partisan domestic election-monitoring organizations emerged in the late 1980s and early 1990s in virtually every region of the world and contributed greatly to a global movement for democracy.[136] This is the main avenue of development for Egypt. NGOs played an active role in the 1995 legislative elections, a lesser role in the 2000 elections, and were able to shadow the 2005 presidential elections.

---

133. BJORNLUND, *supra* note 131, at 13.

134. *Id.* at 14.

135. *See* United Nations Development Programme, *supra* note 87 (stating that only after an Administrative Court ruling did the government allow a small number of representatives of Egyptian NGOs to observe the presidential elections).

136. BJORNLUND, *supra* note 131, at 38-39. Bjornlund provides the important history of domestic election monitoring:

> [It] began in the Philippines in the mid-1980s with the pioneering experience of the National Citizens' Movement for Free Elections (NAMFREL), which has inspired many similar efforts around the world. Since then, in more than sixty countries and in every region of the world, nonpartisan domestic election-monitoring organizations (EMOs) have provided momentum to the struggle for democracy by working to ensure that elections are competitive and meaningful. . . . Domestic coalitions of NGOs, human rights groups, professional associations, social service organizations, university students, and others have worked effectively together to monitor important transitional or otherwise controversial elections in places as diverse as Bangladesh, Kenya, Mexico, Ukraine, and Yemen. EMOs have contributed to more genuine election processes by encouraging fairer campaign practices and a more informed electorate, as well as by reducing the possibility of fraud and irregularities on election day.

Id.

3. *Presidential Election Monitoring*

The history of election fraud in Egypt demonstrates why monitoring the presidential elections in Egypt is an important piece in the larger picture of allowing Egyptians to freely and fairly choose their leaders. Even if the issues regarding criteria for candidacy are resolved to make multi-candidate elections possible on a continuing basis, the presidential elections will remain susceptible to electoral fraud and abuse until adequate monitoring mechanisms are put into place.

The requirement of supervision of presidential elections has an unclear legal status. Article 88 regarding supervision by members of a "judicial body" is in the section of the Constitution on PA elections, and the Constitution did not provide for supervision of presidential referenda under former Article 76. The Judges' Club met on May 13, 2005 and adopted the position that it would refuse to participate in monitoring the presidential elections unless the government gave the judges full independence in their monitoring efforts. The impact of this threat was unclear because there seemed to be no constitutional requirement to have judges of any kind monitor presidential elections. In practice, however, the threat was viable to the extent that the Egyptian administration needed judges' participation and endorsement to show that the elections were free and fair.[137]

President Mubarak clearly wanted to address the issue of monitoring presidential elections through constitutional means rather than provide for it later in implementing legislation. As discussed above, legislation is subject to SCC review and possible invalidation on grounds of unconstitutionality, and since the SCC had intervened to rule on the constitutionality of PA elections, the regime did not want to provide an opportunity for scrutiny of the presidential election process. Law 174 gave some role to judges, although not the complete horizontal and vertical supervision the Judges' Club had wanted. Law 174 reiterates the statement from the constitutional amendment, discussed

---

137. *The Race is On*, *supra* note 19, at 161. Related to the demand for full independence in monitoring the elections, the Judges' Club also has demanded a new law regulating the judiciary in order to reduce the executive's control over the judiciary through the Supreme Judicial Council. Mona Nahhas, *Judicial Stand Off*, AL-AHRAM WEEKLY, Feb. 23-March 1, 2006, *available at* http://weekly.ahram.org.eg/print/2006/783/eg8.htm. This issue continued to develop after the 2005 presidential and legislative elections. The Supreme Judicial Council remove the immunity of four senior judges who had been advocating judicial independence from the executive. *Id.* The Minister of Justice referred two of these four judges—who were also leading critics of fraud in the last presidential and legislative elections—to a judicial disciplinary court, sparking demonstrations in front of the Judges' Club by pro-reform judges and activists. Mona Nahhas, *Judges Refuse to Budge*, AL-AHRAM WEEKLY, May 4-10, 2006, *available at* http://weekly.ahram.org.eg/print/2006/793/eg6.htm. The government sent thousands of anti-riot police to quell the growing demonstrations, and recently the police detained about fifty demonstrators under the emergency law, the continual renewal of which is another complaint of pro-reform activists. Michael Slackman & Mona El-Naggar, *Egyptian Forces Beat Back Demonstration for Judges*, N.Y.TIMES, May 11, 2006, at 11.

above, that the PEC should establish two types of commissions: general supervisory commissions (GSCs) and technical commissions. The GSCs are composed of members of judicial bodies and they supervise the work of technical commissions. The technical commissions conduct the practical electoral work, and there is no requirement that they contain members of judicial bodies.[138]

The jurisdiction of the GSCs extends to "all matters connected to the electoral procedure, and determining the correctness or invalidity of providing any voter with a ballot."[139] After the voting ends and the technical commissions have completed their work, the president of the corresponding GSC gathers the ballots from all of the voting stations and confirms in writing what each candidate received in each polling station, signs off on this document, and sends the report to the PEC.[140] This statement suggests that the GSCs are not required to be present at the voting stations during the voting process but only count the ballots afterwards. Within three days of receiving the reports from the GSCs, the PEC announces the general results.[141]

While Law 174 provides for a new monitoring body, the PEC, the details of the monitoring itself leave room for concern that the monitors best positioned to catch election irregularities, the members of the technical commissions, are not independent, neutral observers. The PEC's authority is not subject to appeal, and half of its members are chosen by the NDP-dominated legislature.

4. *Legislative Election Monitoring*

Law 173 of 2005 on the Exercise of Political Rights went into effect on the same day as Law 174.[142] Law 173 applies to all elections other than the presidential elections and primarily provides for a monitoring mechanism. Law 173, like the constitutional amendment and Law 174, reflects the administration's desire to show attempts at democratic developments while actually continuing tight control of the electoral process.[143] The PA elections, regional parliaments, and CA elections for the elected seats are important events in terms of the ability of those bodies to nominate presidential candidates. Thus, the rules established by Law 173 are closely tied to the presidential election system.

Law 173 creates the Supreme Elections Commission (SEC), composed of eleven members. The SEC's jurisdiction is broad and includes the following:

> 1. Drafting rules for the preparation of voter lists, their contents, and the method of verifying, sorting, and updating it.

---

138. *See* Law 174, *supra* note 77, at art. 34.
139. *Id.* at art. 36.
140. Id. at art. 38.
141. *Id.* at art. 39.
142. Law 173, *supra* note 78.
143. *See id.* at art. 2(bis).

2. Making suggestions for rules for defining the electoral departments.

3. Drafting rules for ordering the use of campaign materials.

4. Participating in efforts of education, creating awareness related to the elections, and drafting instructive rules to operate the electoral process.

5. Ensuring compliance with agreements of supervision related to the elections.

6. Announcing the overall result of an election or referendum.

7. Issuing an opinion regarding plans for specific election laws.[144]

The Minister of Justice serves as President of the commission. Three members are current judges at either the level of Vice President of the Court of Cassation or of the same rank. Six members are individuals not affiliated with a political party, and they serve a term of six years. Four of these six are chosen by the PA, and at least two of them must be retired members of a judicial body. The other two are chosen by the CA, and at least one must be a retired member of a judicial body. The eleventh member is a representative of the Ministry of Interior.[145] As a result, the members of the SEC are even more aligned with the administration and the NDP than are the members of the PEC.

As discussed above, international election observers generally agree that independent electoral authorities should oversee the election process and that they should be separate from the government or political parties. While the SCC decision of July 8, 2000 requires each polling station for PA elections to be supervised by a member of a judicial body, some judges believe that the broad definition of judicial body compromises the integrity of judicial supervision. Further, the ultimate authority for all elections other than the presidential election is the SEC. The membership of the SEC creates substantial doubt that Egypt is meeting these standards.

144. *Id.* at art. 3(c).
145. *Id.* at art. 2 (bis).

IV. CONSTITUTIONAL AUTHORITY AND SUBVERSION

The previous sections of this Article analyze the content of the constitutional amendment and the package of implementing legislation, placing the provisions in their historical and political context. This section begins with a brief discussion of some exemplary aspects of the tensions between the executive and the SCC. This section then returns to the constitutional amendment itself in order to analyze how the amendment shows that the Egyptian administration has harnessed the authority of the SCC to achieve its own political ends.

This process of authority and subversion manifests itself in two ways. First, the amendment includes a level of detail more conducive to legislation than to the constitution. Second, it required the SCC to conduct a pre-promulgation review of the draft law on the presidential elections, and the SCC is not otherwise empowered to conduct pre-promulgation review. These two manifestations reflect the ongoing struggle for power between the executive-legislature and the SCC (and the judiciary more generally), with the Egyptian Constitution as the battleground.

A. *Ongoing Executive-SCC Struggle for Constitutional Power*

Mubarak and the SCC have been locked in a cold war, details of which were discussed above in the section on PA election monitoring and the legitimacy of PA election results. Examples of this struggle also include the most recent SCC President appointment and a subsequent request for statutory interpretation.

SCC President Fathi Naguib died suddenly in office in August 2003, and President Mubarak used his power of discretion to appoint the President of the Cairo Court of Appeals, Mamduh Mohieddin Mar'i as the new SCC President.[146] SCC Presidents were traditionally promoted from within the SCC, although there is no legal requirement to do so. Appointing a new president from outside the SCC was seen as a move by the regime to install a pliant head of court who would serve the regime's interests.

Soon after Mar'i's appointment, the fears that he would be more willing to take a pro-regime position than his predecessors materialized. In March 2004, the SCC had an opportunity to issue a statutory interpretation on an issue related to election monitoring and of great importance to the Mubarak regime: the definition of the cadre of judges who constitute "judicial bodies" for purposes of election monitoring. Since this had been a major issue in the previous legislative elections, the administration wanted to resolve the matter before the 2005 presidential and legislative elections. Following the statutory interpretation procedure, the Prime Minister instructed the Minister of Justice to

146. *Changing the Gavel*, AL-AHRAM WEEKLY, Aug. 28-Sept. 3, 2003, *available* at http://weekly.ahram.org.eg/2003/653/eg1/htm.

request an interpretation of the Law on the Exercise of Political Rights and, specifically, the meaning of "judicial body" in that Law.[147] The SCC took a very broad interpretation, such that any "judicial body" referred to in any legislation counts as a judicial body for purposes of election monitoring.[148] This interpretation was a loss for the Judges' Club, which has been trying to exclude from election monitoring lawyers from the state who technically carry the appellation of "judge."[149]

B. Legislating in the Constitution

An amendment to Article 76 of the constitution was necessary to change the system from a single-candidate referendum to a multi-candidate election. However, the level of detail in the amendment not only far exceeds the original language of Article 76 but also is highly inconsistent with the terse style of the Egyptian Constitution.

The concept of entrenching in a constitution rules that would otherwise seem more legislative in nature is not an Egyptian innovation. Using the United States as an example, Ruhl has noted that "as modern society has focused debate increasingly on competing visions of social form, advocates have turned increasingly to constitutional amendment proposals as a means of dictating their respective visions."[150] In addition to the environmental-related amendments that form the basis for his article, Ruhl inventories the following U.S. constitutional amendment proposals: the religious equality amendment, the school prayer amendment, the crime victims' rights amendment, the flag burning amendment, the human life amendment banning abortion, and the equal rights amendment.[151] He calls these types of efforts "social policy" amendments in contrast to the "operating system" language of the Constitution, and he develops criteria by which to determine whether social policy amendments are conducive to constitutional inclusion.[152] In general, he argues for limiting constitutional amendments to structural matters and keeping the details of social policy out of the Constitution.[153]

There is a fundamental assumption made in such discussions regarding attempts to amend the U.S. Constitution: entrenchment in the constitution means that a particular policy or agenda is enshrined as the highest form of law,

147. The interpretation procedure is provided for by the Egyptian Constitution, *supra* note 26, at art. 175 and Law 48 (1979), *supra* note 29, at art. 33.

148. Supreme Constitutional Court of Egypt, Request No. 2 for Interpretation (March 7, 2004), AL-JARIDA AL-RASMIYA [Official Gazette], No. 10 Supp., 16-24 (March 9, 2004).

149. *See supra* note 137 and accompanying text.

150. J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 246 (1999).

151. *Id.* at n.5.

152. *Id.* at 246.

153. *Id.* at 270.

and the Supreme Court will protect that provision as it would any other constitutional provision. The same assumption should be true in the Egyptian context, in which case it has important implications for the significance of the Egyptian Constitution. The Egyptian regime recognizes that the constitution is a meaningful document and that the SCC has the power to, and indeed will, uphold the constitution. The regime is circumscribed by the constitution, and thus has found a way to harness the constitution and the SCC's strength to its advantage, rather than launch an outright battle. One way to view this amendment is that the Egyptian regime is taking its seriously.[154]

From the perspective of Egyptian constitutionalism, this could be viewed as a positive step. Indeed, the amendment was a tactical move by the administration necessitated by the state of constitutionalism in Egypt today. In the face of a strong and fairly independent SCC, Mubarak had to structure the election reforms carefully to avoid the possibility that the elections would subsequently be challenged on grounds of unconstitutionality, a process that has occurred with a PA election. Mubarak's first line of defense was to carefully include in the constitutional amendment the essential details of the new election system to protect the amendment itself from subsequent SCC review.

The disadvantages or dangers of constitutional entrenchment mirror the advantages. The SCC is now required to uphold the new election system as a constitutional matter, and the system is structured to make it very difficult for non-NDP presidential hopefuls to gain candidacy. The monitoring system seems to leave ample room for abuse. A second amendment revising or rescinding the presidential election scheme would require the same process and is not viable as long as the NDP controls the legislature.

C. *Tampering with Judicial Review*

The amendment included the statement that a draft of the forthcoming

---

154. Okoth-Ogendo discusses a similar phenomenon in other African constitutions, but without an equivalent of the Egyptian SCC, it is more difficult to claim that the regimes recognized the power of the court and had to take it seriously; rather, they used the court systems because they were a politically expedient way of achieving their agendas. He argues that state elites found that:

> the constitutional arena, if properly controlled by [them] offered a more efficient and effective environment for the resolution of *political* conflicts than even the party and, certainly, the electorate at large. Indeed by translating a political opinion or decision into a *constitutional* device or norm, state elites gained the added advantage of passing on the problem of enforcement or supervision ultimately to the judicial arm of the government. *A run to amend the constitution* [to deal with a political crisis] . . . became increasingly attractive as a method of reestablishing equilibrium within the body politic.

Okoth-Ogendo, *supra* note 12, at 73 (emphasis in the original). He describes a subversion of the constitutional order without the concomitant recognition of constitutional authority because the state's elites are not bound by the constitution rather simply use it to their advantage. *Id.*

law on the presidential elections, which was later issued as Law 174 of 2005 on the Presidential Elections and discussed above, must be given to the SCC for pre-promulgation constitutional review. This procedure is not provided for in the constitution or in Law 48, which governs the SCC, and is a highly problematic development for constitutionalism in Egypt.

Specifically, the final clauses of the amendment to Article 76 state:

> The President of the Republic of Egypt will present a draft of the Law on the Presidential Elections to the SCC—after the PA adopts it but before the PA promulgates it—for a determination of its compatibility with the constitution. The SCC will issue its decision in this matter within 15 days from the date the draft was presented to it. If the SCC decides that a provision or provisions of the draft law are unconstitutional, the President of Egypt shall return the draft to the PA to revise it according to this decision. In all cases, the decision of the SCC is obligatory for all people and for all authorities of the state. The SCC decision shall be published in the official gazette within three days of its issuance.[155]

Pursuant to this provision, the SCC made five objections to the legislation, which improved the law from the perspective of access of candidates to campaigning, but did not affect the basic structure of the election scheme.[156] The PA altered the draft of the law to comply with the SCC's comments, promulgated it, and thus Law 174 went into effect on July 2, 2005.

The requirement of pre-promulgation review by the SCC has been a desire of the administration, although as a political matter it has not been able to amend the constitution to provide for this procedure. As early as 1996, Speaker of the PA Fathi Sorour argued that the SCC's interpretation of the constitution was "deviant" and inconsistent with the public good. As a solution, he proposed an amendment to Law 48 to allow the SCC the power of judicial review only of legislation in draft form and only upon the request of the PA. If the SCC reviewed draft legislation and approved it, or required changes and the PA in fact made those changes, then under this proposal the SCC would never again have jurisdiction over the legislation.[157]

Judge Awad el-Morr, President of the SCC at the time of this proposal, fervently rejected the amendment on the grounds that prior review would

---

155. Text of Amendment, *supra* note 59, at 5.

156. Supreme Constitutional Court of Egypt, Decision on the Draft of the Presidential Election Law (June 26, 2006), AL-JARIDA AL-RASMIYA [Official Gazette], No. 25 Supp., 2-9 (June 26, 2005). The SCC objections and comments were minor and included, for example, an objection to the rule that forbade paid campaign advertising on radio or television during the campaign period because it conflicted with the right of the candidate to express his opinion, to spend his campaign funds, and to communicate his campaign platform. *Id.* at 7.

157. Moustafa, Law Versus the State, *supra* note 27, at 209.

undermine the SCC's integrity and efficacy.[158] He stated that most courts cannot apprehend the implications of new legislation until it is implemented.[159] Worse, he claimed, the executive and legislature would use the procedure in a way that would force the SCC to deem legislation constitutional without adequate examination.[160] At a speech at Cairo University in 2000, he explained how such a system might work:

> Do you think that Dr. Fathy Sorour will one day refer to the court a bill and ask it to determine whether it is right or wrong? Do you imagine that the Prime Minister who sends a bill to pass through the People's Assembly will ask for our opinion of it? Do you think we have an opposition [in the PA] with 60 persons who have an interest in asking whether the law is right or wrong? But let us suppose that we had that number in the opposition and they asked us to review a bill. We will even suppose that the Prime Minister has his country's interest at heart and asks us whether the bill is right or wrong. Do you know what the Egyptian Prime Minister would do? He would send you 20 bills on the same day, saying that the cabinet approved these laws, which might be of different years, and ask our opinion in the constitutionality of them all. Every bill would be [] 200 articles long or so, and the Constitutional Court would be required to decide in 30 days on four, five, or six thousand articles . . . . They will dump all bills on us to get the seal of approval of the Constitutional Court, and the result would be that the constitutionality of these bills could not be challenged later on . . . . If you want to destroy the Constitutional Court, let's shift to prior review.[161]

The Speaker of the PA did not propose such an amendment at that time because the administration was not willing to confront the authority and strength of the SCC.

Still, the administration aimed for a similar result years later by including in the presidential election amendment pre-promulgation review of the subsequent implementing legislation. Speaker of the PA Fathi Sorour commented that when the SCC issued its decision regarding the Law on the Presidential Elections,

158. Awad el-Morr, Lecture, Cairo University (Sept. 25, 2000) (transcribed by Tamir Moustafa) *cited in* Moustafa, Law Versus the State, *supra* note 27, at 210-11.

159. *Id.* at 210.

160. *Id.*

161. *Id.*

> [the] PA was correct when it proposed to include in Article 76 the provision of sending the draft law to the SCC before voting on a final version of it, in order that the position of the Presidency is not affected, [since] consequently a decision of the unconstitutionality of the Law will not take place *after* its promulgation by the PA.[162]

Sorour suggests that his interpretation of the text of the amendment is that any decision of the unconstitutionality of the Law could be made only before its promulgation and not after.

As predicted by former SCC President Awad el-Morr, the SCC was given a short amount of time, just fifteen days, to consider in the abstract the constitutionality of the Law on the Presidential Elections. The Law on the Presidential Elections contains fourteen pages and fifty-eight articles, and the allotted time for review placed a significant strain on the SCC.[163] The amendment did not state that the Law on the Presidential Elections would be immune from later review by the SCC, but by this pre-promulgation review the administration sought to obtain as much assurance as it could that the new presidential election system is constitutional.[164]

The SCC received the opportunity to address many of these key constitutional questions very soon after the September 2005 Presidential elections.[165] A complaint submitted to the SCC challenged the constitutionality of the amended Article 76 of the Constitution and challenged certain provisions of Law 174 on the Presidential Elections. In a decision issued on January 15, 2006, the SCC ruled on both of these claims.

With regard to the challenge to the constitutionality of the amended Article 76 of the Constitution, the SCC determined that it did not have jurisdiction over the claim. The Court stated that its jurisdiction as provided for in Article 175 of the Constitution is to conduct "judicial review of the constitutionality of laws and regulations and to undertake the interpretation of legal texts."[166] The SCC cited this provision of jurisdiction and concluded that its mandate does not include the review of the constitutionality of provisions of the constitution, and therefore the claim is outside the Court's jurisdiction.[167]

As for the request to review the constitutionality of Law 174 on the Presidential Elections, the Court made a significant decision that Awad al-Morr

---

162. *Majlis al-sha'b yuwafiqu 'ala ta'dilat al-mahkima al-dusturiya li-qanun intikhabat ra'is al-jumhuriya* [*The People's Assembly Agrees on the Emendations of the Supreme Constitutional Court for the President Elections Law*], AL-AHRAM, June 30, 2005, at 1 (emphasis added).

163. Personal observation by author during this fifteen-day period.

164. Text of Amendment, *supra* note 59, at 5.

165. Supreme Constitutional Court of Egypt (Jan. 15, 2006), AL-JARIDA AL-RASMIYA [Official Gazette], No. 2 Supp., 9-15 (Jan. 18, 2006).

166. Egyptian Constitution, *supra* note 26, art. 175.

167. Supreme Constitutional Court of Egypt (Jan. 15, 2006), *supra* note 165, at 12.

foreshadowed in his 2000 public speech in which he objected to the idea of imposing prior review on the SCC's jurisdiction.[168] The SCC stated that Article 76 as amended provided the SCC with the jurisdiction to review the draft law on the presidential elections for its compatibility with the constitution. The SCC then explained that the President gave the SCC the draft as prepared by the PA, the SCC reviewed it, and then issued a decision that stated which provisions were unconstitutional and what those constitutional defects were. The President transmitted this decision to the PA, which revised the draft in accordance with the SCC's comments and promulgated it as Law 174 on the Presidential Elections.

Analyzing the significance of this procedure, the SCC explained that since the PA corrected all of the constitutional ailments that the SCC noted in its June 26, 2005, decision, the SCC has exercised its power of review of the constitutionality of the legislation. The SCC did not address the question of whether it had the power to review the text of Law 174 irrespective of the fact that it reviewed a draft law that was later adopted as Law 174. The SCC avoided this point by simply and formalistically stating that it had already exercised its right of review over this text.[169]

CONCLUSION: COMPARATIVE LAW LESSONS

This study aimed to demonstrate that there are vast areas of constitutional law that largely have been ignored by U.S. legal scholars, and Egypt's presidential election amendment is one very important example of this neglect. Given its major significance in the power struggles taking place within and among the executive, parliament, and judiciary in Egypt, the lack of attention to the amendment by the U.S. media, policy organizations, and scholars is troubling. The explanation, I believe, is that the amendment and implementing legislation were seen as largely meaningless changes in a legal system that lacks constitutionalism and thus is not worth scholarly energy.

Confining serious scholarly undertakings to legal systems that fit some definition of "mature," "developed," or "functioning" is a regretful yet continuing phenomenon. The comparative law discipline has broadened significantly since the early 1980s, when the title *Law in Radically Different Cultures* was used for a West Publishing comparative law textbook that discussed Egyptian law.[170] For comparative constitutionalism to fully develop, work must be done in new constitutional territory despite, or perhaps because of, the many new challenges it presents. Comparative law scholars need to take lessons from historians, anthropologists, sociologists, political scientists, and linguists in order to make comparative law a truly global enterprise.

---

168. See *supra* note 162 and accompanying text.

169. Supreme Constitutional Court of Egypt (Jan. 15, 2006), *supra* note 165, at 15.

170. JOHN H. BARTON ET. AL., LAW IN RADICALLY DIFFERENT CULTURES (1983).

In order to approach new constitutional territory, this article suggests that scholars should identify a point of entry into the constitutional framework and structure that will allow an exposition of the most significant tensions and trends. For Egypt, the presidential election constitutional amendment is an ideal opportunity for an analysis of the battle between the SCC and the executive and legislature. Focus on this issue has shown the details of the power and frailty of the SCC and the possible paths that the SCC will take, or be taken, in the future. With this understanding of competing constitutional authority and subversion, scholars and practitioners will be better able to follow constitutional developments in Egypt and appreciate their significance.

UNDUE DEFERENCE TO EXPERTS SYNDROME?

Elaine E. Sutherland[1]

INTRODUCTION

Expert witnesses are a recognized part of the legal landscape and, indeed, providing expert evidence to courts has become something of a growth industry.[2] Expert witnesses often make valuable contributions. Engineers give evidence of the unique nature of particular designs in patent cases. Accountants explain how the books might be kept in a business context. Forensic scientists speak to the methodology and probability of matching physical evidence, such as blood or hair samples found at a crime scene, to the accused. Expert witnesses play no less of a role in family-related cases. Psychiatrists explain what might drive one adult partner to kill the other when the killer has been the victim of domestic abuse at the hands of the deceased. Psychologists offer expertise in terms of what is likely to have positive or negative effects on a particular child in the context of custody disputes. Actuaries help the court to understand the value of various assets, like pensions, and how these valuations may be arrived at, in property disputes. Expert witnesses feature particularly prominently when "syndromes"[3] come before the

---

1. LL.B., LL.M., Professor of Child and Family Law, School of Law, University of Stirling, Scotland, and Professor of Law, Lewis and Clark Law School, Portland, Oregon. I am indebted to Professor Emeritus J. Kenyon Mason, himself an expert witness of considerable standing, who gave so generously of his time to comment on an earlier draft of this article. In addition, my thanks go to Professor Fraser Davidson (in Scotland) and Associate Professor Joseph S. Miller (in the United States) for their generosity in sharing their expertise on the law of evidence. Seneca J. Gray of the Boley Law Library at Lewis and Clark Law School deserves special mention for his enthusiastic, meticulous and imaginative assistance with research. The usual disclaimer applies and all opinions and any errors are my responsibility alone.

2. "In the past two decades, the use of expert witnesses has skyrocketed. . . . Some commentators claim that the American judicial hearing is becoming trial by expert." JOHN W. STRONG, MCCORMICK ON EVIDENCE §13 (5th ed. 1999) (references omitted). "A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects, and others, and new professions have developed such as accident reconstructionists and care experts. This goes against all principles of proportionality and access to justice." The Right Honourable the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, ch. 13, ¶ 1 (1996), *available at* http://www.dca.gov.uk/civil/final/contents.htm. It is worth remembering that expert witnesses often play an important part in negotiations that take place prior to a case reaching court and may contribute to a settlement being reached in civil cases.

3. *Stedman's Medical Dictionary* defines the term as, "The aggregate of signs and symptoms associated with any morbid process, and constituting together the picture of the disease." STEDMAN'S MEDICAL DICTIONARY 1721 (26th ed. 1995). Curiously, *Black's Law Dictionary* does not define the word "syndrome" itself. BLACK'S LAW DICTIONARY (8th ed. 2004). However, it does define a number of specific syndromes, variously equating the word with "condition" (Munchausen Syndrome By Proxy), *id.* at 1042, "situation" (parental

courts and, undoubtedly, there is no shortage of either syndromes or expert witnesses prepared to testify about them.[4] Thus, we have had battered child syndrome,[5] shaken baby syndrome,[6] battered woman syndrome,[7] parental

---

alienation syndrome), *id.* at 1146, or "disorder" (repressed memory syndrome), *id.* at 1329. *Merriam-Webster's Collegiate Dictionary* defines "syndrome" as "a group of signs or symptoms that occur together and characterize a particular abnormality." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1196 (10th ed. 1995).

4. *See Scoping Study On Delay In Children Act Cases: Findings and Action Taken* ¶ 64 (2002), *available at* http://www.dca.gov.uk/family/scopestud.htm. This study was instructed by the Lord Chancellor in England and Wales, finding that delays in the handling of cases involving children were attributable, in part, to a shortage of available expert witnesses. *Id.* However, when one looks more closely at the findings, it appears that the shortage is not of expert witnesses *per se*, but is due to a desire for particular witnesses, court practice and overall poor case management. *Id.* at ¶ 65.

5. The term "battered child syndrome" first came to prominence at the multidisciplinary conference, organized by Dr. C. Henry Kempe on "The Battered-Child Syndrome" in 1961, and the seminal article he and others wrote the following year. C. H. Kempe et. al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962). He and Ray Helfer co-edited the first edition of *The Battered Child* in 1968. For a discussion of these early developments, see THE BATTERED CHILD 24-25 (Mary Edna Helfer et al. eds., 5th ed., 1997). Originally, the term was used to describe "altered parent and child behavior, malnutrition, and multiple types and ages of inflicted injury." Kenneth Wayne Feldman, *Evaluation of Physical Injury*, *in* THE BATTERED CHILD, *supra*, at 179.

6. "Shaken baby syndrome (SBS) is the result of a *violent shaking force* that causes a whiplash acceleration-deceleration motion of the relatively unstable infant's head upon its neck. . . . Rapid deceleration occurs when the victim's chin strikes the chest and subsequently when the occiput strikes the interscapular region of the back at the base of the neck. . . . SBS usually produces a diagnostic triad of injuries that includes diffuse brain swelling, subdural hemorrhage, and retinal hemorrhages." Robert R. Kirschner, *The Pathology of Child Abuse*, *in* THE BATTERED CHILD, *supra* note 5, at 271-72 (emphasis in the original text). SBS came to international attention when an English nanny, Louise Woodward, was convicted in the United States of killing Matthew Eappen, a baby in her care. Commonwealth v. Woodward, 7 Mass.L.Rptr. 449 (Mass. Super. 1997); Commonwealth v. Woodward, 694 N.E.2d 1277 (Mass. 1998). Controversy has recently surrounded the diagnosis of SBS in respect of reliance on retinal hemorrhages and retinal folds as indicators of SBS and research suggesting that injuries mimicking SBS can be caused by a low-level fall. *See* J.F. Geddes & J. Plunckett, *The Evidence Base for Shaken Baby Syndrome*, 328 BRIT. MED. J. 719 (2004); P.E. Lantz et al., *Perimacular Retinal Folds from Childhood Head Trauma*, 328 BRIT. MED. J. 754 (2004); Michaelt T. Prange et al., *Anthropomorphic Simulations of Falls, Shakes, and Inflicted Impacts in Infants*, 99 J. OF NEUROSURGERY 143 (2003). *See also* Glenda Cooper, *Doubts Grow on Shaken Baby Syndrome*, THE SUNDAY TIMES, Dec. 26, 2004, *available at* http://www.timesonline.co.uk/printFriendly/0,,1-210-1415464-210,00.html; Sandra Laville, *Doubt Cast on Scores of Child Death Cases*, THE GUARDIAN, June 13, 2005; Lee Scheier, *Shaken Baby Syndrome: A Search for Truth*, CHICAGO TRIBUNE MAGAZINE, June 12, 2005, at 10. Recently, in R v. Harris, [2006] 1 Cr. App. R. 5, 55 (A.C.), the Court of Appeal in England heard a number of appeals against convictions of murder or manslaughter arising from the deaths of children. The Court took the opportunity to explore the evidence surrounding shaken baby syndrome. *Id.* at 68-77. One of the accused had her conviction overturned, one had his reduced from murder to manslaughter, and a third was unsuccessful in his appeal. *Id.* at 117. A fourth appellant was successful in having his conviction for causing grievous bodily harm overturned. *Id.* In February 2006, the Attorney General (for England and Wales) told the House of Lords that, having examined 88 recent "shaken baby" convictions, he believed that only three of them were questionable and should be reconsidered by the court: Amanda Brown, *'Shaken*

alienation syndrome,[8] repressed memory syndrome,[9] and child sex abuse

---

baby' cases set to be reviewed by the courts, THE SCOTSMAN, February 15, 2006, *available at* http://news.scotsman.com/uk.cfm?id=234922006.

7. The "battered woman syndrome" was articulated by psychologist Lenore E. Walker in the first edition of her book THE BATTERED WOMAN'S SYNDROME (1984). *See also* LENORE E. WALKER, THE BATTERED WOMAN (1979). She identified a "cycle of violence", often found in abusive relationships, involving a tension-building stage, an acute battering incident, and a honeymoon stage, characterized by contrition and relative tranquility, before the cycle began again. *Id.* at 126. In addition, she explored the notion that many women responded to their plight with a form of "learned helplessness" to explain why women stayed in abusive relationships. *Id.* This, in turn, might produce a "flight or fight" response on the part of the victim, which has been used to explain why some female victims of abuse went on to kill their abusers. *Id.* at 51. Walker's approach has been criticized by both feminists and those who fear that it provides a "special excuse for women." Anne M. Coughlin, *Excusing Women,* 82 Cal. L. Rev. 1, 27-28 (1994). Feminist criticism has focused on concern that Walker's early work tended to "pathologize" female victims, negating the reasonableness of their fears and perpetuating stereotypical notions of women as helpless. Some argue that, far from responding with passivity, many victims do seek to escape the abuse and that it is inadequate responses from the legal system, in particular, and society, in general, that render such attempts unsuccessful. In addition, it has been argued that Walker's approach presents a "one size fits all" picture of abuse that does not describe all such relationships accurately. The literature is extensive; *see, e.g.*, Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalizion of Negative Stereotypes about Women*, 8 U.C.L.A. WOMEN'S L.J. 99 (1997); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Women Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996). It is worth noting that our understanding of the psychology of abuse has come a long way since the 1970s and 1980s. In particular, we now understand a great deal more about post-traumatic stress disorder (PTSD). Walker and others now tend to adopt the language of PTSD in describing the situation of many abuse victims who respond violently to their abusers. *See generally* LENORE E. WALKER, THE BATTERED WOMAN (2d ed. 2000). Despite this movement from a "syndrome" to a "disorder" the issue remains of pathologizing what some argue is a reasonable response to an unreasonable situation. By 1996, expert evidence on battering and its effects had been admitted as evidence for the defense in every U.S. state. Janet Parish, *Trend Analysis: Expert Testimony on Battering and Its Effects* 3 (U.S. Dep't of Justice, 1996). In Scotland, the courts wrestled with the issue and now evidence of a history of abuse may be used to establish diminished responsibility, reducing a charge of murder to one of culpable homicide (manslaughter). H. M. Advocate v. Galbraith (No. 2), 2001 S.L.T. 953 (H.C.J.). In England and Wales, see Crown Prosecution Service, *The Use of Expert Evidence in the Prosecution of Domestic Violence* (2004).

8. Child psychiatrist Richard Gardner coined the term "parental alienation syndrome" (PAS) in 1985, in the context of alleged child sexual abuse, but he developed it into a much more broad-ranging theory over the last twenty years in his extensive publications on the subject. *See, e.g.*, RICHARD GARDINER, THE PARENTAL ALIENATION SYNDROME (2d ed. 1998). While his claims in respect of its incidence have changed over the years, his central theme relates to the denigration of one parent by the other, leading the child to develop a campaign of irrational hostility towards the denigrated parent. *Id.* at 64. As a result, the child will refuse to have contact with the denigrated parent and will be critical of him or her. *Id.* Gardner advocates that the appropriate response is for the courts to transfer custody of the child to the denigrated parent, terminate contact with the denigrating parent, and de-program the child. *Id.* at 219-60. PAS has attracted considerable criticism in the academic literature. *See, e.g.*, Carole S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001); PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE (Sage, 2003); Janet R. Johnston & Joan B. Kelly, *Rejoinder to Gardiner's*

accommodation syndrome,[10] to name but a few. That a number of the syndromes are themselves controversial makes the role of the expert witness all the more important, both in terms of establishing the existence or otherwise of the syndrome, and in assessing whether it is present in a given case.

Over the years, courts and other agencies around the world have faced problems with the evidence of expert witnesses in family-related cases. This article has its genesis in the coincidental occurrence of two recent examples in the United Kingdom and asks whether there is another syndrome, "Undue Deference to Experts Syndrome", at work in the legal system. In the first example, the evidence of Sir Roy Meadow (and his followers), an English

---

"Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome", 42 FAM. CT. REV. 622 (2004). However, Gardiner has his supporters; *see* Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273 (2003). Courts in the United States have both accepted and rejected PAS. *See* Sally Melnick, *An Aura of Reliability: An Argument in Favor of* Daubert, 1 FLA. COASTAL L.J. 489, 506, 508 (2000). PAS is not recognized by the American Psychiatric Association in its highly-influential *Diagnostic and Statistical Manual of Mental Disorders.* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. Support in Canada for PAS can be found in C (AJ) v. C (R), [2003] B.C.S.C. 664 and In Marriage of Johnson, [1997] 139 F.L.R. 384, 389 (Fam.). PAS has been accepted as a phenomenon by the courts in England, although some judges prefer the term "implacable hostility". *See* V v. V, [2004] 2 F.L.R. 851 (Fam.); Re M, [2003] 2 F.L.R. 636 (Fam.); and Re C (Children) [2002] 1 F.L.R. 1136 (A.C.). Courts in the United Kingdom remain aware of the need to listen to the genuine views of children who do not wish to have contact with a parent. Re S (Contact: Children's Views) [2002] 1 F.L.R. 1156 (Fam.).

9. Repressed memory syndrome (RMS) is known by critics as "false memory syndrome" which, it might be argued, rather prejudges the issue. Under the heading of "Dissociate amnesia", it is described by the American Psychiatric Association in the DSM-IV, as:

> [A]n inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness.... This disorder involves a reversible memory impairment in which memories of personal experience cannot be retrieved in a verbal form (or, if temporarily retrieved, cannot be wholly retained in consciousness).

DSM-IV, *supra* note 8, at 478. It appears that repressed memories can be recovered spontaneously, although greater controversy surrounds recovery through hypnosis and regression therapy. The psychiatric community is somewhat mixed in its acceptance of RMS. Harrison G. Pope, *Attitudes Towards DSM-IV Dissociative Disorders Diagnoses Among Board-Certified American Psychiatrists*, 156 AM. J. OF PSYCHIATRY 321 (1999). Some authors argue that RMS is particularly applicable in cases of past sexual abuse. Laura Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939 (2000). Opponents of RMS point to the possibility of memory implantation or what is recognized in DSM-IV as "pseudomemory construction" of sexual abuse. David Lynch, *Post-Daubert Admissibility of Repressed Memories*, 20 CHAMPION 14, 17 (1996).

10. Dr. Roland Summit first described child sexual abuse accommodation syndrome (CSAAS) in 1983, "to provide a vehicle for more sensitive . . . response to . . . child sexual abuse and . . . [provide] advocacy for the child within the family and within [the criminal justice system]." Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 179 (1983). CSAAS describes the common reaction of children in delaying reporting of sexual abuse and retracting allegations later. *Id.* It is characterized by fearful, tentative and confused behavior on the part of the child. *Id.* Clearly, evidence of the syndrome is important in residence/custody, contact/visitations, and child protection cases, as well as prosecutions.

expert on Munchausen syndrome by proxy (MSBP) resulted in a number of women being convicted of killing their children and imprisoned. Eventually, the validity of the expert's theory was challenged successfully in court, a number of the convictions were quashed, and the women were freed.[11] The same expert's theories had led to the removal of countless children from their families, again on the basis of evidence that the child's parent (usually the mother) suffered from MSPB and had abused the child as a result. Some of these children have been adopted into new families and the fallout from this issue is still being addressed. In the second example, Dr. Colin Paterson, a Scottish doctor, "identified" a condition known as temporary brittle bone disease (TBBD). According to his theory, TBBD provided an alternative explanation of certain injuries to children which displaced the suspicion that the injuries were non-accidental. He appeared as an expert witness for accused parents in criminal cases and in child protection litigation. While both his research and his findings were subsequently discredited, it is not entirely clear how many children may have been returned to their care-givers as a result of his evidence.

The coincidental occurrence of these two examples is instructive for a number of reasons. First, it reflects the eternal dilemma of child protection: what can be described as the "damned if you do, and damned if you don't" phenomenon. Overzealous intervention, designed to protect children from (alleged further) abuse, but without adequate foundation, risks unjustified removal of a child from his or her family, resulting in distress to family members, stigmatization of the parents, and the violation of the rights of both the child and the parents.[12] On the other hand, failure to act timeously, when faced with allegations of abuse, risks exposing the child to further harm and possible death.[13] In the MSBP example, the result of the expert's participation

---

11. R v. Clark, [2003] 2 F.C.R. 447 (A.C.); R v. Cannings, [2004] 1 All E.R. 725 (A.C.). A third woman, Donna Anthony, had her conviction for killing her two children quashed in April 2005, having spent seven years in prison. Joanna Bale, *Mother Set Free as Murder Convictions are Quashed*, THE TIMES, Apr. 12, 2005. In the case of yet another woman, Trupti Patel, the same expert's evidence was allowed. She was acquitted at trial at Reading Crown Court on June 11, 2003. Trupti Patel's case is not reported but references to it can be found in R v. Cannings, [2004] 1 All E.R. 725 (A.C.), paras. 15, 165 and 171. The results of an official review of cases involving parents convicted of killing their children in England and Wales has suggested that very few of the cases warrant reopening and has attracted much criticism. See discussion at footnotes 55 and 56 and accompanying text.

12. One of the most notorious examples of over-zealous intervention occurred in Cleveland, England, in 1987, resulting in an enquiry and reform of the law and procedures. *See* REPORT OF THE INQUIRY INTO CHILD ABUSE IN CLEVELAND 1987 (H.M.S.O., 1988, Cm 412). In Scotland, the removal of nine children from their families and the ultimate return of the children without anything having been proved again resulted in an enquiry, reform of the law and procedural changes. *See* REPORT OF THE INQUIRY INTO THE REMOVAL OF CHILDREN FROM ORKNEY IN FEBRUARY 1991 (H.M.S.O., 1992).

13. Sadly, there is no shortage of examples of a failure to intervene appropriately and the tragic consequences that can follow. The National Coalition for Child Protection Reform (NCCPR) has focused on the inadequacy of aspects of child protection law and procedures. *See*

was over-inclusive prosecution and the, sometimes permanent, removal of children from their families. In the TBBD example, there was the danger of an under-inclusive response, resulting in children being returned to their abusers and being left unprotected. Second, both examples involved the courts in addressing the admissibility of, and value to be attached to, expert evidence. Third, in each case, the experts whose evidence was to be considered were respected members of the medical profession. Finally, each involved the ultimate discrediting of the expert's evidence because of the danger posed by the way he conducted his research and presented his evidence.

Further reflection and research established that problems with these syndromes or diseases are not unique to the legal systems in the United Kingdom, and cases concerning both issues can be found in many other jurisdictions. Nor were they the only examples of expert testimony being called into question in family-related cases and sometimes discredited.[14] This article will examine how the problematic examples of expert evidence about MSPB and TBBD played out in the United Kingdom and the harm that cases of this

---

NCCPR, *at* http://www.nccpr.org (n.d.) (last visited Mar. 17, 2006). Many states have responded by putting special procedures in place to investigate cases giving rise to concern. In Oregon, for example, such was the concern over failures in the child protection system that the Governor established a Critical Incident Response Team (CIRT), in 2004, to review cases of children who were abused or died while in state care in order to improve policy, training and practice. Oregon Dep't of Human Services, *at* http://egov.oregon.gov/DHS/news/2004 news/2004-1213a.shtml (n.d.) (last visited Mar. 17, 2006). Within months, CIRT had reviewed two cases. *Id.* One involved a five year-old girl who was in foster care and whose family members had expressed concern to about her care. Steve Mayes, *Human Services Needs Broad Changes*, THE OREGONIAN, Mar. 2, 2005, at C2. She was found unconscious with a fractured skull, and she was seriously malnourished. *Id.* The second case involved a fifteen-month-old boy, Ashton Parris, who died after having been returned to the care of his parents on a trial basis. *Id.* The boy's father has now been charged with his murder. *Id.* In England and Wales, a tragic trail of abuse cases from Maria Colwell, in 1972, to Victoria Climbié and Ainlee Labonte more recently, points to systemic failures in the child protection system. *See* CHILD ABUSE: A STUDY OF INQUIRY REPORTS 1980-1989 (H.M.S.O., 1991); CHRISTINA LYON ET AL., CHILD ABUSE 646-647 (3d ed. 2003). In Scotland, in 2001, eleven-week-old Caleb Ness died while being cared for by his brain-damaged father, who was later convicted of culpable homicide (manslaughter), despite the fact that the family's problems were known to the local social work department. *See* REPORT OF THE CALEB NESS INQUIRY (2003), *available at* http://download.edinburgh.gov.uk/CalebNess. For the Executive Summary and Recommendations of the resulting enquiry, see *Report of the Caleb Ness Inquiry* (2003), *available at* http://download.edinburgh.gov.uk/CalebNess/Caleb_Ness_Report_Summary_and_Recommendations.pdf. The full Report, running to 264 pages, is available at: http://download.edinburgh.gov.uk/CalebNess. In 2002, also in Scotland, thirteen-month-old Carla-Nicole Bone died at the hands of her mother's boyfriend while her mother looked on, despite repeated pleas from family members to the local child protection agencies. Stuart Patterson and Craig Walker, Family's Anger at Baby Death Report, THE SCOTSMAN, Sept. 18, 2003, available at http://news.scotsman.com/scotland.cfm?id=1032682003&format=print. The man, Alexander McClure, is now serving a life sentence for murder. Id. Cases like these provided the impetus for the latest Scottish child protection review, which resulted in the report, It's Everyone's Job to Make Sure I'm Alright SCOTTISH EXECUTIVE (2002), available at http://www.scotland.gov.uk/library5/education/iaar-00.asp.

14. *See infra* notes 37-50.

kind do, beyond the injustices suffered by the individuals involved. Drawing on the case law and literature from the United States,[15] it will explore how U.S. jurisdictions have addressed the admissibility of expert evidence. In particular, it will examine the mechanisms that are in place to separate valid expert evidence from junk science: a dichotomy that, as we shall see, is rejected by sections of the scientific community. Finally, we will look at how the mechanisms might be improved: an issue which has implications well beyond the specific cases highlighted here. First, it may be helpful to consider the attraction of expert evidence for the legal system along with the attendant pitfalls.

THE ATTRACTIONS AND PITFALLS OF EXPERT EVIDENCE

The attraction of using expert witnesses in court proceedings is not difficult to fathom. To state the obvious, most lawyers and judges simply lack the expertise in a whole variety of non-legal disciplines to utilize the vast knowledge that these disciplines have to offer. Thus, courts need the assistance from experts in these disciplines in order to understand crucial information. Some commentators believe there is a fundamental problem in terms of what courts sometimes expect of expert scientific evidence. It is not simply that lawyers may not understand the information being presented but, rather, that there is something of a failure to comprehend the scientific process. This results in a tendency "to treat all science as a single discipline distinguished only by its classification as valid or junk."[16] If we could get past this simplistic approach, so the argument goes, we would be in a position to make more subtle evaluations of particular evidence. As Edmond and Mercer put it:

> The rejection of a simple dichotomy between "good" and "bad" science facilitates discussion in a number of areas otherwise precluded. For instance, questions relating to the efficacy of various sciences, their objectives, and the ethics of their practitioners can be examined in more specific local terms, freed from the need to anchor them to over-arching, unworkable, mythological images of science.[17]

Somewhat paradoxically, it is this very ignorance of science that often results in non-scientists being mesmerized by it. Science is perceived as solid,

---

15. Where appropriate, occasional references will be made to cases in Australia, Canada and New Zealand, but any full exploration of developments there will have to await a future article.

16. Joelle Anne Moreno, Einstein on the Bench? *What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence*, 64 OHIO ST. L.J. 531, 550 (2003).

17. Gary Edmond & David Mercer, *Trashing "Junk Science,"* 1998 STAN. TECH. L. REV. 3, ¶ 84 (1998).

knowable, measurable: in short, science offers certainty.[18] These factors combine to place the person who *does* understand science, the expert, in an incredibly powerful position. After all, if one is coming from a position of ignorance, the person who holds the key to that certain body of knowledge is something of a savior. The danger for the legal system is that this empowerment of the expert witness will result in undue deference to his or her opinion.

The deference to scientific expertise is magnified when it involves experts who are not only scientists but also doctors. Lawyers are constantly amazed at (and mildly irritated by) how well the medical profession has managed public relations when the legal profession has been so spectacularly unsuccessful in that arena. Despite the prevalence of medical malpractice actions,[19] members of the public, at least, remain largely deferential to, if not in awe of, the medical profession. Maybe it has something to do with the god-like power over life and death. Whatever the cause, there is no doubt that juries and some lawyers hold medical expert witnesses in particularly high regard. In addition, members of one profession tend to behave with the utmost courtesy to members of other professions. While anything that enhances good manners in the courtroom is to be welcomed, there is a danger that this simple courtesy may translate into undue deference. It is interesting to note that, prior to damning the evidence of Dr. Paterson, the expert witness on TBBD, Wall J., prefaced his remarks with the following statement:

> [I]t is only fair that I should record at this point that [two other expert witnesses who disputed Dr. Paterson's findings] paid

---

18. This belief in the certainty of science is somewhat misplaced, not least because of the danger of "fashions", if not in the hard sciences, certainly in the social sciences. For instance, although the divorce of warring parents was once perceived as beneficial to children, summed up in the phrase "better one happy parent than two who are miserable", that view has been challenged by many studies and authors, including Judith Wallerstein and her colleagues. *See, e.g.*, JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 15-16 (1980); JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 39-51 (2000). Medicine is not immune from fashions either. One feature of the Cleveland child abuse debacle was the use, by the two doctors involved, of anal dilation as a diagnostic technique in assessing whether a child might have been sexually abused. *See* REPORT OF THE INQUIRY INTO CHILD ABUSE IN CLEVELAND 1987 (H.M.S.O., 1988, Cm 412). The Court of Appeal, in England, recently highlighted another example:

> Not so long ago, experts were suggesting that new born babies should lie on their tummies. That was advice based on the best-informed analysis. Nowadays, the advice and exhortation is that babies should sleep on their backs – back to sleep. This advice is equally drawn from the best possible known sources.

Cannings [2004] 1 All E.R. 725, at ¶ 28.

19. Note Weintraub's observation, "Physicians have been quick to condemn the legal profession as the cause for the surge in medical malpractice lawsuits. However, in reality, the greater impetus has been the medical expert witness who has developed unique theories of causation with consequent corruption of science." Michael I. Weintraub, *Expert Witness Testimony: A Time for Self-Regulation?*, 45 NEUROLOGY 855, 856 (1995).

> tribute to the work which Dr. Paterson has done in the field of bone pathology. I should also record my own assessment of Dr. Paterson as a highly intelligent man whose manner is sympathetic and whose evidence was given persuasively with both enthusiasm and charm.[20]

Certainly, lawyers and judges are not notorious for being particularly deferential. Nor are all lawyers and judges science-illiterate. That brings another danger into the picture. It is the responsibility of the lawyer to be a zealous advocate of his or her client's case, always within ethical bounds, of course. One result of this is that the lawyer will seek out expert testimony that will be of help to the client's case and a science-savvy lawyer will be somewhat selective in choosing the witnesses he or she calls.[21] It is a feature of the adversarial system that another lawyer will present the opposing case and will have the opportunity to do exactly the same thing. However, the adversarial system itself encourages one advocate to advance a particular scientific theory as valid and the other advocate to seek to dismiss it, again reflecting a lack of subtlety in the understanding of the scientific process.

What of the expert witness themselves? There is no doubt that many experts give evidence in a neutral and objective manner in order to assist the court in understanding the expert's particular field. The fact that many experts are paid for their services is no reason to assume that their objectivity is necessarily compromised.[22] Nonetheless, the fact that "career experts" do exist and that there is a lucrative industry in providing expert testimony might make one pause for thought.[23] That issue aside, there are other causes for caution. Given the powerful position of the expert witness, as the elucidator of knowledge to the ignorant, one might speculate that some experts enjoy being in this position and the issue of the expert's ego enters the picture.[24] A related danger is the extent to which the expert witness is personally invested in his or

---

20. Re AB (Child Abuse: Expert Witnesses), [1995] 1 F.L.R. 181, 183 (Fam.).

21. The irony of the position in which Wall J. found himself in *Re AB* is instructive in this context. Before proceeding to deliver resounding condemnation of the evidence of an expert witness (Dr. Paterson) in the case before him, he quoted from a previous case in which Cazalet J. had criticized the position taken by the same witness. *See* Re J (Child Abuse: Expert Evidence), [1991] 1 F.C.R. 193, 226. Wall J. then made the following statement: "I must also declare a personal interest in the case as I appeared as leading counsel for the parents and myself called Dr. Paterson as a witness on their behalf." *Re AB* [1995] 1 F.L.R. at 183.

22. In a recent Scottish case, the court was more concerned that the expert witnesses for the pursuer (plaintiff) gave their evidence free of charge, seeing this as a reflection of their commitment to a particular position and calling their impartiality into question. *See* McTear v. Imperial Tobacco Ltd. [2005] C.S.O.H. 69 (neutral citation) ¶ 5.18 and ¶ 8.48, *available at* http://www.scotcourts.gov.uk/opinions/2005csoh69.html, discussed *infra* at footnotes 165-166 and accompanying text. It contrasted this with the expert witnesses for the defender who followed the more usual course of charging for their services. *Id.*

23. *See supra* note 2.

24. This line of inquiry is one from which professors might gain valuable personal insights.

her own particular theory. By definition, an expert witness will have devoted considerable energy to working in a particular field. By and large, people prefer to have this devotion validated by it being proved to have been worthwhile, rather than feeling they have been wasting their time. Some experts will be speaking to their own original work. Bearing in mind that very few scientists achieve the fame associated with discovering penicillin or having a condition named after them, there is the danger that some experts will be so attached to their own theories that their ability to assess the theories objectively will be compromised.[25]

In short, there are any number of reasons why, and ways in which, medical and other experts may provide less than objective and reliable evidence. That this danger is recognized by the medical profession itself is encouraging[26] and the profession will act against its own (eventually) where they are adjudged to fall below recognized professional standards. Of course, this will be little comfort to the child who has been injured further after being returned to an abusive parent or the parent whose child has been removed unjustifiably. Thus, the evidence of experts in the field, while often an essential part of child protection cases and associated prosecutions, is not without its dangers. How, then, did expert evidence play out in the selected examples of MSPB and TBBD?

MUNCHAUSEN SYNDROME BY PROXY (MSBP)

The term "Munchausen syndrome" was coined in 1951 by Dr. Richard P. Asher to describe the condition where a patient repeatedly makes false claims of symptoms, or deliberately induces illness in himself or herself, in order to gain medical attention.[27] The element of proxy entered the picture in 1977, when (then[28]) Dr. Roy Meadow applied the term to a care-giver, usually a mother, who did much the same thing, but to a child.[29] Thus, the term

25. As we shall see, there are elements of this in both of the examples discussed *infra*.

26. *See* Weintraub, *supra* note 19. "Inaccurate or false testimony is an embarrassment to our profession . . " *Id.* Chadwick and Krous provide the following criteria for irresponsible medical testimony, although they acknowledge that "other forms of irresponsible testimony will doubtless be described in the future": absence of proper qualifications; use of unique theories of causation; use of unique or very unusual interpretations of medical findings; alleging non-existent medical findings; flagrant misquoting of medical journals or widely used texts; making false statements; and deliberate omission of important facts or knowledge pertinent to the opinion being offered. David L. Chadwick & Henry F. Krous, *Irresponsible Testimony by Medical Experts in Cases Involving Physical Abuse and Neglect of Children*, 2(4) CHILD MALTREATMENT 313, 314 (1997).

27. Richard P. Asher, *Munchausen Syndrome*, 1 LANCET 339 (1951). The name derives from Baron Karl Fredrich von Munchhausen (note the additional "h"), an eighteenth century Prussian aristocrat who served in the Russian cavalry and was famous for telling tall tales. *Id.*

28. Dr. Meadow was knighted in 1997 for his contribution to medicine and childcare.

29. Roy Meadow, Munchausen Syndrome by Proxy: The Hinterland of Child Abuse, 2 LANCET 343 (1977).

Munchausen Syndrome By Proxy (MSBP) was born.[30] While it is most frequently used in the context of non-accidental injury to children, it can arise in other contexts.[31] When the mother makes false claims about a child's symptoms, sometimes made more credible by the production of "evidence" such as a urine sample she has tampered with, the danger is that the child will be subjected to unnecessary, and possibly painful, diagnostic procedures and treatment.[32] There is also the possibility that any condition the child does actually have will go undiagnosed. Where the mother goes as far as to induce illness, the threat to the child's health is obvious and the consequences can be fatal.[33] That some parents will harm their children, quite deliberately, is attested to by an abundance of civil and criminal case law, official enquiries, and academic and other literature on the subject. That some of them do so by means of alleging non-existent illness or fabricating symptoms is also reasonably clear.[34] Where concern about MSBP has arisen is in the way it was

30. While MSBP has been renamed "factitious disorder," the term MSBP will be used in this Article because it is the term used in most of the case law and literature and is, probably irreversibly, etched on the public consciousness.

31. The perpetrator need not be the mother of a child; other caregivers, including some with health care backgrounds, are sometimes implicated. One example is the case of Beverley Allitt, a nurse who was convicted of killing four children in her care and injuring nine others. R v. Allitt (*Beverley*), unreported (1993), *discussed in* T.J. David, *Munchausen Syndrome by Proxy*, 31 FAM L. J. 445 (2001). Coincidentally, Dr. Meadow gave evidence at Beverley's trial. Nor need the victim be a child. Others, including elderly people or companion animals, may be at risk suggesting that the victim's vulnerability and dependence on the care-giver is a factor. *See* H.M.C. Munro & M.V. Thrusfield, *'Battered Pets': Munchausen Syndrome by Proxy (Factitious Illness by Proxy)*, 42 J. OF SMALL ANIMAL PRACTICE 385 (2001) (detailing a study conducted in Scotland by faculty from the Royal School of Veterinary Studies at the University of Edinburgh and suggesting that companion animals may be victims of MSBP).

32. For the description of a range of procedures, including the taking of a bone marrow sample and a bowel sample and intra-muscular in injections, to which a child was subjected over a period of a few months, see, *e.g.*, R v. L.M., [2004] Q.C.A. 192, at ¶¶. 15-16 (A.C.).

33. See, for example, the case of Petrina Stocker who was convicted of the manslaughter of her nine-year-old son, having added salt to his feeding bottles in the hospital. *See* Jenny Booth, *Salt Killer Mother is Jailed for Five Years*, TIMES ONLINE, Feb. 25, 2005, *at* http:www.timesonline.co.uk/printFriendly/0,,1-2-1500104-2,00.html. It appears that both social workers and police officers involved in the case may not have responded with sufficient rigor. *Id.* A subsequent review of hospital procedures was carried out and recommended that feeds be provided in tamper-proof containers and fridges should be lockable. *Id.*

34. For a good, short review of the evidence, see A. W. Craft & D. M.B. Hall, *Munchausen Syndrome by Proxy and Sudden Infant Death*, 328 BRIT. MED. J. 1309 (2004). The use of covert video surveillance (CVS) to observe suspected abusers in hospitals provides the clearest evidence of MSBP. David Southall, *Covert Video Recordings of Lifethreatening Child Abuse: Lessons for Child Protection*, 100 PAEDIATRICS 735 (1997) (describing the use of CVS in thirty-nine cases of suspected MSBP and providing evidence of abuse, mainly attempted suffocation, in respect of twenty-seven of them). Perhaps it should be noted that Professor Southall was later disciplined by the General Medical Council in respect of his evidence of MSBP in another context. *See footnote 72 and accompanying text.* Courts in England and the European Court of Human Rights have found CVS to be permissible in certain circumstances. *See, e.g.*, Re DH, [1994] 1 F.L.R. 679 (Fam.); Malone v. United Kingdom, [1984] Eur. Ct. H.R. 8691/79, ¶ 39; Huvig v. France, [1990] Eur. Ct. H.R. 11105/84 ¶ 29. However, the use of the

diagnosed and attested to by one expert witness and his followers and this evidence was admitted into court and accepted so readily in a number of cases. Having named and identified MSBP, Dr. Meadow went on to elaborate on the theme in subsequent publications.[35] Perhaps most notable was the development of what came to be known as "Meadow's law", summed up in the statement: "One sudden infant death is a tragedy, two is suspicious and three is murder until proved otherwise."[36] Sir Roy Meadow also provided expert evidence on the subject in court, as did others who subscribed to his view. His evidence was offered by the prosecution in criminal cases and by governmental child protection authorities in child protection cases.

The most notorious examples of Sir Roy Meadow's contributions, in the criminal context, concerned the convictions of Sally Clark, in 1999, and Angela Cannings, in 2002.[37] In 1999, Ms. Clark was convicted, by a majority of ten to two, of murdering her two sons, one by suffocation and the other by smothering. Her appeal, in 2000, was dismissed. Her husband campaigned tirelessly and the Criminal Cases Review Commission referred the case back to the Court of Appeal which allowed the appeal and quashed the convictions in January 2003.[38] Central to her original conviction was Sir Roy Meadow's colorfully presented statistical evidence on the likelihood of two children in the same family dying from Sudden Infant Death Syndrome (SIDS).[39] He likened this occurrence to picking the winning horse in the Grand National, running on odds of 80-1, in successive years. As the Court of Appeal concluded, "[w]e rather suspect that with the graphic reference by Professor Meadow to the

---

technique in the hospital setting is not without its critics. *See, e.g.*, Michael T. Flannery, *First, Do No Harm: The Use of Covert Video Surveillance to Detect Munchausen Syndrome by Proxy – An Unethical Means of 'Preventing' Child Abuse*, 32 U. MICH. J.L. REFORM 105, 106-107 (1998) (arguing that, since CVS requires the observer to allow the abuse to continue, if only for a short time, it offends against the fundamental tenet of the medical profession "first, do no harm").

35. Roy Meadow, *False Allegations of Abuse and Munchausen Syndrome by Proxy*, 68 ARCHIVES OF DISEASE IN CHILDHOOD 444 (1993) (Significantly, this article addresses false allegations of abuse as a manifestation of MSBP. It does not address false allegations of MSBP as a form of child abuse); Roy Meadow, *What Is and What Is Not 'Munchausen Syndrome by Proxy'?*, 72 ARCHIVES OF DISEASE IN CHILDHOOD 534 (1995); ROY MEADOW, ABC OF CHILD ABUSE (3d ed. 1997) [hereinafter ABC].

36. Roy Meadow, *Fatal Abuse and Smothering*, *in* ABC, *supra* note 35, at 29. Sir Roy Meadow puts the statement in quotation marks and describes it as "a crude aphorism but a sensible working rule from anyone encountering these tragedies." *Id.*

37. See also the case of Donna Anthony, who had her conviction overturned in April 2005 *see supra* note 11. For reference to the case of Trupti Patel who was acquitted on similar charges despite Dr. Meadow's evidence, see *supra* note 11.

38. R. v. Clark, [2003] 2 F.C.R. 447, ¶ 181 (A.C.).

39. This was not the sole ground for allowing the appeal, since this Court heard for the first time about microbiology results, known to the prosecution but never disclosed to the defense, which led one expert to conclude that "overwhelming straphlococcal infection is the most likely cause of death" of one of the boys. *Id.* at ¶ 122. However, the Court did note that "it seems likely that if this matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis on which the appeal had to be allowed." *Id.* at ¶ 180.

chances of backing long odds winners of the Grand National year after year it may have had a major effect on [the jury's] thinking notwithstanding the efforts of the trial judge to down play it".[40]

In 2002, Ms. Cannings was convicted of murdering her two sons by smothering.[41] Her appeal was allowed and the convictions were quashed in 2003.[42] Again, Sir Roy Meadow appeared as a prosecution witness and part of his evidence related to the statistical probability of two children in the same family dying of SIDS. Again, the appeal did not relate solely to his evidence,[43] although the Court raised some questions about it.[44] Concluding that the convictions were unsafe, the Court observed:

> We recognise that the occurrence of three sudden and unexpected infant deaths in the same family is very rare, or very rare indeed, and therefore demands an investigation into their causes. Nevertheless the fact that such deaths have occurred does not identify, let alone prescribe, the deliberate infliction of harm as the cause of death. ... If on examination of all the evidence every possible known cause has been excluded, the cause remains unknown.[45]

In the light of this case and those of Sally Clark and Trupti Patel, the court noted the unexplained nature of deaths due to SIDS and paid tribute to the continuing research. However, it issued the following stern warning:

> We cannot avoid the thought that some of the honest views expressed with reasonable confidence in the present case (on both sides of the argument) will have to be revised in years to come, when the fruits of continuing medical research, both here and internationally, become available. What may be unexplained today may be perfectly well understood

40. *Id.* at ¶ 178. The Grand National is the best-known horse race in the United Kingdom, attracting unparalleled sums in off-track betting. Thus, reference to it would strike a chord with any juror.

41. Ms. Cannings was also charged with the murder of the third of her four children, but that case did not proceed. R. v. Cannings, [2004] 1 F.C.R. 193 ¶ 2 (A.C.).

42. *Id.* at ¶ 175.

43. Subsequent to her conviction, evidence emerged of possible SIDS deaths and ALTEs ("acute" or "apparent life threatening events") in relation to children of Ms. Cannings' grandmother and, hitherto unknown to her, half-sister. *Id.* at ¶¶ 32, 34.

44. The picture here is complicated by the fact that there was some doubt about to which of two studies Sir Roy Meadow referred in his evidence and whether he had read the background notes in respect of one of them. While another expert witness described Sir Roy's Meadow's evidence as "a travesty", whether this was so or not hinged, in the Court's view, on the extent of his knowledge of the background notes. *Id.* at ¶¶ 143-144.

45. *Id.* at ¶ 177.

> tomorrow. Until then, any tendency to dogmatise should be met with an answering challenge.[46]

Nor was Sir Roy Meadow's influence confined to the criminal arena. In the context of child protection, it is not known how many children have been removed from their parents' care on the basis of evidence of the kind leading to the criminal convictions outlined above. As we shall see, estimates vary and the truth is that the precise figure may never be known.[47] This is due in part to the lack of response by some local authorities in England and Wales[48] and imperfect record-keeping in Scotland.[49] In addition, it should be remembered that the standard of proof in child protection cases requires proof on the balance of probabilities, while the standard in criminal cases is proof beyond reasonable doubt.[50] In short, what is insufficient in the criminal context, may be enough in a child protection case.

One might have thought that the fallout from these cases would have been enormous. After all, several women had been wrongfully incarcerated and children have been removed from their families on the basis of evidence that is, at the very least, questionable. However, if one had been expecting a spectacular official response, one would have been disappointed. Certainly, Sir Roy Meadow was vilified in the popular press[51] and, to a lesser extent, in professional journals.[52] Nor did his followers escape unscathed.[53] Despite this, it appears that Sir Roy was invited to speak at an international conference for

---

46. *Id.* at ¶ 22.

47. *See infra* footnotes 57-70 and accompanying text.

48. *See infra* footnote 60 and accompanying text.

49. *See infra* footnotes 67-69 and accompanying text.

50. *See* Re Uddin (A Child) (Serious Injury: Standard of Proof), [2005] 2 F.L.R. 444 (A.C.).

51. *See, e.g.*, Anna Pukas, Roy Meadow's Evidence has Helped Jail Mums but Now His Reputation is in Tatters: The Man Who Made a Fortune Wrecking the Lives of Women, THE EXPRESS (LONDON), Jan. 21, 2004, at 25; Tracey Lawson, Why an Expert Witness is in the Dock, THE SCOTSMAN, Jan. 24, 2004, at 4. Amongst other details, Tracey Lawson's article offers views by Meadow's former wife about his character, including: "[i]n retrospect the signs were there – in who Roy was – that he would go too far. . . . He found it everywhere. He was over the top. He saw mothers with Munchausen syndrome by proxy wherever he looked." *Id.* She also stated: "I don't think he likes women. . . . I don't think he's gay. But, although I can't go into details, I'm sure he has a serious problem with women." *Id.* On the one hand, a former spouse may be in a unique position to offer insights into an individual's character. On the other hand, who would really welcome such opinions being published in the press?

52. Sally Gillen, *Expert Witness in the Dock*, COMMUNITY CARE, Feb. 5, 2004, at 32.

53. Professor David Southall was similarly criticized in the press. *See, e.g.*, Tanya Thomson, *Angry Parents to Confront Doctor*, THE SCOTSMAN, Aug. 4, 2004, at 5; Maxine Frith, *Southall Verdict: A Pioneer or a Menace? Once in Demand, Professor Faces End of Career*, THE INDEPENDENT (UK), Aug. 7, 2004. Professor John Stephenson, the leading expert to give evidence to the Scottish courts, has had his diagnosis challenged in at least one case. Tanya Thomson, *Abuse Expert to Face Court Over 'Munchausen' Case*, THE SCOTSMAN, January 20, 2004, at 13 [hereinafter *Abuse Expert*].

child protection workers in San Diego in January 2005, much to the annoyance of some of his victims.[54]

What of the response at government level? In January 2004, the Attorney-General, Lord Goldsmith, ordered a review of 258 cases in England and Wales where women had been convicted of killing their children.[55] It appears that only three of the cases reviewed revealed cause for concern, prompting criticism from lawyers, doctors and parents convicted of killing their children.[56] Press reports initially suggested that as many as 5,000 children may have been removed from their families as a result of allegations of MSBP, although this figure has been questioned subsequently.[57] Initially, it was unclear whether these civil cases would be re-examined, with the Children's Minister, Margaret Hodge, and the Solicitor General, Harriet Harman, appearing to differ on the matter.[58] In any event, the government issued guidance to local authorities asking them to review their own cases.[59] One hundred and thirty of the one hundred and fifty local authorities responded to a survey conducted by the Association of Directors of Social Services.[60] They reported that disputed medical evidence arose (or was anticipated to arise) in forty-seven of 5,175 cases.[61] The impact of the medical evidence was known in nine of these cases and, in a further thirty-eight, the case was not sufficiently advanced for the outcome to be clear.[62] That there have been calls for a public enquiry is hardly surprising but, at the time of writing, these calls have fallen on deaf government ears. Incredulity and outrage followed the announcement that Angela Cannings would receive no compensation from the state for the eighteen months she spent in prison wrongfully.[63]

In Scotland, a parallel investigation of criminal cases was conducted by the Crown Office, the body responsible for bringing prosecutions.[64] It appears that twenty-two cases of convictions for murder or culpable homicide

---

54. Jamie Doward, *Parents Demand Gag on Cot Death Doctor's Lectures: Outrage at International Acclaim for Meadow*, THE OBSERVER, Jan. 16, 2005, at 6.

55. Clare Jerrom, *Care Proceedings Excluded From Review of Expert Witness Cases*, COMMUNITY CARE, Jan. 29, 2004, at 6.

56. Clare Dyer, *Quashed Convictions Unlikely After Shaken Baby Review*, THE GUARDIAN, Feb. 15, 2006, at 8.

57. Roy Greenslade, *Media: Sense and Sensitivity*, THE GUARDIAN (LONDON), Apr. 19, 2004, at 4 (noting that it is unclear where this figure came from but that it continues to be repeated in the press).

58. Jerrom, *supra* note 55.

59. *Newsline - Medical Expert Witnesses*, 34 FAM. L.J. 556 (2004).

60. *Id.*

61. *Id.*

62. *Id.* Interestingly, the BBC's Radio 4 *Today* program conducted a poll, to which seventy of the one-hundred-and-fifty local authorities replied. Seventy-four percent of those replying indicated that they were not reopening any cases. Jerrom, *supra* note 55

63. Tanya Thomson, *Compensation Blow for Cot Death Mother Wrongly Jailed*, THE SCOTSMAN, Jan. 12, 2005, at 11.

64. Tanya Thomson, *22 Scottish Child Death Convictions Reviewed by Crown Office*, THE SCOTSMAN, June 2, 2004, at 1.

(manslaughter), some going back as far as ten years, were re-examined and it was concluded that there had been no miscarriages of justice.[65] This was hardly a transparent process and, thus, did little to assuage public concern. The Scottish review of child protection cases involving the removal of children from their parents amid allegations of MSBP has been even less satisfactory. The Scottish Children's Reporter Administration (SCRA), responsible for investigating and pursuing child protection proceedings, re-examined some forty-three cases, dating from 1981 onwards, and found that three of them warranted a return to the courts.[66] Particularly disturbing was the admission by SCRA that five cases could not be reviewed in detail, "three because staff had only a vague recollection of a relevant case and therefore the child could not be identified, two because due to the passage of time the case files or papers are not available."[67] Little wonder, then, that a "SCRA insider" branded the review "a bit of a joke."[68] Indeed, the media seems to have had greater success in tracing cases of children removed from their families and sometimes adopted, amid allegations of MSBP, than has SCRA, albeit journalists have the luxury of relying on nothing more than the, sometimes partisan, accounts of the individuals involved.[69] It is hardly surprising that a number of parents are raising actions in court seeking to have their children returned to them[70] and calls for a public enquiry continue.

It is one function of the General Medical Council (GMC) in the United Kingdom to police the professional standards of its members.[71] How did it respond to these events? In August 2004, the GMC's professional conduct committee banned Professor David Southall, the expert witness in Sally Clark's

---

65. *Id.*

66. *Cannings Judgement: SCRA Review and Findings*, ¶ 22, *at* www.scra.gov.uk/documents/Cannings_Judgement_-_Final_Report.pdf (last visited Mar. 17, 2006).

67. *Id.* at ¶ 8. *See also*, Kate Foster, *Lost Without Trace: The Families Who Were Torn Apart on a Whim*, SCOTLAND ON SUNDAY, Oct. 10, 2004, at 9.

68. Liam McDougall, *Officials Consider Attempt to Trace Parents Wrongly Accused of Child Abuse 'a Joke'*, SUNDAY HERALD, June 5, 2005, at 13. The same anonymous source claimed that the initial review of the SCRA database highlighted 3,500 "potential cases of concern." *Id.* The article quotes Alan Miller, then the Principal Reporter (head of SCRA), as having written to the Scottish Executive warning of "considerable difficulties in practice" in undertaking a thorough review. *Id.*

69. Tim Pauling, *Solicitor Backs Calls for a Public Inquiry Into Misdiagnoses*, ABERDEEN PRESS & JOURNAL, Jan. 27, 2004, at 8 (referring to a "dozen" cases and giving details of two, one of which involved children who have been adopted subsequently); Tanya Thomson, *'Whitewash' Fear Over Child Abuse Review*, THE SCOTSMAN, May 17, 2004, at 2. (referring to twelve families and the nineteen children found by the newspaper).

70. *Abuse Expert*, *supra* note 53 (giving details of a Glasgow solicitor who is representing six mothers who are challenging the removal of their children from their care).

71. "The main objective of the General Council in exercising their functions is to protect, promote and maintain the health and safety of the public." Medical Act 1983 (Amendment) Order 2002, S.I. 2002/3135, §3.

case, from working in any area of child protection for the next three years.[72] That decision was appealed to the High Court and, while it ruled that he should keep his medical license, it did call for the conditions applying to him to be tightened.[73] In June 2005, Dr. Alan Williams, the Home Office forensic pathologist who carried out the post-mortem examination on Sally Clark's sons and failed to disclose aspects of findings in his evidence at her trial, was found guilty of "serious professional misconduct" by the GMC's professional conduct committee and banned from Home Office pathology work for three years.[74] Finally, in July 2005, Sir Roy Meadow was also found guilty of "serious professional misconduct," largely for giving evidence beyond his field of expertise, and lost his license to practice medicine.[75] Ironically, it was expert evidence led at the hearing over allegations that he was guilty of "serious professional misconduct" that may have proved most damning in his case. Sir David Cox, retired Professor of Statistics at Imperial College London, gave evidence that Sir Roy Meadow made fundamental errors in calculating the probability of more than one infant in the same family dying from SIDS.[76] As we shall see, the reaction of sections of the medical profession and the Royal College of Paediatrics and Child Health has been somewhat defensive, albeit the latter went on to respond more constructively thereafter.[77] Sir Roy's "striking off" was to prove short-lived since, seven months later, the High Court overturned the decision and reinstated his license.[78]

MSBP has not escaped the notice of the European Court of Human Rights, although it has addressed the cases before it in terms of the procedures followed rather than the condition itself.[79] In *P, C, and S v. United Kingdom*,[80]

---

72. Sam Lister, *Doctor Will Not Be Struck Off for False Murder Claim*, THE TIMES (LONDON), Apr. 15, 2005, at 16.

73. *Id.*; John Aston, *He Should Have Been Struck Off; Husband's Anger as Baby Doctor Avoids Being Barred*, DAILY POST (LIVERPOOL), Apr. 15, 2005, at 13 (reporting that Professor Southall will be required to refer all cases involving alleged child abuse to another doctor and to report to the GMC every six months).

74. Nigel Hawkes, *Pathologist in Sally Clark Trial is Found Guilty of Misconduct*, THE TIMES, Apr. 4, 2005, at 27.

75. Sam Lister, *Meadow Struck Off for Misleading the Sally Clark Trial*, THE TIMES (LONDON), July 16, 2005, at 2. Strictly speaking, the Fitness to Practice Panel has directed "that the person's name shall be erased from the register." Medical Act 1983, (Amendment) Order 2002, S.I. 2002/3135, §13, at 35D(2)(a).

76. Clare Dyer, *Why Didn't They Spot the Flaws?*, THE GUARDIAN (LONDON), June 21, 2005; Dominic Kennedy, *Cot Death Numbers Don't Add Up, Says Eminent Statistician*, THE TIMES, June 25, 2005, at 27.

77. See *infra* footnotes 140-144 and accompanying text.

78. *Meadow v General Medical Council* [2006] EWHC 146, Mr. Justice Collins expressed the following view: "[H]e made one mistake, which was to misunderstand and misinterpret statistics. . . . It may be proper to criticize him for not disclosing his lack of expertise, but that does not justify a finding of serious professional misconduct". *Id.* at ¶ 54. It is understood that the GMC intends to appeal against this decision.

79. Precisely where the European Court is going on the issues of emergency removal of children from their parents, representation of the parents and the child, and adoption of children

a case also of interest for its trans-Atlantic dimension, a child, S, was removed from her parents at birth, largely due to concerns that the mother suffered from MSBP.[81] Finding violations of Articles 6 (right to a fair trial) and 8 (right to respect for family life) of the European Convention on Human Rights of 1950,[82] the Grand Chamber concentrated on the lack of legal representation of the parents in the proceedings. In *Venema v. Netherlands*,[83] the Court found that the authorities in the Netherlands had violated the parents' Article 8 right to family life by denying the parents the opportunity to contest the allegations against them prior to the removal of their daughter and by acting on incomplete information, including allegations of MSBP.[84]

The reach of Sir Roy Meadow's work goes far beyond the United Kingdom. In the United States, MSBP seems to have made its first appearance in the case law in 1981 when Priscilla Philips was convicted of murdering her daughter.[85] Subsequently, attorneys[86] and the press[87] drew attention to concerns over misdiagnosis of the condition. In Australia, the Queensland Court of Appeal set aside the verdict in the case of a woman who was convicted of torturing one of her children and wounding two others, and ordered a retrial, due to concern that the conviction resulted from undue reliance on the MSBP label.[88] In New Zealand, concern has been expressed over the removal of six

---

against the wishes of their parents, is a fascinating subject which, sadly, is beyond the scope of this article. *See also*, K and T v. Finland (2001) 31 Eur. Ct. H.R. 18.

80. P,C, & S v. United Kingdom, [2002] 35 Eur. Ct. H.R. 31. .

81. *Id.* at ¶ 13. The mother, P, a citizen of the United States, had been convicted of child endangerment in California in respect of allegations that she administered laxatives inappropriately to her child, B, because she suffered from MSBP. B was removed from her care and placed with his father. P subsequently moved to England, married, and gave birth to S. Child protection authorities in the U.S. alerted the authorities in England to the earlier case and concerns that P suffered from MSPB. It was this information that triggered the removal of S. *Id.* at ¶¶ 9-56.

82. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, E.T.S. 45.

83. Venema v. Netherlands, (2004) 39 Eur. Ct. H.R. 5.

84. *Id.* at ¶¶ 98-99.

85. People v. Phillips, 122 Cal. App.3d 69, 82 (Cal. Ct. App. 1981) (referring specifically to Sir Roy Meadow's 1977 article).

86. Tom Ryan, an attorney in Arizona, is a leading critic of misdiagnosis of MSBP. He is quoted by Gloria Padilla as observing, "Munchausen Syndrome by Proxy has become the disease du jour. This diagnosis is nothing more than modern day medical McCarthyism, where mothers are accused of a sinister form of child abuse with nothing more than suspicion, rumor and innuendo." Gloria Padilla, *Lawyer Blasts 'Disease Du Jour'*, SAN ANTONIO EXPRESS-NEWS, May 4, 1998, at 1. In the Foreword to David Allison's and Mark Roberts' *Disordered Mothers or Disordered Diagnosis*, Ryan likens the diagnosis of MSBP to the Hans Christian Andersen fairly tale, *The Emperor's New Clothes* (in which the Emperor is, in fact, naked, but courtiers conspire to feed the fallacy of his spectacular new outfit). DAVID B. ALLISON & MARK S. ROBERTS, DISORDERED MOTHERS OR DISORDERED DIAGNOSIS, ix (1998).

87. Charlotte Faltermayer, *Medea's Shadow*, LEGAL AFF. 43 (June 2004); Steve Levin, *Parental Illness or Child Abuse?*, PITTSBURG POST-GAZETTE, Jan. 3, 1999; Padilla, *supra* note 84.

88. R v. LM, [2004] Q.C.A. 192 (A.C.); *see* Helen Hayward-Brown, *Munchausen Syndrome by Proxy (MSBP)*, 16(5) JUDICIAL OFFICER'S BULLETIN 33, ¶ 93 (2004).

children from their mother amid allegations of MSBP.[89]

It is no exaggeration to say that the recent experiences surrounding MSBP in the United Kingdom has rocked the world of child protection. Due largely to the work of one highly-influential man, who attracted quite a following in the medical community, a number of women served prison sentences for crimes they did not commit. Furthermore, some children were removed from their parents' care for months or years, and other children and parents have been lost to each other through adoption. That this can happen in developed legal systems is nothing short of scandalous. The courts were all too willing to listen to the dogmatic views of experts adhering to a particular theory and, while they may have learned something from this debacle, it remains to be seen whether the deference accorded to experts, and particularly medical experts, will be less absolute in the future. While some of the expert witnesses involved have been subject to sanction by their own professional body, the GMC, it was neither swift to act nor were the sanctions particularly severe.[90] Before we examine the criteria the courts apply in admitting expert evidence – criteria designed to prevent just this sort of injustice from occurring – and the damage that cases of this kind cause, we will look at another example of the influence of an expert and how his theory played out in the courts.

TEMPORARY BRITTLE BONE DISEASE (TBBD)

If Sir Roy Meadow and the impact of his views on MSPB produced a media feeding frenzy, the reaction to Dr. Colin Paterson and his views on the existence of "temporary brittle bone disease" (TBBD),[91] amounted to something of a low-calorie snack. There never was a "Paterson's Law" sitting alongside Meadow's Law. TBBD did not attract a following amongst other members of the medical profession and, indeed, it was its rejection by other experts that may have reduced its impact. Unlike the investigations which followed the overturning of the convictions of Sarah Clark and Angela Cannings, there was initial resistance to the idea of reviewing the cases in which Dr. Paterson played a part.[92] After some dragging of feet, the Children's

89. Lauren Quaintance, *Nursery Crimes: A Mother's Illness*, SUNDAY STAR-TIMES (AUCKLAND), Dec. 21, 2003, at 1.

90. In the light of this, it is interesting to note that Dr. Paterson whose evidence on TBBD is equally questionable did lose his license: see footnotes 125-128 and accompanying text.

91. More recently, the term "transient brittle bone disease" has been used to describe the condition but, as with MSBP, TBBD will be used here since it is better known. *See* Colin Paterson, *The Child With Unexplained Fractures*, 147 N.L.J. 648 (1997) [hereinafter *Unexplained Fractures*].

92. Writing in the influential UK newspaper, *The Guardian*, Clare Dyer reported that David Spicer, a barrister and chair of the British Association for the Study and Prevention of Child Abuse and Neglect, wrote to the Minister for Children, Margaret Hodge, asking if local authorities would be advised to reopen cases in which Dr. Paterson had been involved. Clare Dyer, *Inexpert Witness: In the Fuss Over Roy Meadow, Whose Evidence Incriminated Angela Cannings, the Case of Another Medical Courtroom Specialist Has Gone Unnoticed*, THE

Minister for England and Wales, Margaret Hodge, finally called for a review.[93] While there is now a body of case law rejecting TBBD, which gives some of the strongest condemnation of an expert's testimony found in the law reports, it is not known how often his evidence held sway and led to the return of children to their families.[94] Writing in 1997, Dr. Paterson estimated that seventy-eight children had been returned to their parents after he gave evidence in care proceedings in England and Wales,[95] and his evidence had a similar effect in at least one Scottish case[96] and had an impact in at least two cases in the United States.[97]

What, then, was the theory advanced by Dr. Paterson about this alleged condition, TBBD? Essentially, TBBD provides an alternative explanation to the cause of a pattern of injuries, specifically broken bones, in children. When a child comes to the attention of the authorities because of suspected abuse, part of the child's body will often be X-rayed, with a skeletal survey sometimes being carried out over the whole body. Sometimes the X-rays disclose previous injuries, including bone fractures, typically to the arms, wrists, legs, ankles, or ribs. If the child's caregiver(s) (usually the parent(s)) cannot provide an innocent explanation of how the injuries occurred that is consistent with the injuries themselves, then a strong suspicion arises that that the child has been abused.[98] In a small number of cases, a child will suffer from *osteogenesis imperfecta* (OI), better known as brittle bone disease.[99] This is a permanent genetic condition, of varying severity, in which the sufferer has increased bone fragility, leaving him or her unusually susceptible to bone fractures.[100] Where a child has this condition, and it can usually be diagnosed using well-accepted tests, then the suspicion of non-accidental injury is displaced, since there is now

---

GUARDIAN (LONDON), Apr. 6, 2004, at G2. Initially, it appeared that there would be no such instruction. *Id.*

93. *See, Newsline – Medical Expert Witness*, 34 FAMILY L.J. 556 (2004); *see also* Clare Dyer, *Hodge Calls for Child Care Review*, THE GUARDIAN (LONDON), Nov. 8, 2004, at 10.

94. For a discussion of some of the cases, see *infra* at footnotes113-116 and accompanying text.

95. *Unexplained Fractures*, *supra* note 89, at 648.

96. This case has never appeared in the law reports and, thus, there is no case name. See the discussion of the case *infra* at footnotes117-118 and accompanying text

97. State v. Talmadge, 999 P.2d 192 (Ariz. 2000). See also the discussion *infra* at footnotes120-122 and accompanying text, of the case referred to in Alicia O. Cata, *Child Abuse v. Temporary Brittle Bone Disease: One Lawyer's Experience with Medical Research and its Misapplication to the Facts*, 22 CHAMPION 16 (1998).

98. Feldman, *supra* note 5, at 176-77.

99. *Id.* at 213-15.

100. *Osteogenesis imperfecta* is classified on a scale from IA to IVB, in terms of severity. Statistics on the frequency of the condition vary, but Feldman cites type IA as occurring in 3.5 out of 100,000 births. He notes that type 4A "has the greatest potential of confusion with abuse, but it accounts for only 5% of OI cases. . . . Rarely, mild OI type 3 can also cause confusion. OI types 2 and 3 usually cause severe disease from infancy and, hence, are unlikely to be confused with abuse." *Id.* at 214. Bays estimates the incidence of Type I, the most common form of the condition, as one per 30,000 births. Jan Bays, *Conditions Mistaken for Child Physical Abuse, in* CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 200 (Robert Reece & Stephen Ludwig, eds. 2d ed., 2001) [hereinafter *Conditions Mistaken*].

an innocent explanation of the child's injuries.[101]

It was in this context that Dr. Paterson developed his theory about a condition he called temporary brittle bone disease (TBBD).[102] Where he departed from established medicine was by suggesting that there might be a condition, similar to OI, which created a susceptibility to bone fractures, but which was temporary.[103] Essentially, to put it in lay-person's terms, the child had suffered from brittle bone disease but had "recovered". Again, there was an innocent explanation for the child's past injuries. The problem was that, once the child healed, the condition could no longer be established by recognized tests. To fill that gap, Dr. Paterson provided his own explanation of what might cause TBBD and how it could be established using the evidence that did remain available. He noted similarities between TBBD and both copper deficiency and collagen defects.[104] He found that TBBD generally occurred within the first year of the child's life, appeared to be more common in twins and where birth had been premature. While there was usually no family history of brittle bones, there might be a history of bone laxity. The pattern of injuries often included fractures to the ribs and at the ends of long bones and the condition was sometimes accompanied by projectile vomiting and anemia.[105] Dr. Paterson attached considerable weight to the absence of bruising accompanying diagnosis of fractures when TBBD had occurred, although it appears that bruising is often absent when young children sustain bone fractures.[106]

---

101. It is possible, of course, that a child can suffer from OI and also be the victim of abuse. Daniel R. Cooperman & David F. Merten, *Skeletal Manifestations of Child Abuse*, *in* CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 149-150 (Robert Reece & Stephen Ludwig, eds. 2d ed., 2001).

102. Colin R. Paterson & Dr. Susan J. McAllion, *Osteogenesis Imperfecta in the Differential Diagnosis of Child Abuse*, 299 BRIT. MED. J. 1451 (1989). Ablin & Sane express the view that "[t]he so-called entity of TBBD, proposed as a variant form of OI, originated as a presentation at the Fourth International Conference of OI in 1990. An article was subsequently published in the *American Journal of Medical Genetics* without peer review." Deborah S. Ablin & Shashikant M. Sane, *Non-Accidental Injury: Confusion with Temporary Brittle Bone Disease and Mild Osteogenesis Imperfecta*, 27 PEDIATRIC RADIOLOGY 111 (1997). This observation appears to discount prior publication in the *British Medical Journal*, so presumably what Ablin and Sane mean is that the first presentation of TBBD *in the United States* occurred at the 1990 conference.

103. Colin R. Paterson et al., *Osteogenesis Imperfecta: The Distinction from Child Abuse and the Recognition of a Variant Form*, 45 AM. J. OF MED. GENETICS 187, 188 (1993) [hereinafter *Distinction from Child Abuse*]; Colin R. Paterson, et al., *Reply to Dr. Bawle: Temporary Brittle Bone Disease*, 49 AM. J. OF MED. GENETICS 132 (1994) [hereinafter *Reply to Dr. Bawle*]; Colin R. Paterson et al., *Osteogenesis Imperfecta Variant v Child Abuse: Reply*, 56 AM. J. OF MED. GENETICS 117, 118 (1995) [hereinafter *Variant*]; *Unexplained Fractures*, *supra* note 91.

104. *Variant*, *supra* note 103, at 117.

105. *Distinction from Child Abuse*, *supra* note 103, at 187; *Variant*, *supra* note 103, at 117; *Unexplained Fractures*, *supra* note 91.

106. In Re AB (Child Abuse: Expert Witnesses), [1995] 1 F.L.R. 181, 195 (Fam.), Dr. Paterson attached considerable significance to the absence of bruising, stating that "[h]ad these

TBBD attracted almost unanimous criticism from the medical community,[107] and prosecutors were warned of this new defense.[108] Much of the medical condemnation of the so-called disease was absolute. Kirschner stated, "the concept of 'temporary brittle bone disease' . . . remains totally unsubstantiated",[109] and others expressed similar views.[110] In addition, some commentators were concerned about the credentials of those involved in the research and the lack of opportunity to evaluate the findings.[111] Perhaps of

---

fractures been sustained as a result of a series of deliberate injuries inflicted on a child with normal bones, it would be almost inconceivable that evidence of such injuries would not be obvious." However, Wall J. noted the evidence of two other experts "that fractures in young children frequently occur without evidence of bruising," and considerable support for this proposition can be found in the medical literature. *Id.* This led him to prefer the latters' evidence. *Id.*

107. There appears to be at least one domestic advocate of TBBD in the United States: Dr. Marvin Miller, author of *Temporary Brittle Bone Disease: Associated with Decreased Fetal Movement and Osteopenia* (1998), which was rejected by a number of leading medical journals and published in Calcified Tissue International. *See* Family Independence Agency v. Detrych, 654 N.W.2d 331 (Mich. App., 2002). He has appeared in a number of cases but his testimony has not prevailed over that of other experts. *See* State v. Swain, 2002 WL 146204 (Ohio App.2002) (This case involved an unsuccessful appeal against conviction for felonious assault and child endangerment. At trial, all three of the state's witnesses discounted TBBD as a legitimate theory.); State v. Glover, 2002 WL 31647904 (Ohio App. 12 Dist., 2002) (This case involved an unsuccessful appeal against convictions for felonious assault. Dr. Miller's theories "had not been accepted by the medical community." The theories were rejected by the jury as part of the larger picture of evidence.); *Detrych*, 654 N.W.2d at 331 (On appeal, Dr. Miller's testimony was found inadmissible applying a variant of the Frye test. "Dr. Miller's testimony is based on a novel theory which lacks the appropriate objective and independent validation necessary to permit its admissibility at trial."). TBBD is mentioned and rejected by the courts in a number of appeals. *See, e.g.*, In the Matter of Eric CC, 653 N.Y.S.2d 983, 985 (N.Y. App. 1997).

108. "The bottom line is that TBBD is not accepted in the scientific community. . . . TBBD remains an unsubstantiated hypothesis lacking empirical support. If TBBD is raised as a defense in your jurisdiction, it most certainly should be challenged." NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, AM. PROSECUTOR'S RESEARCH INST., QUESTIONABLE 'BRITTLE BONE DISEASE' DEFENSES TO PHYSICAL ABUSE 1 (8(10) update) (Oct. 1995). "It is vitally important that all MDTs know that TBBD is not a recognized disease." JOËLLE ANNE MORINO, AM. PROSECUTOR'S RESEARCH INST., A COURTROOM DIAGNOSIS: COUNTERING THE DEFENSE OF TEMPORARY BRITTLE BONE DISEASE AND MILD OI (16(8) Update) (2004). Update from 1997 onwards is available online through the APRI website, *at* www.ndaa-apri.org (last visited Mar. 17, 2006). I am most grateful to the staff at APRI for sending me a copy of the 1995 article in response to an email.

109. Kirschner, *supra* note 6, at 262.

110. Deborah S. Ablin, *Osteogenesis Imperfecta: A Review*, 49 CAN. ASS. OF RADIOLOGISTS J. 110 (TBBD "remains a medical hypothesis lacking the support of sound scientific data"); Ablin & Sane, *supra* note 102, at 112 ("until clinical research scientifically established the existence of TBBD, it should remain strictly a hypothetical entity and not an acceptable medical diagnosis").

111. Ablin & Sane, *supra* note 102, at 112 ("objective analysis of the data by an independent observer is not possible"); Ralph S. Lachman, *Differential Diagnosis II: Osteogenesis Imperfecta*, *in* DIAGNOSTIC IMAGING OF CHILD ABUSE 221 (Paul K. Kleinman, ed., 2d ed, 1998) ("because no radiologists were authors of this publication, and no details are given regarding the methods employed in the radiologic evaluation of these patients, it is difficult to assess the accuracy of these findings").

greatest concern was that "most of the radiologic features ascribed to transient brittle bone disease are those classically noted in cases of abuse."[112]

The English courts were the first to express concern over Dr. Paterson's evidence. Cazalet J. made the following observation in 1990: "[Dr. Paterson] accepted that he has been criticised in certain previous cases for developing particular theories as to their causation. In the present case, I think he may have developed a theory of causation rather than a diagnosis."[113] Similarly, in 1994, Wall J. noted:

> Whilst the courts of course accept that there may be cases where there is a divergence between judicial and clinical findings, I regard as worrying in the extreme Dr. Paterson's failure to record in his research material of cases of proven brittle bone disease judicial findings to the contrary. In my judgment this is a factor which must cast the gravest doubt on his findings.[114]

He then went on to detail the following shortcomings in Dr. Paterson's evidence and contribution to the case: omission of reference to the child's brain damage; failure to disclose the controversial nature of his research and omission of factors that did not support his opinion, demonstrating a lack of objectivity; failure to record the fact that previous judicial findings cast doubt on the validity of his research data; reinforcing false hope in parents that they would be exonerated; and the resulting increase in costs in the case.[115] Lest his fellow judges had been too subtle in their criticism, Singer J. was even more forthright in 2001, when he said:

> In my judgment, in relation to any future potential diagnosis by Dr. Paterson of TBBD, his methodology and his credentials to express opinion deserve to be and should be subjected to rigorous scrutiny before he is given leave to report in further cases. In this case, notwithstanding [the earlier comments of Cazalet and Wall JJ.] Dr. Paterson has in my opinion provided a misleading opinion, failed to be objective, omitted factors

112. Lachman, *supra* note 111, at 221. The same point is made by Dr. Jan Bays who gives a detailed analysis of the similarities between TBBD and child abuse, criticizing the lack of evidence produced by Dr. Paterson in support of his theory. *Conditions Mistaken*, *supra* note 100, at 486.

113. *See Re J*, 1 F.C.R. at 193. It should be noted that Dr. Paterson's evidence was mentioned in *Re P (Minors) (Child Abuse: Medical Evidence)*, [1988] 1 F.L.R. 328 (Fam.), but largely in the context of a need for further research into the copper deficiency that he mentioned.

114. *Re AB*, 1 F.L.R. at 199.

115. *Id.*

> which do not support his opinion, and lacked proper research in his approach to the case in point.[116]

In the midst of this, Dr. Paterson's evidence was instrumental in securing the return of twins to their parents in Scotland in 2000.[117] Somewhat frustratingly, the only information in print about this case comes from a newspaper report. Since it was disposed of at first instance, there was no appeal, and there is no law report.[118] It appears that the twins had been removed from their parents at the age of seven months and placed in the care of relatives for almost two years before being returned to their parents by Sheriff John Stewart as a result of Dr. Paterson's evidence of TBBD as a medical condition.

Despite the warnings about TBBD that had been given to prosecutors in the United States by their own professional organization,[119] Dr. Paterson appears to have played a central role in the acquittal of parents on charges of child abuse in Tucson, Arizona in 1998.[120] Two years later, in *State v. Talmadge*,[121] a mother secured a retrial on child abuse charges on the basis that the trial court had improperly excluded Dr. Paterson's evidence. She and her partner (the child's father) were subsequently convicted and imprisoned.[122]

Despite opposition to his theory, Dr. Paterson made himself available to the courts as an expert witness on TBBD and, it will be remembered, according to his own estimate, in 1997, seventy-eight children had been returned to their parents after he gave evidence in care proceedings in the England and Wales.[123] It may be some tribute to the legal system that it was members of the judiciary who prompted the General Medical Council to intervene in Dr. Paterson's case,[124] but what is more alarming is the fact that Dr. Paterson was able to

---

116. Re X (Non-Accidental Injury: Expert Evidence), [2001] 1 F.L.R. 90, ¶¶ 119-20 (Fam.).

117. While there was passing reference to Dr. Paterson's evidence of temporary brittle bone disease in an earlier unreported Scottish case, this was not central to the decision. Strathclyde Region v. DH and KH, [1992] (Inner House) (appeal taken from Scot.) (U.K.).

118. Tara Womersley, *Brittle bones 'are being diagnosed as child abuse,'* DAILY TELEGRAPH, Oct. 18, 2000, *available at* www.whale.to/m/sbs26.html.

119. NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE, *supra* note 108.

120. In an article in the journal of the (US) National Association of Criminal Defense Lawyers, Alicia O. Cata waxes lyrical about the contribution of Dr. Paterson in securing the acquittal of her clients, identified only as R and L, on child abuse charges. Cata, *supra* note 97.

121. State v. Talmadge, 999 P.2d 192 (Ariz. 2000). Part of the GMC case against Dr. Paterson related to his having given evidence in this case after having received a letter of guidance from the GMC. Owen Dyer, *GMC strikes off proponent of temporary brittle bone disease*, 328 BRIT. MED. J. 604 (2004).

122. David J. Cieslak, *Parents Found Guilty of Child Abuse for Second Time*, TUCSON CITIZEN, Feb. 22, 2002, at 1E. Fortunately, it appears that the child involved, Amber, had been fostered suggesting that she was not returned to the care of her abusive parents. She was subsequently adopted by her foster caregivers. *Id.*

123. *Unexplained Fractures*, *supra* note 91, at 648.

124. It is reported that, having received complaints from three High Court judges, Dame Elizabeth Butler-Sloss wrote to the General Medical Council expressing concern about Dr.

continue appearing as an expert witness long after the courts had signaled disquiet over his evidence.

In March 2004, the professional conduct committee of the General Medical Council found Dr. Paterson guilty of serious professional misconduct, citing that his "criteria for the diagnosis of TBBD were unclear, and/or variable, with the result that the use of these criteria in legal proceedings could mislead others thereby posing an unacceptable risk to the safety of children."[125] It is only fair to note that the chairwoman of the committee described Dr. Paterson as "an honest, dedicated professional."[126] His license to practice medicine was withdrawn or, to put it in ordinary parlance, he was "struck off."[127] Sections of the medical community regard the removal of his medical license as harsh.[128]

This, then, was what was being presented to courts from 1990 until 2001. As we have seen, the medical and scientific communities were skeptical of TBBD since its inception, ultimately condemning it. However, the theory continued to be advanced in the courts well after its dismissal due to the lack of scientific validity. That this could happen calls into question the whole issue of how so-called scientific evidence is admitted into court. Before the rules on admissibility of evidence are examined, it is worth exploring the harm caused by cases of this kind.

WHAT IMPACT DO CASES LIKE THESE HAVE?

It is stating the obvious to note that cases of the kind outlined above harm the individuals involved but, lest we forget, let us recap on the magnitude of that harm. Angela Cannings, Sally Clark and Donna Anthony are real women, not characters in a law school class hypothetical. Each spent years in prison

---

Paterson. Rhiannon Edward, *Bone Expert 'Misled Court,'* THE SCOTSMAN, Mar. 2, 2004, *available at* http://news.scotsman.com/uk.cfm?id=244182004&format=print.

125. Hugo Duncan, *Bone Expert Struck Off for Misleading Court*, THE SCOTSMAN, Mar. 5, 2004, *available at* http://news.scotsman.com/uk.cfm?id=256922004&format=print.

126. *Id.*

127. Strictly speaking, the Fitness to Practice Panel has directed "that the person's name shall be erased from the register." Medical Act 1983, (Amendment) Order 2002, S.I. 2002/3135, §13.

128. News of the decision to remove Dr. Paterson's name from the register was broken in the *British Medical Journal* by Owen Dyer. Dyer, *supra* note 121. The Journal offers a "Rapid Response" feature which allows individuals to send letters by email in response to a particular article and sometimes a dialogue develops between correspondents. Correspondence relating to Dyer's article can be found by accessing the article at http://bmj.bmjjournals.com and clicking on "[r]ead responses to this article" on the top right-hand corner of the screen. Much of the correspondence was in support of Dr. Paterson and criticized the GMC decision. *See, e.g.*, Peter M.R. von Kaehne, *Time For an Overhaul of Child Protection* (March 14, 2004); Michael D. Innis, *Medical Ignorance Perverts Due Process in Alleged Child Abuse* (March 16, 2004); Mark Struthers, *Re: Time For an Overhaul of Child Protection* (March 20, 2004); and Michael Innis, *GMC Ruling Unjust* (June 16, 2004). Prior to Sir Roy Meadow being subject to the same sanction, albeit the sanction was short-lived, some commentators saw a sinister dimension in the fact that a person who gave evidence for the defense suffered a greater penalty than those who were witnesses for the prosecution. *See* von Kaehne, *supra.*

before her conviction was overturned. Each had lost children and, far from her loss attracting the sympathy usually extended to a bereaved parent, was vilified and blamed for the deaths. Each had family members who, fortunately for them, often showed incredible courage, loyalty and determination in campaigning on her behalf. Nonetheless, these relatives too had suffered bereavement and their plight was exacerbated by the legal system. In addition, there are the families of living children, torn apart amid allegations of MSBP. Although estimates of the number of families affected vary widely, there are undoubtedly cases where expert evidence has resulted in children being removed from their parents and, sometimes, adopted into new families.[129] Whether, on review, the removal proves to be unjustified remains to be seen, but it seems likely that at least some cases of unwarranted removal will emerge. For the children who can be returned to their parents, the disruption has been enormous; for those who cannot, the toll is immeasurable. Similarly, the parents have experienced nightmares that few of us can truly comprehend. Conversely, in the TBBD cases, there is no way of knowing how many children may have been returned to abusive situations because of expert evidence. Nor is it known how many parents are failing to address fundamental parenting problems, believing they are doing nothing wrong.[130]

However, the damage done by cases of this kind goes well beyond those individuals directly involved. Such cases discredit the whole legal process. When people are wrongfully convicted and incarcerated, the credibility of the legal system is damaged. Although lawyers might argue that the later correction of these errors is something of a tribute to the legal system's ability to police itself, there is little doubt that considerable harm is done by the fact that the errors occurred in the first place. In the context of child protection, whether we are addressing over-zealous intervention (MSBP) or a defense later found to be invalid (TBBD), these failures diminish public faith in the system and may result in a reluctance to trust it and to participate in it. Given that child protection relies on members of the public reporting cases of suspected abuse, society cannot afford to undermine public confidence in the child protection system.

In addition, these cases have, quite properly, discredited evidence of the expert witnesses involved. Both the MSBP and TBBD cases share the common

---

129. See *supra* footnotes 59-62 and accompanying text.

130. This danger was emphasized by Wall J, in *Re AB (Child Abuse: Expert Witness)*, 1 F.L.R. at 193, when he noted:

> If . . . the truth is that the parent has injured the child non-accidentally, the damage done by an opinion which exonerates the parent is severe. The process of acceptance and recognition is either set back or destroyed; the parent's conviction that he or she has not injured the child is reinforced; the question of rehabilitation of the child is rendered more complex and the risks to the child of a return to parental care become even more difficult to quantify. In short, both the parents and more importantly the child, whose interests are paramount, are ill-served.

characteristic of experts being allowed by the courts to advance their own theories – theories to which the experts were particularly attached. To some extent, the lawyers involved must bear responsibility. Why did those opposing the cases advanced by Sir Roy Meadow *et al.* not seek out their own experts of the right kind? Is this an indication of lawyers simply not being sufficiently well-versed in the sciences? It is a feature of the adversarial system that reliance is placed on the competing attorneys to make their cases. With the twenty-twenty vision afforded by hindsight, it seems that Sir Roy Meadow made some fundamental and elementary errors in the use of statistics. That did not become apparent until the General Medical Council heard evidence in his disciplinary case.[131] Had the defense lawyers working for Ms. Clark, Ms. Cannings, and Ms. Anthony known more about statistics, could the whole problem have been avoided? As we have seen, it was the evidence of other experts in the TBBD cases that went a long way to alerting the courts to the problems with Dr. Paterson's theory. It is not usually the function of the court to conduct its own investigation into the facts. Perhaps it should be or, at least, perhaps the court should have greater opportunity to appoint independent experts to assist it.

If these experiences make experts and courts more careful in the future, then that is all to the good. Certainly, there are recent examples of the established position of experts being called into question in other contexts and it may be that this questioning process has been facilitated by the recent experiences of MSBP and TBBD. So, for example, a healthy debate is now underway with respect to shaken baby syndrome and the evidence of its occurrence.[132] However, these cases may have had a more general negative effect in tainting all expert evidence, creating a risk that well-researched and accurate expert evidence may carry less weight in the future. This, in turn, could lead to further injustice to litigants and risk to children.

What of the professionals involved? Clearly, individual careers have been damaged. For Sir Roy Meadow, who is seventy-two years old and retired, the temporary loss of his license to practice medicine had little practical impact. Nor was the diminution to his reputation as significant as it might have been. While disciplinary proceedings were pending, he was invited to speak at an international conference.[133] Only one week after he lost his license, the Court of Appeal, in England, went out of its way to stress that Sir Roy Meadow "had and still has enormous expertise" as a child abuse expert.[134] Dr. Colin

131. *See supra* footnote 76 and accompanying text.

132. *See supra* footnote 6.

133. Doward, *supra* note 54 (reporting that he was invited to speak at an international conference for child protection workers in San Diego in January 2005). An argument might be made that, since disciplinary proceedings were pending, it was correct that he should benefit from the presumption of innocence. However, the convictions of Sally Clark and Angela Cannings had already been overturned by this time and there had been considerable publicity of Sir Roy's role in each.

134. Refusing the appeal in *R v. Martin*, [2005] EWCA Crim. 2043, para.26,

Patterson is also retired, albeit he has lost his license to practice his profession. As we have seen, others involved have got off rather more lightly.[135] While it is sad to see distinguished careers end in ignominy,[136] where a professional has overstated a case or has erred, causing such significant consequences for others, public sympathy is likely to be somewhat minimal.

The lack of humility shown by some of the experts involved is remarkable. Most have not apologized for their actions, albeit Sir Roy Meadow came close at the eleventh hour in the course of his disciplinary hearing before the GMC.[137] For some of the experts involved, the failure to engage in a public "mea culpa" may be due to the fact that they still think they are correct.[138] Others may believe their actions are excused by the fact that they acted in good faith.[139]

What of the impact on the medical profession, more generally? Failure by an individual member of a profession reflects badly on the profession as a whole, which is why bar associations are so harsh on attorneys who transgress. On February 2, 2004, as the Meadow affair unfolded, Professor Sir Alan Craft, President of the Royal College of Paediatrics and Child Care, had a letter published in The Times. It contained the following statements:

> The recent cases concerning cot deaths . . . and suspected Munchausen syndrome by proxy (which has been redefined in recent years as "factitious or induced illness") have confused the legal and medical professions and public. . . . We accept that there must be a review of any cases involving unexplained infant deaths where there may have been a miscarriage of justice. However, this will do nothing to restore public and

---

135. See *supra* footnotes 74-78 and accompanying text

136. In the light of the Court of Appeal's recent attempt, in *R v. Martin* [2005] EWCA 2043, to rehabilitate Sir Roy Meadow's reputation, the reinstatement of his license and the fact that he remains welcome as a speaker in the US, perhaps "ignominy" has not been his fate.

137. Ben Farmer, *Meadow says sorry to family of jailed cot death mother*, THE SCOTSMAN, July 7, 2005, *available at* http://news.scotsman.com/topics.cfm?tid=892&id=751412005. That headline is, itself, somewhat misleading if it is read to mean that Sir Roy Meadow made a spontaneous apology. The story deals with the GMC hearing where misleading statistical evidence was being discussed and counsel asking him, "[i]s that something you feel profoundly sorry about?", to which he is reported as replying, "[y]es, it is." *Id.*

138. Far from apologizing, it is reported that Professor Southall stands by the allegations he made against Mr. Clark and has vowed to "continue working for children." Karen McVeigh, *Still in a Job – the Child Doctor Who Falsely Accused a Father of Murder*, THE SCOTSMAN, Aug. 7, 2004, at 1.

139. A statement made to the press on behalf of Dr. Paterson included the following:

> Dr. Paterson is naturally very disappointed with the decision reached by the GMC. He has spent his working life helping others and researching the intricacies of brittle bone disease, in which he is acknowledged as a world expert. He has never knowingly misled any tribunal or court in setting out his views and has always had regard for the views of others."

Duncan, *supra* note 125.

> professional confidence in the management of child abuse. Many medical posts in the field of child protection remain unfilled and paediatricians are, not surprisingly, increasingly reluctant to act as expert witnesses in these complex cases. 140

If, as indeed appears to be the case, young doctors are less willing to enter the field of community pediatrics for fear of litigation,[141] and experienced pediatricians are becoming reluctant to offer their services as expert witnesses, then the child protection system is, again, placed in jeopardy. However, Professor Craft's response to justified public concern is somewhat defensive, if not downright threatening. It comes very close to saying, "if you dare to criticize us, we will take our ball and go home."[142] To be fair, once some of the dust had settled, the Royal College of Paediatrics and Child Health took a more constructive approach to the issues raised. It launched two reviews, one examining the quality of evidence in recent high-profile child abuse cases and the other addressing recent research on child abuse.[143] In addition, together with the Royal College of Pathologists, it established a working group to develop a protocol for the care and investigations of SIDS cases.[144] Despite the

---

140. Letter from Professor Sir Alan Craft, President, Royal College of Paediatrics & Child Health, *Need to review child protection*, THE TIMES, Feb. 2, 2004 at 17. On February 11, 2004, he wrote to the members of the Royal College itself, highlighting "an unprecedented number of media attacks on paediatricians." He noted that this was exacerbating an existing problem "that paediatricians are becoming reluctant to become involved in child protection unless they absolutely have to." Kent County Council v. The Mother, The Father, B, [2004] EWHC 411, ¶ 88 (Fam.). In 2003, Professor Craft's predecessor commented in the *British Medical Journal* that one reason for the unpopularity of child protection as a pediatric specialty was "the fear of complaints and litigation." *Id.* at ¶ 89. He continued, "No one condones poor clinical practice, but some complaints are malicious and are intended to obstruct social work and police investigations, and some arise from orchestrated campaigns." *Id.*

141. A survey conducted by the Royal College of Paediatrics and Child Care found that, while the number of pediatricians in the United Kingdom rose quite rapidly by 15.2% between 2001 and 2003, less than 1% of them were going into work in the community covering child protection cases and 7.4% of consultant posts in community trusts remained unfilled. Royal College of Paediatrics and Child Care, *Supporting Services for Children: Workforce Census 2003* (Mar. 2005), *available at* http://www.rcpch.ac.uk/publications/research_division_workforce_docs/Censusnew.pdf.

142. It is a pity that members of the public are less likely to see the article Professor Craft co-authored and published only months later, which is rather more balanced and less defensive. *See generally* Craft & Hall, *supra* note 34.

143. Liam McDougall, *Testimony of Child Abuse Experts Under New Scrutiny*, SUNDAY HERALD, May 9, 2004, at 11. The Royal College of Paediatrics and Child Health was not helpful in providing further details of these reviews. An email from the author was passed on by the designated recipient to another person, but the latter did not respond.

144. THE ROYAL COLLEGE OF PATHOLOGISTS & THE ROYAL COLLEGE OF PAEDIATRICS & CHILD HEALTH, *Sudden Unexpected Death in Infancy: A Multi-agency Protocol for Care and Investigation* (2004). This was the report of a working group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health and can be found by searching at www.rcpch.ac.uk.

responses of the professional bodies, some members of the medical profession continue to see Sir Roy Meadow's treatment as scapegoating.[145]

Lest we respond to these implicit threats and fall into the trap of undue deference to medical experts, it is worth noting that a balance can be struck. In *Kent County Council v. The Mother, The Father, B*,[146] for example, a mother, who claimed she had been falsely accused of suffering from MSBP and harming her child, sought to publicize her case in the press. The pediatricians involved sought to protect their identity. In balancing the competing interests of freedom of speech and privacy, Justice Munby noted that, "it is scarcely an exaggeration to say that Sir Roy Meadow has been pilloried and almost demonised in the media."[147] However, he acknowledged that "there is a powerful public interest . . . in knowing who the experts are whose theories and evidence underpin judicial decisions which are increasingly coming under critical and sceptical scrutiny."[148] In the event, he went on to protect the identity of two pediatricians.

Central to ensuring that the legal system makes the best use of sound expert evidence while guarding against that which is hasty, exaggerated, or just plain wrong, are the rules and procedures employed by courts in admitting expert evidence and attaching the appropriate weight to it. What, then, are the relevant rules and procedures?

ADMITTING EXPERT EVIDENCE IN THE UNITED KINGDOM AND THE WEIGHT TO BE ATTACHED TO IT

In England and Wales, reference is made to the "expert witness"[149] and, while the more traditional Scottish term is "skilled witness,"[150] the former will be used here since it is used and understood in both jurisdictions.[151] Essentially, there are three issues to be resolved with respect to expert evidence. First is the question of admissibility: that is, whether the expert evidence will be

145. *See, e.g.*, Richard Horton, *In Defence of Roy Meadows*, 366 LANCET 3, 3-5 (July 2, 2005); Clare Dyer, *Professor Sir Roy Meadow Struck Off*, 331 BRIT. MED. J. 177 (2005) (quoting Sir Alan Craft as saying: "The one thing it will do is frighten any sensible doctor away from doing expert witness work, and the more eminent you are and the more important you are in terms of providing expert evidence the less likely you will be to provide it in the future.")

146. Kent County Council v. The Mother, The Father, B, [2004] EWHC 411 (Fam.).

147. *Id.* at ¶ 129.

148. *Id.*

149. COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 568-72 (10th ed. 2004).

150. W.G. DICKSON, A TREATISE ON THE LAW OF EVIDENCE IN SCOTLAND (3rd ed. 1887) (writing in 1887, Dickson noted the English origins of the term "expert" in this context).

151. Many modern Scottish writers note the English origins of the term "expert witness" and go on to use it nonetheless. *See, e.g.*, I.D. MACPHAIL, EVIDENCE ¶¶17.10A et seq. (1987); FIONA RAITT, EVIDENCE 337-53 (3rd ed. 2001). *Cf.*, A.G. WALKER & N.M.L. WALKER, THE LAW OF EVIDENCE IN SCOTLAND 241, (2nd ed. 2000) (illustrating that the term "skilled witness" is preferred "since it reflects the range of attributes which may qualify the witness to give opinion evidence").

heard at all. Second, if expert evidence is admitted, there is the issue of the content of the expert's evidence and, in particular, the permitted parameters of opinion evidence. Third is the matter of the weight to be attached to the expert's evidence. The first two issues are questions of law, to be decided by the court, and the third is for the trier of fact, either a judge or a jury. It is worth bearing in mind that, in civil cases in the United Kingdom, fact-finding is almost exclusively the province of the judiciary, since civil juries are something of a rarity and are unknown in adoption and child protection proceedings. In criminal trials, juries are a key feature of the system except for more minor offences.

Turning to the question of the admissibility of expert evidence, the first hurdle to overcome is demonstrating the need for such evidence. As Lord Justice Lawton put it: "[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."[152] Ordinary human behavior is usually regarded as inappropriate for expert testimony for this reason.[153] Giving a hint of the danger of undue deference to experts, his Lordship continued:

> The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.[154]

Since medical conditions and syndromes will often be beyond the knowledge of ordinary people, evidence about them from an expert will often be entirely appropriate. Assuming that the court accepts the need for expert evidence, the qualifications and experience of the individual expert proffered must be established. Details of the witness' degrees, other qualifications, publications, memberships of learned societies, and professional organizations, and the like, will normally suffice to demonstrate the requisite level of expertise.[155] Only rarely will a witness be cross-examined on the question of qualifications, and

---

152. R. v. Turner, [1975] Q.B. 834, 841.

153. In exceptional circumstances, evidence of human nature and behavior falling short of a psychiatric condition will be permitted. *See* Malcolm D. MacLeod & David Sheldon, *From Normative to Positive Data: Expert Psychological Evidence Re-examined*, CRIM. L.REV. 811, 812 (Nov. 1991).

154. *Turner*, [1975] Q.B. at 841.

155. Formal qualifications are not essential and expert evidence may be based on the witness' practical experience. In an older English case, a solicitor (attorney) was permitted to give evidence on handwriting on the basis of his amateur interest in the subject. Queen v. Silverlock, [1894] 2 Q.B. 766, 767. *See also* R. v. Murphy, [1980] Q.B. 434, 436-37 (permitting an experienced police officer to give evidence on the speed and displacement of vehicles involved in a road accident); White v. H. M. Advocate, [1991] S.C.C.R. 555 (permitting experienced police officers to give evidence on the quantity of drugs an individual might reasonably possess for his own consumption).

medical experts, like Sir Roy Meadow and Dr. Colin Paterson, would have had no difficulty in demonstrating the requisite expertise.

Unlike their counterparts in the United States, where judges perform a gate-keeping function,[156] courts in the United Kingdom do not engage in detailed exploration of the subject-matter of the evidence at this stage, since that is more usually addressed in assessing the weight to be attached to the evidence. Nonetheless, the ordinary rules of relevance and reliability apply,[157] and these may inject an element of gate-keeping when the court determines whether the evidence proffered is, indeed, expert evidence at all. Thus, for example, the Court of Appeal in England found inadmissible the evidence of a psychologist who offered his opinion on human behavior indicating the likelihood of the deceased having committed suicide, rather than having been killed by her husband, on the basis that it "was not expert evidence of a kind properly to be placed before the Court."[158] In reaching this conclusion, it noted, "his reports identify no criteria by reference to which the Court could test the quality of his opinions: there is no data base comparing real and questionable suicides and there is no substantial body of academic writing approving his methodology."[159] Having got the expert witness into court, what of the content of the evidence he or she may give? Frequently, the expert will be giving evidence of matters observed first-hand or tests he or she has carried out, with the evidence of the pathologist who carried out an autopsy being an obvious example. It is permissible for the expert to refer to relevant literature and texts and passages so referred to, although not the rest of the document, become part of the expert's opinion.[160] Most significant for our purpose is the role of the expert witness in expressing opinions. It is sometimes suggested that there is a general rule to the effect that a witness must give evidence of facts, not opinions. However, it is widely acknowledged that the rule is honored more in the breach than the observance, even as it relates to non-expert (ordinary) witnesses.[161] Whatever the position with respect to ordinary witnesses, when

---

156. *See infra* footnotes 179-204 and accompanying text.

157. For an example of how general court procedures may limit scrutiny of a particular claim of expertise, see Mearns v. Smedvig Ltd., 1999 S.C. 243, 250 (1998) (where the Outer House of the Court of Session refused to require the pursuer in a personal injury case to submit to quasi-medical tests as to the effects of a particular injury (the "Blankenship system") to be carried out by a person who was not medically-qualified and whose methods were novel and unorthodox in nature and not yet accepted by the medical profession).

158. R. v. Gilfoyle, [2001] 2 Cr.App.R. 57, 67 (Eng.). The court could have reached the same decision by applying the rule that expert evidence on the behavior of ordinary people is inadmissible.

159. *Id.*

160. Main v. McAndrew Wormald Ltd., 1988 S.L.T. 141, 142 (Scot.). *See also* Balmoral Group Ltd. v. H.M. Advocate, 1996 S.L.T. 1230, 1231 (Scot.) (stating it is permissible for an expert to refer to an unapproved code of practice since he was simply asked whether he regarded it as a statement of good practice).

161. Indeed, the Law Reform Committee noted that an ordinary witness might more naturally give an accurate account of events by mixing a certain amount of opinion with the

"the issue involves scientific knowledge, or acquaintance with the rules of any trade, manufacture, or business, with which men of ordinary intelligence are not likely to be familiar,"[162] it is permissible for the expert witness to express opinions on the relevant matters and, indeed, that is often the whole point of calling an expert witness. An obvious example here would be the expert witness speaking to the standard of care to be expected of a member of a particular profession. However, it is crucial that, prior to offering opinion evidence, a factual basis for that evidence must be laid.[163] This will be of particular importance where, for example, a witness is speaking to the existence of a syndrome and its applicability to a particular individual, but has never met or examined the individual.

In all of this, the role of the expert is to assist the court, rather than to advocate for a particular position.[164] A Scottish court had the opportunity to explore this point in a recent case, where the widow of a cigarette smoker who had died of lung cancer was seeking damages from a tobacco company.[165] The court heard from a number of expert witnesses on the subject of the link between smoking cigarettes and contracting lung cancer. It noted that the witnesses for the pursuer (plaintiff) "were or had been connected in one way or another with ASH [an anti-smoking lobbying group], and were clearly committed to the anti-smoking cause; and no doubt for this reason were prepared to give evidence *gratis*."[166] While this generosity on their part was not, in itself, fatal, the court felt it justified "scrutiny of each of their evidence, so as to see to what extent they complied with their obligations as independent expert witnesses and how soundly based their views were."[167] In the event, the

---

facts. *See* Law Reform Committee, *17th Report: Evidence of Opinion and Expert Evidence* ¶ 4 (1970, Cmnd 4489). *See also* WALKER, *supra* note 151, at 239 (stating that "[t]estimony, which at first sight appears to be of fact, may prove to be actually of belief or opinion" and citing identification of a person as an example).

162. DICKSON, *supra* note 150, at ¶ 397.

163. TAPPER, *supra* note 149, at 568. ("The facts upon which an expert's opinion is based must be proved by admissible evidence . . . ."); WALKER, *supra* note 151, at 244 ("Since opinion is based on a certain state of facts, it is valueless unless the facts are averred and proved.").

164. In National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd, [1993] 2 Lloyd's Rep. 68, 22 (Eng.), Mr. Justice Cresswell set out the duties and responsibilities of expert witnesses and included the following:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . . .
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise . . . . An expert witness in the High Court should never assume the role of an advocate.

Id.

165. McTear v. Imperial Tobacco Ltd., [2005] C.S.O.H. 69 (Sess. Cass.), *available at* http://www.scotcourts.gov.uk/opinions/2005csoh69.html (the Scottish Court website).

166. *Id.* at ¶ 5.18. The court noted that the expert witnesses for the defender had charged for their services but found this unsurprising stating: "This is generally the case: expert witnesses are usually professional people who would normally expect to seek appropriate remuneration for research, preparation of reports and attendance at court." *Id.*

167. *Id.* at ¶ 5.18.

court found that none of them had been "mindful of the need to be independent and each appeared . . . to engage in advocacy to a greater or lesser extent,"[168] and this greatly diminished the value the court attached to their evidence.

The opinion of a given expert is open to challenge, of course, either through cross-examination or by leading other expert witnesses who reach a different conclusion: a technique used to great effect in *McTear*. Despite these safeguards, it is a matter for concern that expert witnesses were able to have the impact they did in the context of MSBP and TBBD. However, such problems with expert scientific evidence are not new.[169]

On the third question posed at the beginning of this section, the weight to be attached to the expert's evidence, one cannot do better than to remember the words of Lord President Cooper from 1953. In what has come to be the *locus classicus* of the position of the expert witness in the Scottish courts, he said:

> Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or a Judge sitting as a jury . . . . Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence . . . the decision is for the Judge or jury.[170]

This position has long been accepted in England, where the above passage is cited frequently with approval.[171] The weight to be attached to particular evidence is a question of fact and, on occasion, courts have been quite brutal in their condemnation of particular expert evidence.[172] While the trier of fact is not bound by expert opinion, the Court of Appeal issued the following warning:

---

168. *Id.* at ¶ 6.149.

169. In the 1970s and 1980s, the evidence of a leading Home Office forensic scientist resulted in a number of successful appeals in criminal cases. In Preece v. H.M. Advocate, 1981 CRIM.L.R. 783 (1981),a man who had served seven years of a life sentence had his conviction overturned when it became apparent that the expert had drawn unwarranted conclusions from blood samples and seminal stains. In 1999, a police officer, Shirley McKie, was acquitted of perjury arising from the alleged presence of her fingerprint at a murder scene where she claimed never to have been. Her acquittal was based largely on two fingerprint witnesses from the United States who discredited the evidence of the experts from the Scottish Criminal Records Office Fingerprint Bureau. An internal inquiry followed, resulting in changes in procedure, and the man convicted of the murder appealed. For a discussion of this case, see RAITT, *supra* note 151at 347. In February 2005, Ms McKie accepted a settlement of £750,000 from the Scottish Executive and there have been calls for a public enquiry into the whole affair: Michael Howie et al, *Pressure builds for a public inquiry into McKie affair* THE SCOTSMAN, February 23, 2006, at 10.

170. Davie v. Magistrates of Edinburgh, 1953 S.C. 34, 40 (Sess. Cas.).

171. *See, e.g.*, TAPPER, *supra* note 149. at 569.

172. *E.g.*, Re B. (a child), [2003] 2 FCR 156, ¶ 36 (Eng. C.A.) (addressing the issue of ordering a child to be given the controversial combined MMR (measles, mumps and rubella)

> Where expert evidence is admissible in order to enable the judge to reach a properly informed decision on a technical matter, then he cannot set his own 'lay' opinion against the expert evidence which he has heard. But he is not bound to accept the evidence even of an expert witness, if there is a proper basis for rejecting it in the other evidence which he has heard, or the expert evidence is such that he does not believe it or for whatever reason is not convinced by it.[173]

As we have seen, there was considerable criticism of the evidence of Dr. Paterson in the courts. It took longer for Sir Roy Meadow's evidence to be subject to similar challenge, but the courts got there eventually. Nonetheless, in each case, we have examples of later-discredited evidence being admitted and weight being attached to it. This can only add strength to the calls for rethinking the law on admissibility of expert evidence in the United Kingdom.[174] In that, can anything be learned from the very different approach taken in the United States?

ADMISSIBILITY OF EXPERT EVIDENCE IN THE UNITED STATES

In the United States, as in the United Kingdom, the court must be satisfied, first, that the assistance of an expert is warranted by the subject-matter in question. That is to say, "the subject of the inference must be so distinctively related to a science, profession, business, or occupation as to beyond the ken of lay persons."[175] While there is some support for the view that this permits the judge a degree of latitude in determining whether an expert is really required, the Federal Rules of Evidence tend to permit expert evidence where it is simply helpful. Rule 702 provides for the use of expert evidence "if scientific, technical or other specialized knowledge *will assist* the trier of fact to understand the evidence or to determine a fact in issue . . . ."[176] The second hurdle to overcome, in introducing expert evidence, relates to the credentials of the particular expert witness presented, since Rule 702 refers to "an expert by knowledge, skill, experience, training, or education . . . ."[177] Given the

---

vaccine, Lord Justice Sedley went as far as to brand the views of one expert witness "junk science").

173. Dover Dist. Council v. Sherred, (1997) 29 H.L.R. 864 (Eng. C.A.).

174. *See, e.g.*, MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE ch. 5 (2001). *See also* Simon Pearl & Genesta Luxmoore, *The Judge as Gatekeeper - a US Practice Worth Adopting*, 148 NEW L.J. 974 (1998).

175. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 13 (5th ed. 1999 & Supp. 2003). *See also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 7.6 (2nd ed. 1999 & Supp. 2004).

176. PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 385 (3rd ed. 2005) (emphasis added). Even where expert evidence would be of assistance, it may still be excluded if it would tend to mislead or prejudice the jury, for example, by introducing evidence they cannot evaluate for themselves. *Id.* at 76.

177. *Id.*

abundance of experts offering their services, this should not be a difficult hurdle to leap. State courts apply much the same two tests in terms of subject-matter need and the qualification of the expert.[178]

Thereafter, the U.S. approach to admissibility of expert evidence diverges, quite dramatically, from that found in the United Kingdom, by requiring U.S. judges to play a more active part in assessing the validity of scientific evidence. The following is a brief overview of how this central role for the judiciary has developed. The federal courts first recognized the need for a specific rule in 1923, in what came to be known as the "*Frye* test", which requires that expert evidence had to be "generally accepted" in order to be admissible. Considering whether to admit evidence of a "systolic blood pressure test" (a precursor of the polygraph), the Court of Appeals for the District of Columbia was confronted, in *Frye v. United States*,[179] with a novel scientific development. It articulated the test in the following terms:

> Just when scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[180]

While the *Frye* test was adopted subsequently in many state courts,[181] its status was called into question at federal level in the 1970s, in part due to what were then the new Federal Rules of Evidence.[182] In addition, there were concerns that either it excluded useful evidence or that some evidence could pass the test and yet result in a court being presented with evidence that was too inconclusive to be of assistance.

The U.S. Supreme Court sought to clarify matters, in 1993, in *Daubert v. Merrell Dow Pharmaceuticals*.[183] There, the plaintiffs were two young

178. STRONG, *supra* note 2, at §13; *See also*, MUELLER & KIRKPATRICK, *supra* note 175, at §7.5.

179. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

180. *Id.* at 1014.

181. *See* Alice B. Lustre, *Post-Daubert* Standards *for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453 (stating that the *Frye* test, or variants thereon, continues to be employed in a number of states today).

182. Rule 702 is of particular relevance here. Pre-*Daubert* it read as follows: "If scientific, technical or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." *See infra* note 197 for the post-*Daubert* amendments to Rule 702.

183. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

children who claimed that their limb reduction defects were the result of their mothers having taken an anti-nausea drug, Bendectin, during pregnancy. They were unsuccessful in securing damages from the manufacturer of the drug because they could not produce published studies demonstrating that Bendectin did actually cause limb reduction.[184] While the Court clarified that the *Frye* test had been superseded and displaced by the Federal Rules of Evidence,[185] for our present purpose, the greater significance of the case was the new test it laid down for the admissibility of expert scientific evidence and the proactive role given to judges. Under what came to be known, unsurprisingly enough, as the "*Daubert* test", judges are charged with the function of acting as gatekeepers in determining the admissibility of expert scientific evidence by applying a two-stage test. First, the judge must determine whether the evidence is, indeed, "scientific knowledge". While the Court did not provide any satisfactory definition of "scientific knowledge",[186] Justice Blackmun set out the criteria for this evaluation.[187] He made clear that the following questions should be asked in respect of the theory or technique, but should be regarded as neither exhaustive nor as exclusive: [188] (a) Can the theory or technique be tested and has it been so tested;[189] (b) Has it been subjected to peer review and publication;[190] (c) What is its known or potential error rate; (d) Is there a standard governing the operation of the technique; (e) To what extent is it generally accepted in the relevant scientific community?[191] Thus, the *Frye* test

184. Under the relevant procedure, the defendants were granted summary judgment at district court level. *Id.* at 583.

185. *Id.* at 587.

186. *Id.* at 590-91. Justice Blackmun describes "scientific knowledge" as "an inference or assertion . . . derived by the scientific method." *Id.* He refers to the "scientific method" as "scientific knowledge" that "implies a grounding in the methods and procedures of science." *Id.*

187. *Id.* at 593-94.

188. The Court elaborated in *Kumho Tire Co. Ltd. v. Carmichael*, saying: "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts in every case." Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). That decision also extended the *Daubert* test to all expert evidence. *Id.*

189. KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) Justice Blackmun quoted Karl Popper in *Daubert* as follows: "The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." *Daubert*, 509 U.S. at 593.

190. *Daubert*, 509 U.S. at 593-94. Justice Blackmun's elaboration on this criterion was quoted as follows:

> Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science', in part because it increases the likelihood that substantive flaws in methodology will be detected. . . . The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Id.

191. *Id.* With respect to this criterion, Justice Blackmun quoted, with approval, from United States v. Dowling, 753 F.2d 1224, 1238 (3rd Cir, 1985): "[a] reliability assessment does

was subsumed into a more wide-ranging enquiry. Only if the evidence qualifies under the first step, need the judge move on to the second step and assess the relevance of the evidence to the particular case and admit it if it will "assist the trier of fact to understand the evidence or determine a fact at issue".[192] This second issue has been described as one of "fit" and as "an aspect of relevancy and helpfulness".[193] As the Court acknowledged, "'[f]it' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes".[194] The *Daubert* test has been adopted, in whole or in part, in over thirty states.[195] It was refined by subsequent case law[196] and, as a result, the Federal Rules of Evidence were amended further in 2001 to include more specific reference to *Daubert*-type criteria.[197]

The result is that U.S. judges are now called upon to play a very active gatekeeping function in assessing expert evidence at the stage of admissibility. The *Daubert* Court itself was at pains to point out that the judge is focused "solely on principles and methodology, not on the conclusions that they generate,"[198] albeit the Court has since acknowledged that "conclusions and methodology are not entirely distinct from one another."[199] The Court was mindful of the dangers posed by scientific evidence and noted Rule 403 of the

---

not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *Daubert*, 509 U.S. at 594.

192. *Id.* at 592.

193. MUELLER & KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 7.17 (4th ed. 2000).

194. *Daubert*, 509 U.S. at 591. The question of "fit" was further clarified in *General Electric Company v. Joiner*, where a majority of the Court observed "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).

195. Each state has its own admissibility standards, used in state courts, and they can be classified as states that have adopted the *Daubert* test; those that continue to apply the *Frye* test; those that have not rejected *Frye* entirely but which apply *Daubert* factors; and those which have developed their own tests. For a full discussion of where each state fits into this picture, see Lustre, *supra* note 181.

196. While the *Daubert* Court emphasized that its criteria provided a non-exclusive list, the courts have developed the criteria further. A good summary of the developments is set out in the *Advisory Committee's Note to FRE 207 as Amended December 1, 2001*. This note is reproduced as Appendix 1 to MUELLER AND KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES (Supp. 2004).

197. *Daubert*-type criteria were added to Rule 702 which now reads as follows (the additions are indicated in italics):

> If scientific, technical or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

FED. R. EVID. 702 (emphasis added).

198. *Daubert*, 509 U.S. at 595.

199. *Joiner*, 522 U.S. at 146.

Federal Rules of Evidence, which permits exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair *prejudice*, confusion of the issues, or misleading the jury."[200] Further, it addressed the concern raised in the case that its approach would "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions".[201] However, it viewed this concern as "overly pessimistic about the capabilities of the jury and the adversary system generally."[202] Chief Justice Rehnquist's opinion in *Daubert* noted that "judges should not become amateur scientists"[203] but, as has been observed, "that and more is surely what *Daubert* presupposes."[204]

Initially, at least, it has been suggested that members of the federal judiciary were not particularly welcoming of the *Daubert* test.[205] A recent survey of U.S. state judges sheds more light on how the *Daubert* test operated prior to the latest round of amendments to the Federal Rules of Evidence, and it addresses the operation of basic concepts that remain central to admissibility decisions. In the first part of the study,[206] four hundred state judges were sampled and ninety-four percent of those responding said they found the *Daubert* test valuable in their decision-making, with fifty-five percent expressing the view that it provided "a great deal of value."[207] So much for the popularity of *Daubert*, but what of its efficacy? This is where the survey signals cause for concern, since it demonstrated that an overwhelming number of judges did not understand two of the basic concepts used in the *Daubert* test. While eighty-eight percent of the judges reported that they found "falsifiability" to be a useful guideline in determining the merits of proffered scientific evidence, only six percent of them demonstrated a true understanding of the concept of falsifiability.[208] Similarly, while ninety-one percent of judges reported that they found "error rates" to be useful in assessing the quality of the

200. ROTHSTEIN, *supra* note 176, at 385 (emphasis added).

201. *Daubert*, 509 U.S. at 595.

202. *Id.* at 596.

203. *Id.* at 601, (Rehnquist, C.J., concurring in part, dissenting in part).

204. MUELLER & KIRKPATRICK, *supra* note 175, at § 7.17.

205. Rorie Sherman, *Judges Learning Daubert: 'Junk Science' Rule Used Broadly*, NAT'L L.J., Oct. 4, 1993. "Many federal judges believe *Daubert* has made their lives more difficult... . They are going to have to give a more reasoned statement about why they are letting in evidence." *Id.*

206. Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 441 (2001). Part I of the study, a total of four hundred surveys of judges were completed with a seventy-one percent response rate. The surveys were conducted by means of a structured telephone interview. *Id.*

207. *Id.* at 443.

208. *Id.* at 444. Perhaps this finding should come as no surprise in the light of the observation of Chief Justice Rehnquist in *Daubert* itself, when he wrote: "I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability', and I suspect some of them will be, too." *Daubert*, 509 U.S. at 600 (Rehnquist, C.J., concurring in part, dissenting in part).

evidence offered, only four percent of them demonstrated an accurate understanding of the definition of error rates.[209] They did considerably better in understanding what was meant by two of the other *Daubert* criteria, "peer review and publication"[210] and "general acceptance",[211] but the results of the study do suggest that a *Daubert*-type test is, perhaps, just too technical and complicated for every-day use in the courts. Like earlier studies, analyzing judicial opinions, it may be that judges simply do not have the requisite knowledge or skills to engage in this kind of scientific evaluation.[212]

The second part of the study was based on the responses of 325 state judges [213] and was rather more specific in its ambit.[214] For our present purpose, the responses addressing psychological syndromes are of particular interest.[215] Judicial experience of a range of syndromes varied[216] and, while MSPB was not one of the syndromes addressed by the researchers specifically, eight of the judges mentioned "factitious disorders" when asked about experience of other syndromes.[217] The judges were asked to identify what aspects of psychological syndrome evidence they found most problematic in determining admissibility.

---

209. Gatowski, *supra*, note 206, at 45-47. In *Daubert*, the Supreme Court opined that "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation . . . ." *Daubert*, 509 U.S. at 594. It was against this standard that the judges were tested.

210. Gatowski, *supra* note 206, at 447. Seventy-one percent responded in a way that showed a clear understanding of the peer review process. *Id.* Even here, ten percent demonstrated a clear lack of understanding of the process. *Id.* This improved performance is not surprising when one remembers that "peer review and publication" is a familiar concept, at least in academic legal circles.

211. *Id.* at 447-48. Eighty-two percent demonstrated an accurate understanding of "general acceptance": It should be remembered that "general acceptance" is the familiar *Frye* test. *Id.*

212. *See* Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 72 (1998).

213. Veronica Dahir et al., *Judicial Application of Daubert to Psychological Syndrome and Profile Evidence*, 11 PSYCHOL. PUB. POL'Y. & L. 62, 68 (2005). Judges who completed Part I of the survey were given the option of participating in Part II, which was conducted by means of structured telephone interviews or written questionnaires and had an eighty-one percent response rate. *Id.*

214. Part II was directed to judges' experience with particular kinds of scientific evidence (DNA, epidemiology, specific kinds of psychological evidence, including syndromes and profiles) and their techniques for managing scientific evidence in court. Gatowski, *supra* note 206, at 440; Dahir, *supra* note 213, at 67.

215. Dahir, *supra* note 213, at 68-9. Of the 325 judges who participated in part II of the study, 318 provided codable answers to the questions dealing with syndromes, and 260 reported at least some exposure to psychological syndrome evidence. *Id.* at 68.

216. *See id.* at 69. The syndromes on which the study focused particularly (the rate of "some" experience is shown in brackets) were: battered women's syndrome (78%); rape trauma syndrome (64%); child sex abuse accommodation syndrome (75%); parental alienation syndrome (39%); repressed memory syndrome (41%); and post-traumatic stress disorder (79%). *Id.*

217. *Id.* at 70.

Perhaps it is rather telling that few of the judges mentioned the *Daubert* criteria at all,[218] referring slightly more often to qualification of the expert, subjectivity of the diagnostic process, and application to the particular case (relevance), as being of greater concern.[219] While one might conclude from this that the judges surveyed found the *Daubert* criteria unproblematic, the results of Part I of the study, demonstrating a lack of judicial competence in aspects of the criteria, should be borne in mind. Thus, it is not unreasonable for the researchers to conclude, as they do, that their "results reveal a strong tendency for judges to continue to rely on more traditional standards such as general acceptance and qualifications of the expert when assessing psychological syndrome . . . evidence."[220]

WOULD APPLICATION OF THE *DAUBERT* TEST HAVE MADE A DIFFERENCE?

A crucial question is whether application of the *Daubert* test would have dealt with the Meadow-Paterson problem in a U.S. context. As we have seen, the *Daubert* test involves a number of elements: falsifiability; peer review and publication; error rate; and general acceptability.[221] We have also seen that many judges have a great deal better understanding of two of these elements - peer review and publication and general acceptability - than they do of the others.[222] It can certainly be argued that it is the factors that judges understand that weigh most heavily when they make their decisions. Conversely, if judges do not understand some of the elements of the *Daubert* test, it can be doubted that these factors play any significant part in their decision-making process. There is no reason to suppose that members of the judiciary in the United Kingdom are any more science-savvy than their U.S. counterparts and, indeed, their educational backgrounds may suggest that many are likely to be less so.[223]

Turning first to peer review and publication, it should be remembered that both Sir Roy Meadow and, perhaps to a lesser extent, Dr. Paterson were eminent members of their profession with a slew of publications to their names. As far as general acceptability is concerned, it is important to note that it already forms part of the test of admissibility of expert evidence in the United Kingdom. In any event, Sir Roy Meadow certainly had no difficulty in attracting a significant following from other members of the profession, in part

218. *Id.* at 72. The most often-cited of the *Daubert* criteria was "general acceptance", which was mentioned by nine percent of the judges, with "falsifiability" and "peer review and publication" receiving only three mentions each. *Id.*

219. *Id.* Each was mentioned in eleven percent of the responses. *Id.*

220. *Id.* at 74-5.

221. See the discussion at footnotes 186-194 and accompanying text.

222. See footnotes 206-212 and accompanying text.

223. While the study of law in the United States is undertaken at post-graduate level, it is usually studied at the undergraduate level in the United Kingdom, with most law students proceeding straight from high school to law school. Thus, most members of the judiciary in the United Kingdom will not have had exposure to the sciences at college or university level.

due to his very eminence so, again, that element of the *Daubert* test would probably have been satisfied. Dr. Paterson's theory was always subject to more controversy, but it may have attracted sufficient support to pass muster and, as we have seen, did so on occasions in the United States under the general acceptability standard of the *Frye* test.[224] Even supposing that the other elements of the *Daubert* test - falsifiability and error rates - had been understood and applied, the very facts that might have caused the expert evidence to be rejected were not led in the MSBP cases.

It is difficult to assess whether the *Daubert* test proved helpful with respect to MSBP in the United States in avoiding the debacle experienced in the United Kingdom, since the position taken here is not that the phenomenon of parents fabricating illness in children never occurs. We have ample evidence that it does. The difficulty exemplified by the United Kingdom cases is that it was being inappropriately diagnosed. Thus, the fact that MSBP has been found to be present in a given case in the United States is of no assistance.[225] Slightly more insight can be gleaned from how TBBD played out in the United States. As we have seen, the evidence of Dr. Paterson was accepted in at least two cases in the United States,[226] but under a version of the *Frye* test. Certainly, attempts to lead evidence from the home-grown TBBD proponent, Dr. Marvin Miller, seem to have met with considerably less success,[227] so it may be that *Daubert* had some impact.

All of this suggests no more than that application of a test along the lines of the *Daubert* test might have made a difference, at least in the some of the TBBD cases. That is hardly a resounding vote of confidence. When one considers the difficulty experienced in the United States in applying the test, the conclusion must be that adopting such a test would not, in itself, guarantee that the problems experienced in the United Kingdom would be avoided. Thus, we must look at what else we might do.

---

224. See footnotes 120-122 and accompanying text.

225. *See, e.g.*, Commonwealth v. Robinson, 565 N.E.2d 1229, 1237-38 (Mass. 1991) (mother convicted of involuntary manslaughter having caused child to ingest large quantities of salt; trial judge prohibited specific mention of MSBP or Failure to Thrive syndrome); State v. Lumberera, 845 P.2d 609, 619 (Kan. 1992) (mother convicted of murder; no expert evidence that she actually suffered from MSBP; reversed on appeal due to a catalogue of errors); Reid v. State, 964 S.W.2d 723, 727 (Tex. 1998) (mother convicted of murder; evidence of MSBP admitted); Adoption of Keefe, 733 N.E.2d 1075, 1080 (Mass. 2000) (mother's consent to adoption dispensed with; reversed on appeal; MSBP not found to be present here); In re A.B., 600 S.E.2d 409, 410 (Ga. 2004) (child found deprived due to mother's MSBP; reversed on appeal); State v. Hocevar, 7 P.3d 329, 341-42 (Mont. 2000) (it is worth noting that at least one court found the *Daubert* test to be inapplicable to MSBP, since it was not a novel scientific theory).

226. State v. Talmadge, 999 P.2d 192, 197 (Ariz. 2000) and the unnamed case, both discussed at footnotes 120-122 and accompanying text.

227. See the discussion *supra* at footnote 107.

WHAT ELSE MIGHT BE DONE?

Recent experiences in the United Kingdom with MSPB and TBBD serve as a warning that legal systems must take greater care in the use of expert evidence, not only in respect of these examples, but over the whole spectrum of syndromes, disorders and conditions. The state of our knowledge and understanding of the world around us is advancing at an unprecedented rate and "science" plays an enormous part in that. Almost daily, new studies are published on this or that and new theories emerge. In so far as they contribute to debate within the scientific community, this is all very healthy. In so far as they may offer insights into new treatments for troubled people, rather more caution may be warranted. It is when we turn to the use of this developing knowledge in court proceedings that we are presented with an enormous challenge. In the context of the family, the decision to admit particular evidence may have far-reaching consequences for the safety of an individual child, the privacy and integrity of a given family, or the liberty of a particular parent. The evidence may relate to whether a condition exists at all, as in the case of TBBD, or to the applicability of a given condition, like MSBP, in the case of a particular individual.

The trick for the legal system is to identify that which is sufficiently well-researched and well-tested to warrant placing reliance on it and to reject the rest. We have heard the admonition against treating "all science as a single discipline distinguished only by its classification as valid or junk."[228] That may be sound advice on how to approach scientific inquiry, but the point is that evidence is either admissible, or it is not. There is no subtle middle ground in that decision. On the one hand, if we admit evidence that later proves to be exaggerated, too generalized, or just plain wrong, we risk injustices of the type outlined in the foregoing discussions of MSBP and TBBD. On the other hand, if we simply place more obstacles in the way of admitting expert testimony in court, we risk missing the opportunity to understand better what is happening. Many theories that were once controversial are now well-accepted. In this context, it is tempting to cite Galileo's view that the earth might not be the center of the universe and the reaction of many of his contemporaries that his position was not only wrong but blasphemous. However, there are numerous, more recent examples of theories that were once novel and are now accepted. It was a long and hard battle to get courts to accept the impact of a history of domestic abuse in driving the victim to kill her aggressor.[229] We should remember that Henry Kempe was breaking new ground when he published his seminal article on child abuse in 1962.[230] Thus, we need to find a way to utilize

228. Joelle Anne Moreno, *Einstein on the Bench? Exposing What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence*, 64 OHIO ST. L.J. 531, 550 (2003).

229. *See supra* note 7.

230. *See* Kempe *supra* note 5.

new information while, at the same time, guarding against unfounded theories. So what can we do to enhance the ability of judges to make the decision?

It is tempting to advocate a macro solution, like abandoning the adversarial system in favor of the more inquisitorial model of justice found in many European countries. This would place the court under the obligation to find its own experts and remove the iniquity of impecunious defenders being placed at a disadvantage when pitted against the limitless resources of the state in finding experts willing to testify. Aside the fact that such a radical change to the legal system is unlikely to happen any time soon in either the United Kingdom or the United States, the question remains whether this would solve the problem. It would still leave the judge with the question of what scientific evidence to admit and this, in turn, would require assessment of the evidence being proffered. In short, we would be no further forward. A more modest solution might be to suggest that old favorite of family lawyers - the family court. But, still, the problem of admissibility of scientific evidence would remain. Granted, if the particular judge was hearing only a discreet range of cases (family-related matters), the range of expert evidence proffered might be narrower, thus enabling him or her to develop a familiarity with the science and the evidence. However, that would be of little help as new theories emerged, as they most certainly will.

Still on the macro level, but rather more attainable, would be to improve the education of lawyers and judges so that each has a better understanding of scientific methodology and information. It will be recalled that in Sir Roy Meadow's case, the fundamental errors he made in respect of statistical analysis did not become apparent until he was being disciplined by the General Medical Council. Throughout the cases in which he gave evidence, it seems his powerful evidence about the probability of more than one child dying of SIDS in the same family went unchallenged. If ever there was an example of lawyers "not knowing what we don't know", that was it. If one does not know what to question, one cannot know what other expert advice to seek and to offer to the court. Unless the court is given the full range of competing expert views, how can it assess the reliability of scientific evidence? As we saw with the example of TBBD, it was only once the courts were exposed to the views of those who disagreed with Dr. Paterson's theory that they were able to discount his evidence. In order to meet these problems, it has been suggested that "[t]hose involved in legal education at every level should make efforts to raise the scientific literacy of all those involved in the legal system."[231] Those who advocate this approach "are not proposing that judges become scientists but only that they be trained to ask relevant questions when determining the admissibility of proffered scientific evidence"[232] and that "[w]hat judges need to know is not how to design the best scientific study, but how to evaluate

231. Gatowski, *supra* note 206, at 455.
232. Dahir, *supra* note 213, at 74.

imperfect ones."[233] We are beginning to appreciate that meaningful legal education goes well beyond teaching law students "the law" and legal methodology. This, in turn, requires law teachers to be more aware of the broader picture of law in context.[234] In the meantime, resources have been developed to assist the judiciary and lawyers, and more could be done here.[235]

The recent U.K. experience suggests that there may be a case for the judiciary taking a more active gatekeeping role in assessing the admissibility of expert evidence. On the other hand, as we have seen, it may be that a full-blown *Daubert* test is rather too complex for judges to apply, causing them to rely on concepts they understand, like peer review publication and general acceptability. Of course, a more science-savvy judiciary, assisted by similarly improved attorneys, might make the *Daubert* test more useful, but we might also consider reformulating the test to ask simpler questions. For example, Moreno suggests that judges ask themselves: "How did the experts arrive at their conclusions?;" "How did the experts test their conclusions?;" and "How did the experts rule out other conclusions?"[236]

In addition, there are a number of ways in which the presentation of expert evidence could be policed or changed. First, we might consider using expert witnesses selected from a panel of experts accredited by their own profession.[237] It has been suggested that such a body should be independent, set standards of competence, have a code of conduct making clear to expert witnesses what is expected of them, and have the power to remove a given expert from the panel in certain circumstances.[238] At first sight, such a solution looks attractive since it suggests a monitoring of experts by members of their own profession and might reduce the incidence of mavericks peddling their own particular theories. However, there is the danger that those who were advancing a theory outside the mainstream of accepted wisdom in the

---

233. Gatowski, *supra* note 206, at 455.

234. *See, e.g.*, *Family Law Education Reform Project*, Hofstra University School of Law – The Center for Children, Families, and the Law, http://www.hofstra.edu/Academics/Law/law_center_family.cfm (last visited Mar. 17, 2006). This project is run jointly by Hofstra University Law School's Center for Children and the Association of Family and Conciliation Courts, and is designed to provide law teachers with the tools to teach students about the interdisciplinary nature of family law. *Id.*

235. *See, e.g.*, Gatowski, *supra* note 206 at 455. "In recent years, a number of educational resources have been developed to assist judges in understanding their gatekeeping role and to help them properly apply appropriate admissibility standards in the courtroom," *Id.* (citing the FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2nd ed. 2000) and their own publication, SHIRLEY A. DOBBIN AND SOPHIA I. GATOWSKI, A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE, produced by the State Justice Institute, *available at* www.unr.edu/bench (last visited Mar. 17, 2006)).

236. Moreno, *supra* note16, at 565.

237. Such a body has been established by the Council for the Registration of Forensic Practitioners, *See* Council for the Registration of Forensic Practitioners, *at* http://www.crfp.org.uk (last visited Mar. 17, 2006).

238. LORD JUSTICE AULD, REVIEW OF THE CRIMINAL COURTS IN ENGLAND AND WALES 572-73 (2001).

profession might be excluded, thus denying the courts the opportunity to hear new ideas and challenges to existing ones. In any event, the courts seem to have little difficulty in assessing the credentials of experts. Perhaps most telling of all is that Sir Roy Meadow would, most probably, have had little difficulty in gaining accreditation from his peers. After all, he was a former president of the Royal College of Paediatrics and Child Care.

A second possibility would be for the court to appoint expert witnesses in place of, or in addition to, those proffered by the parties.[239] Such a system presupposes a panel of experts from which the court would choose so that the benefits and shortcomings of that aspect are rolled into any system involving a court-appointed expert. There are other advantages, as well. First, the impecunious defender (whether in a criminal case or a case relating to child protection) would not be placed at a disadvantage by his or her lack of resources. Second, where the court-appointed expert is the only expert heard, there would be cost savings. Third, it is less likely that a court-appointed expert would be chosen to advance a particular position, and the so-called "battle of the experts" could be avoided. However, it is often the case that there is more than one credible view on matters covered by scientific evidence, and the danger is that the court would not be afforded the full picture. A variation on the idea of a court-appointed expert is to give the court the power to direct that evidence be given by a joint expert. If the parties cannot agree on a joint expert, then the court will appoint one. This is the solution found in the new Civil Procedure Rules in England and Wales,[240] as part of a far-reaching reform of civil justice system there, resulting from the Woolf Report.[241] It should be noted that these rules are confined to civil cases and that family proceedings are exempt from them.[242] Again, while this has the attraction of reducing costs, there is the danger that the court will be deprived of competing views from relevant professionals.

CONCLUSION

So, to return to our original question, is there a phenomenon - "Undue Deference to Experts Syndrome" - at work in the legal system? There is no doubt that the legal systems in the United Kingdom have been shaken, if not rocked, by the recent experiences of expert witnesses and their evidence about MSBP and TBBD. Individuals have been incarcerated, families dismantled,

239. For differing views on the benefits of such a system, see M.N. Howard, *The Neutral Expert: A Plausible Threat to Justice*, 1991 CRIM.L.R. 98 (1991); Geoffrey L. Davies, *Expert Evidence: Court Appointed Experts*, 2004 C.J.Q. 367 (2004).

240. Civil Procedure Rules 1998, 35.7 (SI 1998/3132). The new Rules came into force on April 26, 1999. For a critique of how this system is working, see Brian Thompson, *The Problem With Single Joint Experts*, 154 NEW L.J. 1134 (2004).

241. Lord Woolf, M.R., *Access to Justice: Final Report*, ¶ 13 (1996), *available at* http://www.dca.gov.uk/civil/final (last visited Mar. 17, 2006).

242. Civil Procedure Rules 1998 2.1 (SI 1998/3132).

and children returned to potentially abusive parents, all because courts were persuaded by medical experts with impressive credentials who pedaled their own theories. Where does responsibility for these debacles lie? Clearly, some of the responsibility lies with the expert witnesses themselves. They were either too blinkered or too arrogant to admit to the doubts that existed about their own theories, or they failed in their fundamental duty to offer balanced and impartial testimony. In short, they were fallible human beings and they have paid the price for their fallibility. However, it is the responsibility of the legal system to protect against just such human failings. Initially, at least, the legal system failed to do so. Some responsibility must lie with the adversarial system that encourages lawyers to seek out witnesses who will support their case. While that very system should ensure that other, possibly equally single-minded experts are found by opposing counsel, ignorance or economics may preclude that from happening. In this, the lawyers, and those who educate them, failed. Certainly, it is difficult "to know what you don't know", but lawyers must be vigilant to ensure that expert evidence is subjected to rigorous scrutiny by trawling for all of the necessary specialists to assist them. They would be armed to do so better if legal education included additional components specifically addressing scientific method. Ultimately, however, responsibility lies with the courts. It was the courts that permitted the educated, confident and articulate Sir Roy Meadow to make the sweeping statements that so swayed juries. Similarly, while Dr. Paterson's evidence first appeared in the courts in 1988, doubt was being cast on his evidence in the early 1990s and, while courts continued to criticize him, he went on appearing throughout that decade and into the next. There seems little doubt that very considerable deference is shown to expert medical witnesses by the courts. If we have learned anything from the MSBP and TBBD debacles, it is that we must not allow "considerable deference" to become "undue deference."

CYBER-SWASHBUCKLING? THE U.S. COPYRIGHT HOLDER'S BATTLE AGAINST EXTRATERRITORIAL PEER-TO-PEER NETWORK INFRINGEMENT IN U.S. COURTS WILL NOT END WITH *GROKSTER*

Bradley D. Spitz

> No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. *Today's pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers, and on the street.* The pirate's credo is still the same - why pay for it when it's so easy to steal?[1]

I. INTRODUCTION

Globally, the conflict between the rights of copyright holders and the march of technology is as old as the concept of intellectual property itself.[2] Each new technological breakthrough, from the printing press to the photocopier and beyond, has threatened the rights of copyright holders, forcing copyright law to constantly evolve.[3] Especially within the United States, one of the newest of these technological breakthroughs, the Internet, continues to present significant challenges to lawmakers and copyright holders.[4] The Internet has proven troublesome for lawmakers and copyright holders in the United States largely because, unlike any form of technology before it, it is truly global in scope.[5]

The problems presented by the Internet are especially apparent in cases involving peer-to-peer ("P2P") file sharing networks - computer networks by which users on the network can obtain files, including media subject to copyright, from other users on the network.[6] When a company or individual creates a P2P network and makes software that allows access to that network available on the Internet, any Internet user in the world may download that

---

1. Recording Industry Association of America, *Anti-Piracy*, *at* http://www.riaa.com/issues/piracy/default.asp (2003) (emphasis in original).

2. *See* Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 261 (1996).

3. *Id.*

4. *See id.* The Internet is discussed in more detail in Part II.A.

5. *See* Barbara Cohen, Note, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOK. J. INT'L L. 401, 406-07 (1996). "Perhaps the largest and most important problem facing the Internet is the fact that national boundaries are disregarded and easily transcended by this 'global' information superhighway." *Id.*

6. *See, e.g.*, Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37, 56-57 (2001). Peer-to-peer networks are explained in detail in Parts II.B and II.C.

software and use the associated P2P network.[7] This is so even if the creator of the network did not intend it for global use.[8]

As a hypothetical example,[9] let us say that Arlogeist GmbH,[10] a computer software corporation based in Germany, develops a P2P file sharing program called Swapster. In order to distribute its program to the German public, Arlogeist makes it available on the Internet for download on its website. However, news of the new file-sharing network quickly spreads beyond Germany. Within months, the network has tens of thousands of users from all over the world, including the United States, all of whom have obtained the Swapster program from Arlogeist's website.

The creator of a P2P network such as Swapster may not intend for its network to impact the rights of copyright holders in the United States, but the very nature of the Internet has caused it to do exactly that.[11] Through a P2P network, any person from anywhere in the world can share copyrighted media with any other person from anywhere in the world with the mere click of a mouse.[12] In the above example, even if one takes an isolated view of the rights of a copyright holder under U.S. law and solely looks at activity within the United States, it can be seen that Swapster has affected those rights merely by being made available on the Internet.[13] Swapster may never have been meant for American distribution or use. However, the global structure of the Internet has allowed Americans to download and use the program, which in turn engages them in the unauthorized distribution of copyrighted works under U.S. law.[14]

Peer-to-peer networks are also troublesome to U.S. lawmakers and copyright holders because the networks are often decentralized,[15] meaning there

---

7. *See* Cohen, *supra* note 5, at 406-07; Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 550 (2002).

8. *See* Cohen, *supra* note 5, at 406-07; August, *supra* note 6, at 550.

9. The hypothetical example that follows was inspired by the illustration provided for the "sliding scale" jurisdictional analysis as it applies to websites on the Internet in August, *supra* note 7, at 550-51, and the general notion of the global nature of the Internet as set forth in Cohen, *supra* note 5, at 406-07.

10. The acronym "GmbH" stands for the German business classification *Gesellschaft mit beschränkter Haftung*, which translates into English as a "company with limited liability." The term designates a company that is incorporated but not publicly traded. Winthrop Corporation, *Corporate Information: Definitions and Company Extensions*, *at* http://www.corporateinformation.com/defext.asp (2006).

11. *See* Cohen, *supra* note 5, at 406-07.

12. *See* Tanaka, *supra* note 6, at 56-57; Cohen, *supra* note 5, at 406-07.

13. *See* Tanaka, *supra* note 6, at 56-57; Cohen, *supra* note 5, at 406-07.

14. *See* Tanaka, *supra* note 6, at 56-57; Cohen, *supra* note 5, at 406-07.

15. Jonathan A. Franklin & Roberta J. Morris, Symposium on Constructing International Intellectual Property Law: The Role of National Courts: International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals for, and Comments on the Current Proposals, 77 CHI.-KENT. L. REV. 1213, 1226-27 (2002).

typically is no single central server that acts as the backbone of the network.[16] The fact that these networks do not need a central server to operate effectively allows them to be "self-running," which up to this point in the United States has successfully allowed these networks to operate as an "end run" around copyright enforcement efforts.[17] In addition, because a decentralized P2P network may not necessarily have a home country, the laws of many different countries may apply.[18] For example, the traditional roadblocks associated with multinational litigation in the United States, such as the presumption against extraterritoriality, personal jurisdiction, forum, and choice of law, would apply to litigation against a decentralized P2P network based in a foreign country.[19] Furthermore, decentralized P2P networks make even otherwise simple inquiries, for example, deciding against whom to litigate, much more difficult.[20] It has been suggested that copyright holders should go after the networks' software distributors and developers because the majority of users must install P2P file sharing software to gain access to the network,[21] but this is not always an adequate solution.[22]

Specifically for the copyright holders, several factors operate to make any kind of litigation against infringing users very risky and burdensome. First, the availability of adequate compensation from this kind of infringement is questionable at best.[23] Second, a high likelihood exists that any judgment obtained for this kind of infringement would be unenforceable.[24] Third, there is a great probability that, even if a judgment or injunction against an infringing user was enforceable, such a judgment would be largely unable to completely stop all infringing activity.[25] Finally, a battle of "big conglomerates versus small individuals" would likely generate a large amount of negative publicity against large media companies and, therefore, against the copyright holder.[26] The U.S. Supreme Court recently resolved the split between the Seventh Circuit[27] and the Ninth Circuit[28] in favor of copyright holders in the case of

16. *See id.* at 1229. For a more detailed explanation of decentralized P2P networks, *see infra* Part II.C.

17. *See* Franklin & Morris, *supra* note 15, at 1229.

18. *Id.*

19. Jeffrey L. Dodes, Note and Comment, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 296 (2002).

20. *See, e.g.*, Tanaka, *supra* note 6.

21. *Id.* at 57.

22. *See id.* at 73-74; *infra* Parts III and IV.

23. *See id.*

24. *See id.* at 74.

25. *See id.*

26. *Id.* at 74-75.

27. *See generally In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003) (holding creator of decentralized P2P network liable for secondary copyright infringement).

28. *See generally* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004) (holding creator of decentralized P2P network *not* liable for secondary copyright infringement).

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.[29] In *Grokster*, the Court ruled that the creator of a decentralized P2P network can be held liable for secondary copyright infringement.[30] Despite this favorable resolution, a copyright holder in the United States must still weigh the costs and benefits of litigation and determine whether litigating against an infringing decentralized P2P network is even practicable.[31]

The purpose of this Note is to emphasize that, even in the wake of the Court's decision in *Grokster*, the United States copyright holder's battle against infringement on decentralized P2P networks is far from over. Focusing primarily on the option of litigation inside the United States, this Note will address the obstacles that a copyright holder will necessarily face before he will be able to successfully battle infringement on decentralized P2P networks in a court of law. Part II of this Note provides the reader with a general technical background of the Internet and P2P networks. Parts III and IV address the considerations that a U.S. copyright holder must make in deciding whether litigation is a worthwhile solution at all, and, if so, against whom to litigate. The concluding parts discuss the procedural obstacles to litigation - personal jurisdiction, forum, the presumption against extraterritoriality, and choice of law - which must be considered with a foreign P2P network against which litigation is sought.

II. TECHNICAL BACKGROUND AND HISTORY

Because of the technical nature of this topic, one cannot fully understand the applicable legal issues without some knowledge of the relevant technology. The following is a brief background and history of the internet and P2P file sharing networks.

A. *The Internet*

The Internet is the collective term that has been given to the large electronic communication system that connects most computers and computer networks throughout the world.[32] Although the Internet has only recently attracted mainstream attention, it is in fact more than thirty years old.[33] The

29. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 125 S.Ct. 2764 (2005).

30. *Id.*

31. *See infra* Part III.

32. THE MERRIAM-WEBSTER DICTIONARY 395 (5th paperback ed. 1997). Although the terms "Internet" (capitalized) and "internet" (not capitalized) are often used interchangeably, the terms have slightly different meanings. The non-capitalized form of "internet" refers to any interconnected set of computer networks, while the capitalized "Internet" refers specifically to the largest of these sets of networks. Denis Howe, *Free On-Line Dictionary of Computing, internet, at* http://foldoc.org/foldoc.cgi?query=internet (Sept. 17, 1996).

33. *See* Alex Colangelo, *Copyright Infringement in the Internet Era: The Challenge of MP3s*, 39 ALBERTA L. REV. 891, 892 (2002).

predecessor of the Internet, originally called ARPAnet,[34] began in 1969 as a network of four computers designed to provide a decentralized computer network for the United States military that could withstand a Soviet nuclear attack.[35] Over time, ARPAnet spread out to encompass military and university research, where it was widely regarded as a very effective method of communication.[36]

Despite this early expansion of the Internet into the military and universities, it did not become viable as a public communications tool until after 1989, when the Hypertext Transfer Protocol (HTTP) and Hypertext Markup Language (HTML) were developed.[37] These two innovations standardized how web pages on the Internet were created, which in turn allowed the development of the "World Wide Web" (the "Web") and Internet browsers with the ability to "surf" the Web.[38] With these developments, the Internet exploded in size.[39] By 1997, there were over 100,000 servers[40] dedicated to the Web.[41] As was noted in the introductory example involving Arlogeist GmbH and Swapster, it is on this Web where creators of P2P file sharing networks make the software that allows access to those networks available for download on the Internet.[42]

B. Peer-to-Peer Networks and File Sharing

File sharing got its first major shot in the arm in 1999 when an eighteen-year-old college student named Shawn Fanning, trying to help his roommate find an obscure rap song, created a music-sharing program called Napster.[43] Upon its completion, Napster became the first computer program to utilize what would become known as a P2P network.[44]

A P2P network greatly differs in structure from how information is

---

34. ARPA stands for the U.S. Department of Defense's Advance Research Project Administration, the initial developer of ARPAnet. *Id.*

35. *Id.*

36. *Id.* at 893.

37. *Id.*

38. *Id.* For more information on HTTP, HTML, and the Web, see World Wide Web Consortium, *World Wide Web Consortium, at* http://www.w3.org (last modified Feb. 23, 2006).

39. Colangelo, *supra* note 33, at 893.

40. "Server," when used in this sense, means a central computer that processes requests from Internet browsers to load a web page. *See* Denis Howe, *Free On-Line Dictionary of Computing, HTTP server, at* http://foldoc.org/foldoc.cgi?query=web+server (Feb. 5, 1997).

41. Colangelo, *supra* note 33, at 893.

42. *See supra* Part I. For an example of how creators of P2P networks make their software available to end users through the World Wide Web, see Sharman Networks, *Kazaa, at* http://www.kazaa.com (2005) [hereinafter *Kazaa*].

43. Sarah D. Glasebrook, Comment, *"Sharing's Only Fun When It's Not Your Stuff": Napster.com Pushes the Envelope of Indirect Copyright Infringement*, 69 UMKC L. REV. 811, 811 (2001).

44. *See id.* at 815-16.

traditionally accessed on the Internet.[45] The traditional method for accessing information on the Internet is called the "client-server model," and it is best illustrated when a user accesses a page on the Web through his computer's Internet browser.[46] To access the web page, the Internet browser on the user's computer requests information from the computer on which the web page is hosted, at which point the computer that hosts the web page sends the requested information back to the user's computer.[47] In this model, the user's computer (the "client") receives data, and the computer that hosts the web page (the "server") sends data.[48] These roles are largely constant - the "client" computer will very rarely send any data to the "server" computer, and the "server" computer will very rarely receive any data from the "client" computer.[49]

In contrast, although the software required to access a P2P network will typically be downloaded from the Web through a server computer by a user in a manner substantially similar to the client-server model described above, the actual P2P networks themselves do not make such a distinction between client and server.[50] Once a user signs on to a P2P network, that user's computer then joins a group of networked computers that can both send and receive data to one another.[51] Thus, in a P2P file sharing network, the user's computer effectively takes on both client and server roles.[52] This allows a user to both send and receive files to and from other users of the network, with some of these files being potentially subject to U.S. copyright law.[53]

C. *Decentralized Peer-to-Peer Networks*

For a P2P file sharing network to work, there must be a means by which the network can keep a list of the files available on the network and the locations where those files can be found.[54] In the older P2P file sharing networks, like Napster, this list, called an "index," was kept on a small number of central computers in the network.[55] One of the newer and more significant breakthroughs in P2P file sharing networks, however, is the decentralized model.[56] In these newer decentralized networks, each computer in the network can keep its own index of the files available on that network.[57]

---

45. *See, e.g.*, Jesse M. Feder, *Is Betamax Obsolete?:* Sony Corp. of America v. Universal City Studios, Inc. *in the Age of Napster*, 37 CREIGHTON L. REV. 859, 863 (2004).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.* at 864.
55. *Id.* at 864-65. These central computers are called "indexing servers." *Id.* at 864.
56. *See generally id.* (describing a decentralized model).
57. *Id.* at 865.

From the network creator's perspective, the greatest advantage of the decentralized P2P file sharing network is that such a network does not require a centralized network infrastructure, which can be costly and may hinder the overall efficiency of the network.[58] Additionally, because there are no central computers vital to a decentralized P2P network's livelihood, these networks are capable of maintaining themselves or even destroying themselves should the need arise.[59] Furthermore, once started, a decentralized network needs no further human control or monitoring to function.[60] Functionally, decentralized P2P file sharing networks work much like the older centralized networks.[61] However, because there are no central computers through which all users must connect, the users of a decentralized P2P network connect directly to each other.[62] A user gains access to the full network by connecting to computers already on the network, then to all of the computers that each of those computers are connected to, and so on, until the user is connected to the entire network.[63] Since the roles of server and client are so blurred in a decentralized P2P network, some network designers have begun to call the users of their networks "servents," a term which itself blurs the terms "server" and "client."[64]

The original decentralized P2P file sharing network software, Gnutella, was developed in 2000 by Justin Frankel and Tom Pepper of Nullsoft, a division of America Online ("AOL").[65] Developed partially in response to impending legal action against centralized networks such as Napster,[66] the original motivation for the decentralized model was to eliminate the central network computers in order to make it harder for legal action to be brought against the creators of the network.[67] Nullsoft finished a working version of the Gnutella program in March 2000 and released the program to a limited test group.[68] Due to legal concerns, however, AOL stopped the availability of the

---

58. *Grokster*, 125 S. Ct. at 2770.

59. Franklin & Morris, *supra* note 15, at 1229.

60. *Id.*

61. Tanaka, *supra* note 6, at 49.

62. *Id.*

63. *See GnuFU: Gnutella for Users*, *at* http://basis.gnufu.net/gnufu/index.php/GnuFU_en (last modified Feb. 4, 2006). This method of connecting a user to a decentralized P2P network is known as the "Friend of a Friend" ("FoF") model. *Id.*

64. Lime Wire LLC, *Gnutella Glossary*, *at* http://www.limewire.com/english/content/glossary.shtml (2006).

65. Wikipedia, The Free Encyclopedia, *Gnutella*, *at* http://en.wikipedia.org/wiki/Gnutella (2006) [hereinafter *Gnutella*].

66. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). It should also be noted that although a program called Napster continues to operate today, the current Napster network does not operate at all like the pre-*A&M* Napster network. Roxio, which primarily engages in the business of selling CD- and DVD-burning software, purchased the rights to the Napster name in November 2002, and now operates a network under the Napster name as a subscription service. *See, e.g.*, Brad King, Wired News, *Napster's Assets Go for a Song* (Nov. 28, 2002), *at* http://www.wired.com/news/digiwood/0,1412,56633,00.html.

67. *See Gnutella*, *supra* note 65.

68. *Id.*

program and forbade Nullsoft from working on it any further prior to an official release.[69] Despite the actions of AOL, the program was quickly reverse engineered[70] by the users in the test group, and many open source[71] clones of the program - programs that could do everything Gnutella could do, including accessing the same network - quickly sprung up.[72] Although computer technology and the Internet have rapidly advanced since Gnutella's development, the influence of Gnutella and its early clones can still be seen in many of the major current commercial P2P networks such as LimeWire[73] and Morpheus.[74]

The decentralized P2P network model was predominately legally motivated from the beginning; one can easily see the products of that legal motivation in practice today.[75] The most important difference between newer decentralized P2P networks and older centralized networks may be that, due to the very nature of a decentralized P2P network, they are almost impossible to

---

69. *Id.* Since America Online, the parent company of Nullsoft, would likely have been a potential major corporate defendant in any lawsuit against Nullsoft had Gnutella been officially released, one can easily see the reasons for America Online's concern. It should also be noted that, at the time Gnutella was nearing completion, America Online was in negotiations to acquire Time Warner, a major music company. *See, e.g.*, Kevin Maney, *Techie's Napster-like idea blasted off, now he's flying high*, USA TODAY, Nov. 22, 2000, *available at* http://www.usatoday.com/tech/columnist/cckev054.htm (last modified Nov. 22, 2000).

70. "Reverse engineering" is "[a] method of obtaining technical information by starting with a publicly available product and determining what it is made of, what makes it work, or how it was produced." U.S. Department of State, *Glossary of Intellectual Property Terms*, *at* http://usinfo.state.gov/products/pubs/intelprp/glossary.htm (n.d.) (last visited Mar. 21, 2006).

71. Open source software, through the use of public software licenses such as the Free Software Foundation's GNU General Public License, located at http://www.gnu.org/copyleft/gpl.html, allows for the free distribution, modification, and improvement of computer programs. For more on the Free Software Movement and open source software, see Free Software Foundation, Inc., *The Free Software Definition*, *at* http://www.fsf.org/philosophy/free-sw.html (2005).

72. *Gnutella*, *supra* note 65.

73. LimeWire was created by Lime Wire LLC, which is incorporated in the state of New York. Although the LimeWire program has made significant improvements over the original Gnutella program (such as "swarm" downloads that allow a user to download the same file from more than one user simultaneously in order to increase download speed and the use of "ultrapeer" computers that increase the speed by which a user can connect to the network), LimeWire is still heavily influenced by Gnutella. *See* Lime Wire LLC, *Features*, *at* http://www.limewire.com/english/content/features.shtml (2006); Lime Wire LLC, *LimeWire Open Source Development*, *at* http://www.limewire.com/english/content/development.shtml (2006).

74. *Gnutella*, *supra* note 65. Morpheus was created by StreamCast Networks, Inc. StreamCast Networks, Inc., *Morpheus*, *at* http://www.morpheus.com (2006) [hereinafter *Morpheus*]. In addition to being able to access the Gnutella network, Morpheus is also able to access the networks of many other popular P2P file sharing programs, as well as its own network, NEOnet, which was developed by the Gnuterra Corporation. *Id.* For more information on NEOnet, see Gnuterra Corporation, *The NEOnet Story*, *at* http://www.neonetwork.com (2006).

75. *See Gnutella*, *supra* note 65.

completely shut down.[76] As Colangelo has stated, because there is not a centralized index that all users must access in order to use the network, "[s]hutting down the service would necessarily involve blocking each individual from connecting to the network."[77] While at first glance this may not seem like a daunting task, studies have indicated that there were approximately 40 million people using P2P file sharing networks in the United States alone in 2002.[78] By 2004, the number of P2P file sharing network users had grown to approximately 60 million in the United States and 100 million worldwide.[79] The vast and rapidly growing number of these individual users worldwide has proven a major stumbling block for the U.S. copyright holder.[80]

III. DETERMINING WHETHER LITIGATION IS A FEASIBLE OPTION

Once one has a basic technical understanding of P2P networks, it becomes much easier to see the obstacles a copyright holder in the United States will face in attempting to enforce his intellectual property rights against decentralized P2P networks. If a copyright holder wishes to enforce his rights through litigation, there are many factors that he must consider, especially before attempting to engage in litigation against a decentralized P2P network based in a foreign country. The first and most immediate of these factors is whether it would be feasible to engage in litigation at all.[81] Due to the global scope of the Internet and the structure of decentralized P2P networks, the costs associated with litigation against a potentially large number of defendants from a large number of countries become a significant factor.[82] These concerns force the copyright holder to determine whether the potential benefits of litigation against the network exceed the costs of that litigation.[83] Otherwise, litigation would not be worthwhile.[84]

Fortunately for copyright holders, recent American case law in this area has largely been resolved in their favor.[85] Before June 2005, the case law in the United States on the issue of whether the creators of a decentralized P2P file sharing network could be held liable for copyright infringement was conflicting and potentially unfavorable.[86] A split between the Seventh and Ninth Circuits

---

76. *Id.*

77. Colangelo, *supra* note 33, at 900.

78. Judith Lewis, *Power to the Peer, You Can Lead Consumers to Music, but Can You Make Them Pay?*, L.A. WEEKLY, May 17, 2002, *available at* http://www.laweekly.com/features/3916/power-to-the-peer.

79. Interview by David McGuire with Eric Garland, CEO, Big Champagne (Jan. 22, 2004), *at* http://www.washingtonpost.com/ac2/wp-dyn/A36356-2004Jan21.

80. *See* Colangelo, *supra* note 33, at 900.

81. *See generally* Franklin & Morris, *supra* note 15; *see* Tanaka, *supra* note 6, at 73-74.

82. *See generally* Dodes, *supra* note 19.

83. *Id.*

84. *Id.*

85. *See generally Grokster*, 125 S.Ct. at 2764.

86. *Compare Aimster*, 334 F.3d at 643, *with Grokster*, 380 F.3d at 1154.

on this topic made it troublesome to determine what the applicable law actually was with regard to the liability of the creators and distributors of decentralized P2P file sharing networks.[87] On June 27, 2005, however, the U.S. Supreme Court resolved this circuit split in favor of copyright holders and against P2P networks.[88]

The theory of liability that is used in U.S. case law is contributory copyright infringement, which was laid out by the U.S. Court of Appeals for the Second Circuit in the case of *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*[89] In *Gershwin*, a U.S. court held for the first time that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another" can be held liable as a contributory infringer.[90]

The U.S. Supreme Court refined this theory in the 1984 case of *Sony Corp. of America v. Universal City Studios, Inc.*[91] The defendants in *Sony* manufactured home videocassette recorders, which allowed home users to record television shows for future viewing. The plaintiffs, who were the copyright holders of various television shows, brought suit against the defendants based on the theory of, *inter alia*, contributory copyright infringement. The U.S. District Court for the Central District of California held that the defendants were not liable for contributory copyright infringement because the noncommercial recording of television programs by a user in his own home constituted a fair use of the copyrighted material.[92] The U.S. Court of Appeals for the Ninth Circuit reversed, holding that there could be no noncommercial home use exception to copyright protection absent "a clear direction from Congress," and found the defendants liable for contributory infringement.[93]

The U.S. Supreme Court granted certiorari in 1982,[94] and in 1984 it ruled on the case, reversing the Court of Appeals.[95] The Court held that the sale of copying equipment does not constitute contributory copyright infringement if that equipment is capable of "substantial noninfringing uses,"[96] a test which

87. *See generally* Brandon Michael Francavillo, Comment, *Pretzel Logic: The Ninth Circuit's Approach to Contributory Copyright Infringement Mandates That the Supreme Court Revisit Sony*, 53 CATH. U. L. REV. 855 (2004).

88. *See generally Grokster*, 125 S.Ct. at 2764.

89. Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971).

90. *Id.* at 1162 (footnote omitted).

91. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

92. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 456 (C.D. Cal. 1979).

93. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 966, 974 (9th Cir. 1981).

94. Sony Corp. of Am. v. Universal City Studios, Inc., 457 U.S. 1116 (1982).

95. *Sony*, 464 U.S. at 456.

96. *Id.* at 442.

prior to this case had been used primarily for contributory patent infringement.[97]

The circuit split regarding the liability of P2P network creators began in 2003 in the case of *In re Aimster Copyright Litigation*.[98] In *Aimster*, the U.S. Court of Appeals for the Seventh Circuit ruled that John Deep, distributor of a decentralized P2P file-sharing network program called Aimster,[99] was liable under the theory of contributory copyright infringement.[100] Although the court found that Aimster was certainly capable of noninfringing uses, it held that these potential noninfringing uses were not enough for Deep to escape liability.[101] Instead, the court interpreted the *Sony* decision as requiring evidence that the network had actually been used in noninfringing ways.[102] In support of its decision that Aimster had not actually been used for its potential noninfringing uses, the court noted, among other factors, that the tutorial that came bundled with the Aimster program contained only examples involving the sharing of copyrighted music.[103]

Additionally, the program had an optional feature; for a monthly fee, a user could download with a single click the forty most shared songs on the Aimster network, which were invariably copyrighted works.[104] The court then held more generally that in order for the provider of a P2P file-sharing service to escape liability for contributory copyright infringement, the provider must affirmatively produce evidence to show either (1) that the network was actually used substantially for noninfringing purposes, or (2) that, if the network was used substantially for infringing purposes, it would be disproportionately costly for the provider to eliminate or reduce the infringing uses on the network.[105]

On the other hand, in 2004, the U.S. Court of Appeals for the Ninth Circuit came to the opposite conclusion in its decision of *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, holding that the provider of a

---

97. *Id.* at 440. Section 271(c) of the U.S. Patent Act states:

> Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, *and not a staple article or commodity of commerce suitable for substantial noninfringing use*, shall be liable as a contributory infringer.

35 U.S.C. § 271(c) (2006) (emphasis added).

98. *Aimster*, 334 F.3d at 643.

99. John Deep, the creator of the Aimster program, changed the program's name to Madster and continued to develop the program in some capacity after the ruling in *Aimster*, although the program's development has since been halted. For more information, see John Deep, *Madster, Aimster – John Deep v. RIAA*, *at* http://www.madster.com (2005).

100. *Aimster*, 334 F.3d at 653-54.

101. *Id.* at 651.

102. *Id.*

103. *Id.*

104. *Id.* at 651-52.

105. *See id.* at 653.

decentralized P2P filesharing network was not liable for contributory copyright infringement.[106] *Grokster* involved a suit by a large number of copyright holders in the entertainment industry against the providers of the Morpheus,[107] Grokster,[108] and Kazaa[109] P2P file-sharing networks. Unlike the Seventh Circuit in *Aimster*,[110] the Ninth Circuit in *Grokster* held that the *Sony* substantial noninfringing uses test does not include a requirement of *actual* noninfringing uses.[111] The court held that because the file-sharing networks in question were merely capable of substantial noninfringing uses and the network providers could not have had "specific knowledge of infringement" due to the decentralized nature of their networks, the network providers could not be held liable under a theory of contributory copyright infringement.[112]

While the U.S. Supreme Court denied certiorari in *Aimster*,[113] it granted certiorari in *Grokster* on December 10, 2004,[114] likely because of the circuit split that had been created.[115] On June 27, 2005, in a unanimous decision, the Court reversed the Ninth Circuit's decision in *Grokster* and ruled that the creator of a P2P network *can* be held liable for secondary copyright infringement.[116] However, the Court did not reverse the Ninth Circuit on the basis of *Sony*.[117] Instead, the Court based its ruling on inducement to infringe

106. *Grokster*, 380 F.3d at 1167.

107. *See Morpheus*, *supra* note 74. StreamCast Networks, Inc. was formerly known as MusicCity.Com, Inc. *See Grokster*, 380 F.3d at 1154.

108. Grokster was developed by Grokster, Ltd., a corporation based in Nevis, West Indies. Grokster, Ltd., *About Us*, *at* http://web.archive.org/web/20030812172059/http://grokster.com/aboutus.html (archived Aug. 12, 2003). As a result of this litigation, Grokster has ceased operations. *See* Grokster, Ltd., *Grokster*, *at* http://www.grokster.com (n.d.) (last visited Mar. 21, 2006) [hereinafter *Grokster Website*].

109. Kazaa was originally developed by KaZaa BV, a Dutch company. However, over the course of this litigation, control of the program passed to Sharman Networks. KaZaa BV eventually ceased defending this case, and default judgment was entered against it. *Grokster*, 380 F.3d at 1159 & n.4. Unlike the older Gnutella file-sharing network, Kazaa utilized a "supernode" architecture, utilizing a technology it called "FastTrack." In a supernode network, users that meet certain minimum requirements, such as processing speed, are made into "supernodes" and act as small indexing servers for a portion of the network. A supernode network has the characteristics of both a centralized and decentralized network. *Id.* at 1159. Sharman Networks continues to operate Kazaa in a substantially unchanged form. *See Kazaa*, *supra* note 42.

110. *See Aimster*, 334 F.3d at 643.

111. *Grokster*, 380 F.3d at 1161. *See id.* at 1162 n.9 (disagreeing with the Seventh Circuit's interpretation of *Sony*).

112. *Id.* at 1161-62.

113. Deep v. Recording Indus. Ass'n of Am., Inc., 540 U.S. 1107 (2004).

114. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S.Ct. 686 (2004).

115. For argument in support of the U.S. Supreme Court's decision to grant certiorari to *Grokster*, see Francavillo, *supra* note 87.

116. *Grokster*, 125 S.Ct. at 2783.

117. *Id.* at 2783. "In sum, this case is significantly different from *Sony* and reliance on that case to rule in favor of StreamCast and Grokster was error." *Id.* at 2782. While *Sony* was

copyright.[118] Justice Souter, who wrote the opinion for the Court, noted that "one who distributes a device *with the object of promoting its use to infringe copyright*, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[119] Grokster and StreamCast Networks, Inc., the creator of Morpheus,[120] argued against liability for secondary copyright infringement to the Supreme Court by attempting to characterize themselves as mere bystanders.[121] They argued that they had no way of keeping definite records of which files are downloaded by users on their networks or the times at which downloads by users on their networks occur.[122] They also emphasized that their networks can be utilized for noninfringing uses, such as the distribution of public domain works and the distribution of copyrighted works that are authorized for distribution by the copyright holder, and that these uses were "significant in kind, even if infrequent in practice."[123]

However, the Court did not accept the characterization suggested by Grokster and StreamCast.[124] Instead, the Court noted that the record strongly suggested that "from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement."[125] In both cases, the Court made reference to earlier file-sharing programs that were released just after the legal defeat of the Napster network for copyright infringement[126] - StreamCast's OpenNap and Grokster's Swaptor - that, in the Court's opinion, were clearly aimed at obtaining Napster's former users.[127] The Court also made note of the intentions of both Grokster and StreamCast in forming these new programs.[128] Grokster indicated, in an internal communication, that they aimed to have more copyrighted material on their network than any other network.[129] Likewise, StreamCast created promotional material flaunting the network's illegality, although the record did not make it clear whether those materials had ever actually been released.[130] On

---

not controlling to the Court's decision, Justices Ginsburg and Breyer address *Sony* in concurring opinions. *See id.* at 2783 (Ginsburg, J., concurring); *see id.* at 2787 (Breyer, J., concurring).

118. *Id.* at 2770.

119. *Id.* (emphasis added).

120. *See Morpheus*, *supra* note 74. Although named as a defendant initially, KaZaa BV, the original creator of the Kazaa network, ceased defense of this case at the trial court level and a default judgment was entered against it. *Grokster*, 380 F.3d at 1159 & n.4.

121. *See Grokster*, 125 S.Ct. at 2772.

122. *Id.*

123. *Id.* According to StreamCast, among the public domain works available on Morpheus' network are copies of the briefs from this case. *Id.*

124. *Id.*

125. *Id.*

126. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (enjoining the Napster P2P network from allowing access to copyrighted works).

127. *Grokster*, 125 S.Ct. at 2772-73.

128. *Id.* at 2273-74 & n.7.

129. *Id.* at 2773-74.

130. *Id.* at 2773-74 & n.7. Among the proposed advertising materials for StreamCast's

the basis of these findings, the Court held that Grokster and StreamCast could be held liable for copyright infringement, despite the fact that their networks could have substantial noninfringing uses.[131]

The Supreme Court's *Grokster* decision created almost immediate positive results for American copyright holders. In November 2005, Grokster agreed to permanently shut down its operations as part of a settlement of the case.[132] A study by the New York-based market research firm NPD Group also showed that the number of households engaged in illegal P2P downloading fell by eleven percent in the six months following the Court's decision.[133] Still, litigation will never completely eliminate the problems presented by decentralized P2P file sharing networks, nor will it even be a feasible option in all instances.

For example, litigation is quite obviously not a feasible option for a U.S. copyright holder if that litigation is not likely to provide the copyright holder with adequate compensation for its efforts.[134] According to Franklin and Morris, a copyright holder should first look for a major software distributor, preferably one that receives a profit from the network software's distribution.[135] Such a "deep pocket" is easy to find in a case like *Grokster*, where a network has been created by a corporation that profits from the network.[136] In other cases, like ones involving open source network programs and other distribution methods where profit is not the primary concern, finding a distributor that is also a "deep pocket" is much more difficult.[137] If a major software distributor or other "deep pocket" ultimately cannot be found, the copyright holder may be forced to resort to litigation against individual network users.[138] Due to the

---

OpenNap network was an advertisement that read: "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?" Another touted OpenNap as the "#1 alternative to Napster." In fact, the chief technology officer of StreamCast said of the unveiling of the OpenNap network, "[T]he goal is to get in trouble with the law and get sued. It's the best way to get in the news." *Id.* at 2773.

131. Id. at 2779.

132. Associated Press, *Grokster Goes Down*, WIRED NEWS (Nov. 8, 2005), *at* http://www.wired.com/news/digiwood/0,1412,69503,00.html. Currently, Grokster's website displays only the following text:

> The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized P2P services is illegal and is prosecuted by copyright owners.
>
> There are legal services for downloading music and movies. This service is not one of them.
>
> YOUR IP ADDRESS IS [IP address omitted] AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous.

Grokster Website, *supra* note 108.

133. Roy Mark, *Grokster Ruling Slows Illegal Downloading*, Internetnews.com (Dec. 14, 2005), *at* http://www.internetnews.com/xSP/print.php/3570996.

134. *See generally* Franklin & Morris, *supra* note 15; Tanaka, *supra* note 6.

135. *See* Franklin & Morris, *supra* note 15, at 1229.

136. *See id.*

137. *See id.*

138. Tanaka, *supra* note 6, at 73-74.

millions of these individual P2P network users worldwide, successfully litigating against each individual user would be practically impossible.[139] Furthermore, even if this litigation was successful, the copyright holder would likely be entitled to nominal damages only, such as the market price of a CD multiplied by the number of copies each individual user distributed.[140] Even if these nominal damages added up to a substantial award, the individual network users could escape paying these damages by simply declaring bankruptcy.[141]

The high costs and impracticality would not be the only significant burdens on mass litigation against individual users; a copyright holder that decided on mass litigation would also likely face problems with its public image.[142] Because many individual P2P network users are students or other people perceived as being somewhat powerless, mass litigation against these users will paint a picture of "big conglomerates versus small individuals" that would generate negative publicity for the copyright holder.[143] Moreover, many copyright holders under U.S. law are large corporations with a large customer base, and many of those corporations are wary of the possible negative publicity they could face in the event that they began to sue individual users that were also their own customers.[144]

Therefore, it is questionable whether litigation could provide copyright holders with compensation for infringement that has already occurred in the absence of a "deep pocket," such as the one that was present in *Grokster*.[145] Worse yet, litigation may not be a practical long-term solution to stop future infringing activity on P2P networks in all cases, especially on decentralized networks like Gnutella and its progeny.[146] Since so many "clone" programs of Gnutella were made that were able to access Gnutella's network, and most of these clones were freely available under an open source software license, a new Gnutella clone program that accesses the same network of computers can be easily developed by a new distributor whenever any one particular program is enjoined from development.[147] Additionally, because of the structure of the

139. *See* Jesse Feder, *Keynote Address, Winter 2001 Symposium*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 265, 270 (2001). "As [Congressman] Barney Frank once said in a hearing, 'there ain't enough cops in the world to go after all the end-users.'" *Id.*

140. Tanaka, *supra* note 6, at 74.

141. *Id.*

142. *Id.* at 74-75.

143. *See id.*

144. *See* Feder, *supra* note 139, at 270.

145. *See generally id.*; Tanaka, *supra* note 6.

146. *See* Tanaka, *supra* note 6, at 74.

147. *Id.* "[E]ven if decentralized P2P software developers/distributors can be held liable for copyright infringement under the current law and even if content providers are able to stop distribution of such software, alternatives may emerge without difficulties because the Gnutella platform is an open source project like Linux . . . ." *Id.*

decentralized P2P model, even the old program would not completely cease to function until every individual user was prohibited from using the network.[148]

Moreover, because of issues such as personal jurisdiction and forum, it will not always be practical or even possible for a copyright holder to engage in litigation in the United States.[149] An American copyright holder may attempt to enforce its legal rights in the courts of another country through international agreements such as the Berne Convention if the circumstances of a case make it necessary to do so.[150] However, recent international P2P copyright cases reveal a mixed legal landscape unfortunately similar to that of pre-*Grokster* American case law.[151] This mixed legal landscape casts doubts on whether international litigation is an effective alternative.[152]

For example, the Federal Court of Australia recently found Sharman Networks, the creator of the Kazaa file sharing network, liable for secondary copyright infringement.[153] The court ordered Sharman to place restrictions on downloads of copyrighted files on its network, but Sharman instead made the Kazaa software unavailable to Australian residents from its website.[154] On appeal, a Full Bench of the Federal Court of Australia ruled that these actions

---

148. *See Gnutella*, *supra* note 65. "As long as there are at least two users, Gnutella will continue to exist." *Id.*

149. *See infra* Parts V-VI.

150. *See generally* Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The Berne Convention contains the principle of "national treatment," which simply put means that foreigners from a signatory country who hold a copyright in their own country are entitled to at least the protection given to nationals in each other signatory country. Joseph Greenwald & Charles Levy, *Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works, Introduction and Bibliography Written November 1989*, 1 B.D.I.E.L. 711 (1994). Because such protection is "automatic" and requires no formalities to obtain, the Berne Convention allows a U.S. copyright holder to pursue legal action against an infringing user in any member country to the treaty. *Id.*

151. *Compare* Anthony Deutsch, *Court: Kazaa not responsible for swapping*, USA TODAY, Dec. 19, 2003, *available at* http://www.usatoday.com/tech/news/techpolicy/2003-12-19-kazaa-dutch_x.htm (the Netherlands), *with* Kristy Needham, *Kazaa ordered to clamp down on "rip-offs,"* SYDNEY MORNING HERALD, Sept. 5, 2005, *available at* http://www.smh.com.au/news/breaking/kazaa-ordered-to-clamp-down-on-ripoffs/2005/09/05/1125772455786.html (Australia).

152. *Compare* Deutsch, *supra* note 151 (the Netherlands), *with* Needham, *supra* note 151 (Australia).

153. Needham, *supra* note 151; Louisa Hearn, *Kazaa Blocks Access in Australia*, SYDNEY MORNING HERALD, Dec. 6, 2005, *available at* http://www.smh.com.au/articles/2005/12/06/1133631231971.html.

154. Hearn, *supra* note 153; *Kazaa*, *supra* note 42. Kazaa's official website now has the following language at the top of the main page: "ATTENTION USERS IN AUSTRALIA: To comply with orders of the Federal Court of Australia, pending an appeal in the February 2006, use of the Kazaa Media Desktop is not permitted by persons in Australia. If you are in Australia, you must not download or use the Kazaa Media Desktop." *Kazaa*, *supra* note 42. Although Sharman has blocked access to the Kazaa program on their website, they have not forbidden Australian citizens who already have the Kazaa program from accessing the Kazaa network. Hearn, *supra* note 140.

by Sharman did not comply with the court's previous order, opening the door to potential liability for contempt.[155] In contrast, in a case brought in the Netherlands by the Dutch music rights organization Buma/Stemra in 2001 against Kazaa, the Amsterdam Court of Appeal ultimately held that the creators of Kazaa were not liable as secondary copyright infringers and that all liability, if any, fell solely on the individual users of the Kazaa network.[156] Buma/Stemra appealed this decision to the Dutch Supreme Court.[157] In a much-publicized 2003 opinion, the Dutch Supreme Court upheld the decision of the Amsterdam Court of Appeal and allowed Sharman Networks, the new providers of the Kazaa file sharing program, to continue operations.[158]

Even if one were to put aside any issues of international law and assume that every country in the world would rule in favor of the copyright holder, international litigation would still be a very daunting task due to the sheer number of P2P network users from many countries.[159] The Internet is a worldwide set of networks,[160] thus it is very likely that similar litigation would have to be conducted in a large number of countries to produce even a minimally favorable result for the copyright holder.[161] The very real possibility exists that the costs associated with litigation in many countries would exceed

---

155. Universal Music Australia Pty. Ltd. v. Sharman Networks Ltd., [2006] FCAFC 41, 2006 WL 711090, ¶¶ 2-3 (Mar. 23, 2006). Currently, Sharman plans to contest any contempt proceedings brought against it. Louisa Hearn, *Kazaa faces new court battle*, THE AGE (Melbourne), Mar. 23, 2006, *available at* http://www.theage.com.au/news/breaking/kazaa-faces-new-court-battle/2006/03/23/1143083882135.html. As a spokesperson for Sharman stated, "[The March 23 decision by the Federal Court of Australia] was procedural and the judge has confirmed that another court will consider this matter. This clarification by the judge is useful and we look forward to the opportunity to test the record companies' allegations." *Id.*

156. Ot van Daalen, *[NL] Dutch Court of Appeal Re-addresses Peer-to-Peer Issue*, IRIS Legal Observations of the European Audiovisual Observatory, *at* http://merlin.obs.coe.int/show_iris_link.php?language=en&iris_link=2002-5:12&id=4379 (May 12, 2002).

157. Deutsch, *supra* note 151.

158. *Id.* Unlike the U.S. Supreme Court, the Dutch Supreme Court does not perform a full review or decide on the merits of a case; instead, a review by the Dutch Supreme Court is typically limited to a small number of minor points. *See* Ot van Daalen, *[NL] Supreme Court Decides on Peer-to-Peer File-Sharing Issue*, IRIS Legal Observations of the European Audiovisual Observatory, *at* http://merlin.obs.coe.int/iris/2004/2/article31.en.html (Feb. 14, 2004). An unofficial translation of the Dutch Supreme Court's opinion is available at http://www.eff.org/IP/P2P/BUMA_v_Kazaa/20020328_kazaa_appeal_judgment.html (last modified Mar. 28, 2002).

159. *See* Tanaka, *supra* note 6, at 74; Feder, *supra* note 139, at 270.

160. *See supra* Part II.A.; Cohen, *supra* note 5, at 406-07.

161. Dodes, *supra* note 19, at 300.

> If . . . the most convenient forum is in a foreign nation, the U.S. court may dismiss the case in favor of the foreign jurisdiction under the forum non-conveniens doctrine. The problem . . . however, is that since the direct infringement by [P2P networks occurs] in various countries, there may be multiple convenient foreign courts that satisfy the alternative forum element of the doctrine.

Id. (footnote omitted).

the losses that the copyright holders suffer from the infringing networks against which they seek to litigate.[162] The costs and burdens, combined with general burdens associated with pursuing litigation against P2P networks, will unfortunately force a U.S. copyright holder to decide whether the costs of litigation make it a worthwhile solution to infringement on P2P networks at all.[163]

IV. FINDING DEFENDANTS FOR LITIGATION

If a copyright holder does determine that the potential benefits of litigation outweigh the costs, it must then find defendants against whom to litigate. In cases such as *Grokster*, where a file sharing network is created or maintained with the intent to profit, this step can be refreshingly simple.[164] Under U.S. law dating back to *Gershwin* and similar to international law, a copyright holder can make a very strong case that a party who profits or intends to profit from a P2P file-sharing network "induces, causes or materially contributes to the infringing conduct of another."[165] Furthermore, as stated in Part III, the problems associated with obtaining adequate compensation from litigation against a P2P network vanish when a "deep pocket" is involved with that network's development.[166] For example, Sharman Networks, the provider of Kazaa, generates revenue through the distribution of Rights Managed content,[167] through the use of advertising programs that deliver advertisements to the user's computer based on his Internet use, through the sales of third-party products and services, and through a premium version of its own software that does not contain advertising programs.[168] As a result of these practices, Sharman Networks has been subject to litigation in the United States, the Netherlands, and Australia, and it will likely be the subject of more U.S. and international litigation in the future.[169]

---

162. *Id.* "Unless the plaintiff has significant financial resources, it would be very difficult to litigate in multiple foreign courts." *Id.*

163. *Id.*

164. *Cf.* Franklin & Morris, *supra* note 15, at 1229 (discussing "the desires of copyright owners to sue a major distributor or deep pocket").

165. Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

166. *See* Franklin & Morris, *supra* note 15, at 1229.

167. "Rights Managed content" refers to digital media, such as music, that employs Digital Rights Management (DRM). "Specifically, rights management technologies enable a content owner to stipulate a set of rules, or policy rights, that govern how the content may be used, by whom, for how long, etc." Steve Ballmer, Microsoft Corporation, *Executive E-Mail: Rights Management: Enabling Opportunities*, *at* http://www.microsoft.com/mscorp/execmail/2003/05-07rightsmanagement-print.asp (May 7, 2003).

168. Sharman Networks, *How can Kazaa be free?* (2005), *at* http://www.kazaa.com/us/help/faq/howis_kazaa_free.htm (last visited Mar. 10, 2006).

169. *See supra* Part III.

In the case that litigation against a major corporate developer or distributor is not possible, occasionally a third-party website or content provider exists that somehow aids or abets copyright infringement on a P2P network.[170] A third party website or content provider aids or abets copyright infringement on a P2P network by engaging in practices such as providing a search engine for a P2P network over the World Wide Web that any user of the Internet may access.[171] A copyright holder can consider litigation against such a third party if one exists.[172] For example, the independent website MP3Board.com, which provided a search engine for the Gnutella network, has been named in a series of secondary infringement lawsuits from the Recording Industry Association of America and multiple recording companies.[173] Similar actions have begun internationally, as well.[174] In Australia, for example, a group of recording companies initiated a $500 million lawsuit against the owner and operator of mp3s4free.net, a website that provided a search engine for MP3 music files located elsewhere on the Internet.[175]

If a major corporate party associated with the P2P network cannot be found, which is often the case for a decentralized and open source P2P network program, finding defendants is much more difficult.[176] If a P2P network is not constructed with the intent to profit, which is very often the case for networks that utilize the decentralized model, there may not be any major corporate distributor from which to seek compensation.[177] Unfortunately, there may be no corporate party to sue in these cases except for the copyright holder's last resort - the individual users themselves.[178]

V. PERSONAL JURISDICTION

In the event that a U.S. copyright holder decides that litigation against a decentralized P2P network is a worthwhile course of action and finds sufficient defendants against whom to litigate, there are still a number of other concerns. Specifically, the concerns are greater in situations where the P2P network is

170. *See* John Borland, CNET News, *MP3Board countersues RIAA, calls MP3 links legal, at* http://news.com.com/MP3Board+countersues+RIAA%2C+calls+MP3+links+legal/2100-1023_3-243331.html?tag=st.rn (July 18, 2000); Australian Associated Press, *Landmark music copyright case*, THE AGE (Melbourne), Oct. 25, 2004, *available at* http://www.theage.com.au/articles/2004/10/25/1098667684432.html.

171. *See* Borland, *supra* note 170.

172. *See id.*

173. *See, e.g., id.*; Arista Records, Inc., v. MP3Board, Inc., No. 00 Civ. 4660 (SHS), 2002 U.S. Dist. LEXIS 16165, Copy. L. Rep. (CCH) P28483 (S.D.N.Y. Aug. 29, 2002). Although the Gnutella program was discontinued by America Online prior to its official release, clone programs that utilize the same network of users continue to exist. *See supra* Part II.D.

174. *See, e.g.*, Australian Associated Press, *supra* note 170.

175. *Id.*

176. *See* Tanaka, *supra* note 6, at 73-74.

177. Franklin & Morris, *supra* note 15, at 1229.

178. *See* Tanaka, *supra* note 6, at 73-74.

based in a country other than the United States. For example, if a copyright holder attempts to litigate a claim in the United States against a P2P network based in another country, the first obstacle that would arise is the problem of obtaining personal jurisdiction over the foreign defendants.[179]

At first glance, it would seem very difficult for a U.S. copyright holder to obtain personal jurisdiction in an American court over a foreign P2P network. With the globalization of the Internet, however, the courts have developed two tests that are more lenient towards the exercise of jurisdiction in such cases.[180] The first of these tests looks at the nature and quality of the business' commercial contacts with the United States.[181] The second of these tests looks at the extent to which the business affects the United States.[182]

The commercial contact test for personal jurisdiction was laid out in the case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[183] The test is an extension of the traditional three-prong minimum contacts analysis and requires the following three conditions to be met before jurisdiction can properly be exercised over a non-resident defendant: "(1) the defendant must have sufficient 'minimum contacts' with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable."[184]

The scenarios that are possible under the *Zippo* test are best illustrated as part of a "sliding scale."[185] On one end of the scale are those businesses that knowingly and repeatedly transmit files in the course of their business via the Internet to a resident within the forum.[186] In cases such as these, the courts have typically treated the intentional and repeated contacts of the business as implied consent to personal jurisdiction in the forum.[187] On the other end of the scale are those businesses that create passive Internet websites which merely make information available to all visitors.[188] The courts have typically treated these businesses as not having consented to personal jurisdiction.[189] In the middle of the scale are those businesses that create interactive websites that exchange information via the Internet with a resident within the forum.[190] In these cases, the courts have held that whether a business impliedly consents to

179. *See generally* Eleanor M. Lackman, *Slowing Down the Speed of Sound: A Transatlantic Race to Head off Digital Copyright Infringement*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1161 (2003).

180. *Id.* at 1186-87.

181. *Id.* at 1186.

182. *Id.*

183. Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).

184. *Id.* at 1122-23.

185. August, *supra* note 7, at 550.

186. *Id.*

187. *Id.*

188. *Id.* at 550-51.

189. *Id.* at 551.

190. *Id.* at 550.

personal jurisdiction is determined by looking at the frequency and commercial nature of the information exchanged.[191]

In recent years, however, in deciding matters of personal jurisdiction over Internet businesses, the courts in the United States have shifted their focus away from the potential commercial contact between the business and the forum and toward the actual effects of the business on the forum.[192] The effects doctrine, introduced by the U.S. Supreme Court in the case of *Calder v. Jones*,[193] subjects a defendant to personal jurisdiction in a state when "a) the defendant's intentional tortious actions b) expressly aimed at the forum state c) cause harm to the plaintiff in the forum state, which the defendant knows is likely to be suffered."[194] Although the effects doctrine was originally used for defamation cases, the courts have extended the doctrine to areas such as intellectual property.[195]

An example of the effects test in action in an intellectual property context is the case of *Nissan Motor Co. Ltd. v. Nissan Computer Corp.*,[196] a trademark infringement case that arose out of Nissan Computers' use of the "nissan.com" domain name.[197] Nissan Computers, a Massachusetts-based company, altered the content of the "nissan.com" website to incorporate automobile search engines and used a logo for the website that was similar to that of Nissan Motors.[198] Nissan Motors, a California corporation, brought suit in the U.S. District Court for the Central District of California,[199] and Nissan Computers filed a motion to dismiss for lack of personal jurisdiction.[200] The District Court denied the motion and ruled that it could properly exercise jurisdiction over Nissan Computers.[201] The court noted in support of its ruling that Nissan Computers had derived revenue through "the intentional exploitation of consumer confusion," and that the effects of this exploitation were most felt in California, the state in which Nissan Motors was based.[202]

Although the U.S. courts, in analyzing Internet cases, have begun to shift from a *Zippo* commercial contact analysis to a *Calder* effects analysis, personal jurisdiction in cases specifically involving P2P networks is still mostly

191. *See id.*

192. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1371-72 (2001).

193. Calder v. Jones, 465 U.S. 783, 789-90 (1984).

194. Geist, *supra* note 192, at 1372.

195. *See id.* at 1373.

196. Nissan Motor Co. Ltd. v. Nissan Computer Corp., 89 F.Supp.2d 1154 (C.D. Cal. 2000).

197. Geist, *supra* note 192, at 1373.

198. *Nissan*, 89 F.Supp.2d at 1157.

199. *Id.*

200. *Id.* at 1158.

201. *Id.* at 1160.

202. *Id.* at 1161.

determined by the *Zippo* analysis.[203] In 2003, the U.S. District Court for the Central District of California, the same court that presided over *Nissan* three years prior, exercised personal jurisdiction over Sharman Networks through application of the *Zippo* standard.[204] The court found that Sharman's Kazaa software was being used primarily for commercial purposes and that Sharman had at least constructive knowledge that California users were downloading and using its software from the fact that it had been downloaded from their website over 143 million times.[205] Therefore, the level of commercial contact between Sharman and California was such that Sharman had impliedly consented to personal jurisdiction in the state.[206]

In light of the rise of decentralized P2P networks, however, the current rules of personal jurisdiction may not be sufficient for the U.S. copyright holder.[207] The distributor of a decentralized P2P network, much like Sharman Networks, is not intentionally transmitting files to any particular forum by merely making them available on a website.[208] Moreover, unlike Sharman, most decentralized P2P networks are not created with commercial distribution in mind.[209] Consequently, the *Zippo* test would not be applicable against most distributors of a decentralized P2P network program.[210] Although it has never been used against a P2P network, the effects test seems to be a more effective weapon against these networks because it does not rely on commercial activity.[211] Therefore, a U.S. copyright holder should be mindful of both the nature of the network against which it is preparing to litigate and the analysis the court will use to determine whether personal jurisdiction is appropriate before commencing litigation.[212]

VI. FORUM

If a copyright holder wishing to litigate in the United States is able to obtain personal jurisdiction over those against whom he is litigating, the next obstacle the copyright holder will necessarily face is the problem of establishing the United States as an adequate forum for the suit.[213] As discussed in Part III, due to the high costs of litigation and other burdens, a copyright holder will

---

203. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 243 F.Supp.2d 1073, 1087-88 (C.D. Cal. 2003).

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Franklin & Morris, *supra* note 15, at 1229.

208. *See* August, *supra* note 7, at 551.

209. *See* Franklin & Morris, *supra* note 15, at 1229.

210. *See id.*

211. *See generally Calder*, 465 U.S. at 787; *Nissan*, 89 F.Supp.2d at 1159-60.

212. *See* Franklin & Morris, *supra* note 15, at 1216-17.

213. *See generally* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* L.Q.R. 1987, 103 (Jul.), 398-432, 398 (describing the doctrine of forum non conveniens).

find it very difficult, if not impossible, to pursue litigation against infringing file-sharing networks in every country and forum in which they operate.[214] Therefore, it must be the goal of the copyright owner in pursuing copyright infringement litigation against file-sharing networks to bring as many parties and claims as possible before a single forum.[215] If a U.S. copyright holder decides to pursue litigation in a court of the United States, that court must hold that it is a proper and convenient forum to hear the dispute.[216] Even if a court could exercise jurisdiction, a court can decline to exercise jurisdiction over a dispute under the doctrine of *forum non conveniens* if the court decides that another forum would be more appropriate.[217]

Very often, a dismissal on *forum non conveniens* grounds in an American court will prove fatal to a U.S. copyright holder's claim.[218] In a 1987 case study, David Robertson tracked the results of thirty commercial cases and fifty-five personal injury cases that were dismissed from the U.S. federal courts on *forum non conveniens* grounds.[219] Of those eighty-five plaintiffs, only three successfully got their cases to trial in a foreign forum, and none of those three plaintiffs won their cases at trial.[220] Twenty-seven of the fifty-five personal injury plaintiffs and eight of the thirty commercial plaintiffs either completely abandoned their cases after dismissal or settled their claims for ten percent of their potential value or less.[221] Ultimately, only four of the personal injury plaintiffs and five of the commercial plaintiffs ever achieved "anything like full satisfaction."[222] In light of these statistics, the importance of successfully establishing forum in an American court is very clear.[223]

The typical analysis in which U.S. courts engage in making determinations of forum was illustrated by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*.[224] When deciding on a *forum non conveniens* question, a

---

214. Dodes, *supra* note 19, at 300.

215. Jane C. Ginsburg, *The Fourth Annual Herbert Tenzer Distinguished Lecture in Intellectual Property: Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 156 (1997). "The copyright owner's goal in pursuing an infringement action is to bring as many parties and claims as possible before a single forum." *Id.*

216. *See generally* Robertson, *supra* note 213.

217. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947), *superseded by statute on other grounds*, 28 U.S.C. § 1404(a) (1982). "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* The typically stated purpose for the doctrine is to discourage "those who seek not simply justice but perhaps justice blended with some harassment" by "forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." *Id.*

218. Robertson, *supra* note 213, at 418.

219. *Id.* at 419.

220. *Id.*

221. *Id.* at 420.

222. *Id.*

223. *See id.*

224. *Gilbert*, 330 U.S. at 508 (1947).

court in the United States must weigh the interests of both parties involved in the dispute, taking into account:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[225]

In addition, a court must take into consideration the likelihood that any judgment against the defendant will be enforceable in the defendant's jurisdiction.[226] A court must also give great deference to the plaintiff's choice of forum in weighing the interests of the parties.[227] Further, a court must be reluctant to disturb the plaintiff's choice of forum if the defendant's interests in having the dispute litigated in a more convenient forum do not outweigh the plaintiff's interests in having the dispute litigated in the current forum.[228]

In cases that involve the laws of more than one country where no one forum is the most appropriate for all of the claims of the dispute, in the interests of convenience and avoiding "fragmented litigation," the courts will usually either hear an entire case or dismiss an entire case and will not usually split the claims of a case because of inconvenient forum.[229]

Precedent seems to suggest that the determination of a forum is not a major hurdle to a U.S. copyright holder seeking to pursue litigation against a P2P network based in another country in a court of the United States.[230] In cases such as these, the global nature of the Internet spreads out the potential defendants in the litigation, but at the same time makes the "sources of proof" required by the copyright holders more accessible.[231] For this reason, despite the fact that Internet defendants could be spread over a larger area, Internet defendants are more susceptible to suit in the United States than other foreign defendants.[232] Evidence of this susceptibility can be seen at the trial level in the

---

225. *Id.* The interest most likely to be pressed is the private interest of the litigant. *Id.*

226. *See id.*

227. *See id.*

228. *Id.* "The court will weigh relative advantages and obstacles to fair trial. . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

229. Peter Nicolas, *Use of Preclusion Doctrine, Antisuit Injunctions, and Forum Non Conveniens Dismissals in Transnational Intellectual Property Litigation*, 40 VA. J. INT'L L. 331, 379-80 (1999).

230. *See generally Aimster*, 334 F.3d at 643; *Grokster*, 380 F.3d at 1154.

231. *See generally* August, *supra* note 7; *see generally* Nicolas, *supra* note 229.

232. *See generally* August, *supra* note 7; *see generally* Nicolas, *supra* note 229.

Grokster case, where KaZaa BV,[233] a Dutch company and the maker of the Kazaa program, and Sharman Networks, a company organized under the laws of the nation of Vanuatu[234] that does business principally in Australia and the successor in interest to KaZaa BV, were both subject to suit in the U.S. District Court for the Central District of California.[235] However, although forum may not be a major hurdle to a U.S. copyright holder, establishing forum only gets a claim heard by a court in the United States. The copyright holder must also convince that court to apply U.S. law to the claim.

VII. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

If a U.S. copyright holder manages to obtain jurisdiction against the foreign P2P defendants and keep that jurisdiction through the *forum non conveniens* analysis, the copyright holder will still have difficulty obtaining a remedy unless it can convince the court to apply U.S. law extraterritorially.[236] Generally, the courts are extremely hesitant to apply U.S. law extraterritorially, out of both respect for the authority of other sovereign countries and concerns over the comity of nations.[237] The general rule regarding the presumption against extraterritoriality, as stated in 1909, is that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[238]

Absent an exception to this general rule, the courts of the United States will typically not allow U.S. law to be applied extraterritorially to a foreign defendant.[239] Three exceptions to the presumption against extraterritoriality

---

233. Before trial, KaZaa BV changed its name to Consumer Empowerment BV. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029, 1031 (C.D. Cal. 2003).

234. Vanuatu is comprised of a group of islands in the South Pacific Ocean, approximately three quarters of the way from Hawaii to Australia. U.S. Central Intelligence Agency, *The World Factbook - Vanuatu*, *at* http://www.cia.gov/cia/publications/factbook/print/nh.html (last updated Jan. 10, 2006).

235. *Grokster*, 243 F.Supp.2d at 1087-88.

236. Susan S. Murphy, Note, *Copyright Protection, "The New Economy" and the Presumption Against the Extraterritorial Application of United States Copyright Law: What should Congress Do?*, 33 CONN. L. REV. 1401, 1404 (2001). "Without the application of United States' copyright protection abroad, the United States copyright industries are left to rely on international treaties, non-governmental organizations and industry alliances to combat the escalating overseas piracy problem. These methods of protection have proved woefully inadequate . . . ." *Id.*

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

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

Id.

238. *Id.*

239. *See id.*

exist: (1) cases in which Congress has explicitly stated in the language of a statute that it intends the statute to apply extraterritorially; (2) cases in which the failure to apply a law extraterritorially will create "adverse effects" within the United States; and (3) cases in which conduct inside the United States causes extraterritorial effects that outweigh the potential for conflict with the laws of another sovereign nation.[240]

In the case of an American plaintiff pursuing litigation for infringement of its copyright under United States law against a P2P network located in another country, only the second exception to the presumption against extraterritoriality would apply.[241] The U.S. Copyright Act, while providing for protection of works that originated in another country under certain circumstances, does not explicitly allow American copyrights to be enforced extraterritorially.[242] Furthermore, the nature of the problem faced by U.S. copyright holders is the conduct of P2P networks located in other nations violating U.S. copyrights, not the conduct within the United States creating effects extraterritorially. Therefore, in order for the holder of a U.S. copyright to obtain an extraterritorially enforceable judgment over a P2P network based in another country, the adverse effects created in the United States by failing to enforce American copyright law extraterritorially must outweigh the potential for conflict with the laws of the nation in which the network is based.[243]

In most cases, this balancing of interests leans clearly in favor of the copyright holder.[244] Because of recent international intellectual property treaties[245] and other measures, the copyright law of most countries is becoming analogous enough to most American law provisions to avoid any major conflicts.[246] In addition, not only is the potential for conflict with the laws of other nations very low, but the potential for adverse effects on the United States if its copyrights are not enforced extraterritorially is very high.[247] The Internet is a truly global set of computer networks, where users from multiple countries

240. *See* Murphy, *supra* note 236, at 1407 (citing Entvl. Def. Fund v. Massey, 986 F.2d 528, 531-32 (D.C. Cir. 1993)).

241. *See* 17 U.S.C. § 104 (2005).

242. *Id.* The U.S. Copyright act grants protection to works published by persons who are not U.S. citizens but who are citizens of a country that is a party to a copyright treaty with the United States. *Id.*

243. Murphy, *supra* note 236, at 1407.

244. *See generally* Cohen, *supra* note 5; Greenwald & Levy, *supra* note 150.

245. Examples of these international intellectual property treaties include the Berne Convention, *supra* note 150, and the World Intellectual Property Organization (WIPO) Copyright Treaty, *at* http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm (Dec. 23, 1996.

246. As an example of the global harmonization of copyright law, *see* Berne Convention, *supra* note 150.

247. To illustrate this point, the Recording Industry Association of America has stated that music piracy, of which the association asserts that P2P file sharing is a form, costs the U.S. recording industry $4.2 billion annually. Recording Industry Association of America, *supra* note 1.

can conduct business or other activities instantly and simultaneously.[248] Because of this global nature of the Internet, all Internet activities and any regulation of Internet activities will necessarily impact other countries.[249] In the hypothetical example at the beginning of this Note,[250] Arlogeist GmbH, a German corporation, made its P2P file-sharing program called Swapster available through its website, with the initial intent that it would only be used by the German public. Due to the global nature of the Internet, however, users in the United States could also use the program and engage in the unauthorized distribution of copyrighted media through its network. Because of the extraterritorial conduct by Arlogeist, and its potential effects on U.S. copyright holders' rights, it is apparent that the failure to apply U.S. copyright law extraterritorially would create a strong adverse impact on those who hold copyrights in the United States.

Despite the fact that the interests of U.S. copyright holders seemingly outweigh the potential for conflict with the laws of other nations, courts in the United States have traditionally been hesitant to go against the presumption against territoriality in copyright cases.[251] However, as evidenced by *Grokster*, courts in the United States are becoming more willing to exercise U.S. copyright law extraterritorially in Internet cases.[252] Thus, the presumption against extraterritoriality is becoming less of a hurdle to litigating a secondary infringement claim in a court of the United States against a peer-to-peer network based in another country.[253]

VIII. CHOICE OF LAW

In addition to convincing a U.S. court that the extraterritorial application of U.S. law is proper in a particular case, a copyright holder must also convince that court to actually apply U.S. law.[254] In some cases, a court of the United States may elect not to apply U.S. law to one or more defendants even when justified.[255] This could potentially lead to problems, especially when the

248. *See* Cohen, *supra* note 5, at 406-07.

249. *See* Joshua S. Bauchner, Note and Comment, *State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate*, 26 BROOK. J. INT'L L. 689, 689-90 (2000). Nations attempting to regulate the Internet should be aware that any attempt at regulation "may have a direct and significant impact on other states." *Id.*

250. *See supra* Part I.

251. Murphy, *supra* note 236, at 1402-03.

252. *See generally Grokster*, 243 F.Supp.2d at 1073 (U.S. District Court for the Central District of California applied U.S. copyright law extraterritorially against KaZaa BV, a Dutch company and the maker of the Kazaa program, and Sharman Networks, an Australian company and the successor in interest to KaZaa BV).

253. *See generally id.*

254. *See generally* William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383 (2000).

255. *Id.*

defendants involved in the litigation come from a large number of countries.[256]

When infringing acts on a P2P file-sharing network are being conducted within the United States, as in the Swapster hypothetical,[257] U.S. courts have held quite clearly that U.S. copyright law is to be applied with respect to that domestic conduct.[258] However, the choice of law analysis becomes much more complicated when the courts are asked to consider acts of infringement on the Internet that occur overseas.[259] When infringing acts on a P2P network take place in multiple countries, a court will have great difficulty in determining the nation whose laws should apply in a particular case.[260] For this reason, the U.S. courts have traditionally tried to avoid making these determinations; in fact, U.S. courts are reluctant to hear a case at all if it involves the application of the intellectual property law of another country to foreign infringement.[261] Because the U.S. courts are reluctant to hear cases that will require the application of the laws of other nations, choice of law is vital to a copyright holder's claim in the United States.[262] If the holder of a U.S. copyright cannot convince a court in the United States to apply U.S. copyright law in an infringement claim, the very real possibility exists that the court will refuse to hear the claim at all.[263]

This problem has slightly improved in recent years, but it still presents a major stumbling block to a U.S. copyright holder.[264] With the introduction of international copyright law treaties and agreements, foreign copyright law and U.S. copyright law are harmonizing in some aspects.[265] This growing harmonization alleviates some of the concerns the U.S. courts may have over applying the laws of another country, but the unifying aims of these treaties have not yet been advanced far enough for the U.S. courts to reconsider their reluctance to apply foreign law.[266]

Until a time comes when international copyright law has been harmonized to a point where the U.S. courts feel comfortable applying it, a copyright holder will likely need to show that infringement is taking place on a P2P network within the United States before U.S. law will apply.[267] In

256. *See generally* Dodes, *supra* note 19.

257. *See supra* Part I.

258. Patry, *supra* note 254, at 448. "The applicable law for infringing conduct that takes place in the United States is quite simply the substantive, domestic U.S. copyright law." *Id.*

259. *See* Cohen, *supra* note 5, at 406-07.

260. *See id.*

261. Brandon Dalling, Note and Comment, *Protecting Against International Infringements in the Digital Age Using United States Copyright Law: A Critical Analysis of the Current State of the Law*, 2001 BYU L. REV. 1279, 1304 (2001).

262. *See* Robertson, *supra* note 213, at 420; *supra* Part VI.

263. Studies have shown that claims originally brought in a U.S. court have a significantly smaller chance of success if the U.S. court denies hearing the claim on *forum non conveniens* or other grounds. Robertson, *supra* note 213, at 420; *supra* Part VI.

264. *See* Robertson, *supra* note 213, at 420.

265. As an example of the global harmonization of copyright law, see Berne Convention, *supra* note 150.

266. *See* Dalling, *supra* note 261, at 1304.

267. *Id.*

Grokster, the U.S. District Court for the Central District of California found that it was the appropriate forum to exercise its jurisdiction over claims of secondary infringement against Sharman Networks.[268] In its analysis, the court stressed that Sharman Networks had engaged in a significant amount of business in the United States.[269] But if a case arises in the future involving a decentralized P2P network with no corporate distributor, such as an open source Gnutella clone, the copyright holder will not be able to rely on business activity as a basis for the application of U.S. copyright law.[270] Instead, the copyright holder will have to take the much more difficult route of actually proving that users within the United States were engaging in infringement on the network.[271] If a copyright holder cannot show that there is a sufficient amount of infringement occurring on a P2P network within the United States, it will have trouble convincing the court to apply U.S. copyright law to the dispute or even to hear the case at all.[272]

IX. CONCLUSION

Although the recent decision of the U.S. Supreme Court in *Grokster*[273] was a major victory for copyright holders in the United States, the problems those copyright holders face from decentralized P2P file sharing programs, especially those based in other countries, still cannot be taken lightly. If a copyright holder wishes to assert his rights through litigation, there are a number of roadblocks that must immediately be considered, such as the possibility of obtaining a favorable judgment and adequate compensation, in determining whether litigation is even a feasible option. Even after these obstacles are addressed, the issue of finding defendants for litigation lingers. If the copyright holder additionally wishes to make a claim for copyright

---

268. *See Grokster*, 243 F.Supp.2d at 1087.

269. *Id.*

> Here, there is little question that Sharman has knowingly and purposefully availed itself of the privilege of doing business in California. First, Sharman essentially does not dispute that a significant number of its users - perhaps as many as two million - are California residents. Indeed, given that Sharman's [Kazaa] software has been downloaded more than 143 million times, it would be mere cavil to deny that Sharman engages in a significant amount of contact with California residents.

Id.

270. For more information on open source software, *see supra* note 39. For further information on the problems that a decentralized P2P network and non-corporate developers create for an American copyright holder, *see supra* Parts II.D. and III.

271. *See* Patry, *supra* note 254, at 448 (stating that U.S. copyright law is used for infringement that occurs in the United States).

272. *Compare* Patry, *supra* note 254, at 448 (stating that U.S. copyright law is used for infringement that occurs in the United States), *with* Dalling, *supra* note 261, at 1304 (stating that U.S. courts are reluctant to apply foreign copyright law to infringement that occurs in other countries).

273. *Grokster*, 125 S.Ct. at 2764 (2005).

infringement in a court of the United States, he must first ensure that such a claim is possible and not prohibited by lack of personal jurisdiction, inconvenient forum, or an unfavorable choice of law.

Because most activities conducted over the Internet are global in scope and not confined to any particular country, a U.S. copyright holder does have rights with respect to infringing activity on P2P file sharing networks. However, these rights are very limited, and they may carry little weight outside of American soil. Therefore, despite the U.S. Supreme Court's recent ruling in *Grokster*,[274] copyright holders should be mindful that the battle against infringement on these networks is only just beginning.

274. *Id.*

FOREIGN INVESTMENT LAW IN THE PEOPLE'S REPUBLIC OF CHINA: WHAT TO EXPECT FROM ENTERPRISE ESTABLISHMENT TO DISPUTE RESOLUTION

Jessica Zoe Renwald*

INTRODUCTION

"The future of China is closely linked with that of the whole world."[1]

Since the opening up of China in 1978[2] by Deng Xiaoping,[3] China's gross domestic product has grown an "average of 9.5% a year."[4] According to a recent *Economist* survey, much of China's growth during the past twenty-five years is due to a significant amount of foreign direct investment (FDI).[5] Through 2004, China received a cumulative $563.8 billion in foreign direct

---

* J.D., Indiana University School of Law-Indianapolis, 2006. I would like to thank Professor Frank Emmert, Executive Director of the Center for International and Comparative Law, for his advice and assistance on this Note.

1. Zhonguo Renmin Gongheguo Xianfa [P.R.C. Constitution] pmbl. (1982), http://english.people.com.cn/constitution/constitution.html (last updated Mar. 22, 2004) [hereinafter XIANFA].

2. *See* William I. Friedman, *One Country, Two Systems: The Inherent Conflict Between China's Communist Politics and Capitalist Securities Market*, 27 BROOKLYN J. INT'L L. 477, 478 (2002). The Communist Party took control of China's economy in 1949 and turned it into a planned economy. *Id.* A state-run economy produced "few incentives" for the Chinese to participate in the economy, which led to an "ailing" state-owned sector. *Id.* In 1978, Deng Xiaoping adopted the "open door" policy, which consisted of several reforms designed to use foreign capital and resources to "speed up" the growth of the Chinese economy. *Id.*

3. Deng Xiaoping (1904-1997) was the Chairman of the Party's Central Military Commission. *See* CNN In-Depth Specials, *Reformer with an Iron Fist*, *at* http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/deng.xiaoping (n.d.) (last visited Mar. 29, 2006). Deng Xiaoping was one of the leaders in the movement to open China up to foreign investment and a market economy. *Id.*

4. *The Real Great Leap Forward*, THE ECONOMIST, Sept. 30, 2004, *available at* http://www.economist.com/displaystory.cfm?story_id=3219418. China's GDP growth is "three times the rate than that in the United States" and is "faster than in any other economy." *Id. See also China's Growing Pains*, THE ECONOMIST, Aug. 19, 2004, *available at* http://www.economist.com/displaystory.cfm?story_id=3107157. *An Economist* poll forecasts growth "this year at 9.2%, and at a still-stellar 7.9% next year." *Id.*

5. *See generally The Real Great Leap Forward*, *supra* note 4; *see also* Joshua Kurlantzik, *Asia Minor*, NEW REPUBLIC, December 26, 2002, at 24. The author notes that "90 percent of foreign-invested businesses in China plan to expand their operations in the next three years." *Id.*

investment.[6] Its large population[7] and immense commercial opportunities[8] make China one of the most important, if not the key, destination for foreign direct investment in the world.[9] The economic potential of the Chinese market is undeniable,[10] and it has become a magnet for foreign investors.[11]

However, despite China's accession to the World Trade Organization (WTO) in 2001[12] and the rise of various successful FDI vehicles operating within China, foreign investors should be cautioned that the concept of the rule of law has not been fully implemented within China.[13] Particularly when establishing an enterprise in China or resolving disputes with Chinese entities, the foreign investor needs to be aware of the cultural and structural differences inherent in the Chinese legal system as they pertain to the type of investment enterprise chosen by the foreign investor.

This Note serves as a practical commentary designed to offer information for the medium-sized firm thinking about investing in China for the first time. Part I of this Note will address the current state of the law in China and how the structure of the Chinese government contributes to the sometimes confusing combination of laws for the foreign investor. Part II will discuss several popular forms of foreign direct investment in China and the restrictions and establishment procedures unique to each type. Part III will compare the most popular methods of dispute resolution mechanisms with Chinese entities, focusing on arbitration and litigation and how they affect different types of investment enterprises. Finally, as a result of China's accession to the WTO

---

6. U.S. DEPT OF STATE, 2005 INVESTMENT CLIMATE STATEMENT-CHINA, *available at* http://www.state.gov/e/eb/ifd/2005/42000.htm (n.d.) (last visited Mar. 29, 2006) [hereinafter U.S. DEPT OF STATE]. China added "$64.0 billion" in the year 2004. *Id.*

7. *See* China Population Development and Research Center, *at* http://www.cpirc.org.cn/en/eindex.htm (updated daily) (last visited Mar. 29, 2006). An estimated 1.3 billion people reside in China. *Id.*

8. *See China's Growing Pains*, *supra* note 4, at 11. A middle class of approximately 100 million people exists in China, "where none at all existed before." *Id.*

9. *See* Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 320 (2004) (observing that China is "second only to the United States" as a destination for foreign direct investment); *see also* U.S. DEPT OF STATE, *supra* note 6. "China has maintained its position as one of the world's top two destinations for foreign direct investment." *Id.*

10. *See The Real Great Leap Forward*, *supra* note 4. "China is . . . likely one day to overtake America and become the world's number one economy." *Id.*

11. *See generally* Sameena Ahmad, *Survey: Behind the Mask*, THE ECONOMIST, Mar. 18, 2004 (describing the current "tidal wave of foreign enthusiasm for China" evidenced by the influx of FDI and rapid growth), *available at* http://www.economist.com/displayStory.cfm?Story_id=2495113.

12. *See generally* CHINA DEVELOPMENT GATEWAY, CHINA'S LONG MARCH INTO THE WTO (July 25, 2003) (detailing the long process begun in 1986 that led to China's accession to the WTO on Dec. 11, 2001), *at* http://www.chinadaily.com.cn/chinagate/doc/2003-07/25/content_249150.htm.

13. *See generally* Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369 (2002) (giving a thorough description of the problems still inherent in the Chinese legal system).

and other developments, many positive reforms have been instituted by the Chinese government. Part IV will offer perspectives on the various changes to the Chinese system and the future outlook for foreign investment in China.

I. CHINA'S STRUGGLE WITH THE RULE OF LAW

"The People's Republic of China is a socialist state under the people's democratic dictatorship."[14]

China is an extremely diverse nation[15] divided into twenty-three provinces.[16] Each province is then subdivided into prefectures, counties, and cities.[17] In addition, each county may also be subdivided into townships, "national minority townships," or towns.[18] Although diverse and with many smaller units of government, the Chinese regime is a "unitary system" with all authority coming from the central government.[19] The Chinese Constitution (Constitution) identifies China as a "socialist state under the people's democratic dictatorship"[20] and applies the principle of "democratic centralism."[21] These phrases perhaps seem odd to western notions, but they exemplify the concepts upon which the law in China is based.[22]

Since the Communist Revolution in 1949,[23] law in The People's Republic of China (PRC or China) has become an "ideological instrument of politics."[24] For example, the laws in China are plagued by problems of "vagueness," "omissions," and "general 'catch-all' provisions."[25] The less certainty and detail in the laws, the better the Chinese government will be able to respond to

---

14. XIANFA art. 1.

15. *See* Dr. Jianfu Chen, *Dealing With Local Law In China*, 3 CHINA L. UPDATE 3 (2000). A 1990 census revealed that there are fifty-six ethnic nationalities in China. *Id.* Aside from the Han Chinese majority, the fifty-five different ethnic minorities make up about 91.2 million people of the approximately 1.3 billion people in China. *Id.*

16. *See id.*

17. *Id.*

18. *Id.*

19. Corne, *supra* note 13, at 369. "The PRC is a unitary, not a federated state- state power being an indivisible whole." *Id.*

20. XIANFA art. 1. *See also* Mao Tse-tung, *On the People's Democratic Dictatorship*, *in* SELECTED WORKS OF MAO TSE-TUNG (1969).

21. XIANFA art. 3.

22. *See generally* Eric Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L 43 (2001). The Chinese legal system followed the Marxist thought that the Communist Party should have "absolute control" over the "organs of the state." *Id.* at 57.

23. *See supra* note 2.

24. Orts, *supra* note 22, at 57.

25. Corne, *supra* note 13, at 374. *See, e.g.*, Wholly Foreign Owned Enterprise Law of the People's Republic of China (Apr. 12, 1986), http://www.chinajnbook.com/business/wfoenla.htm [hereinafter WFOE Law]. Article 5 states, "Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures. . . ." *Id.* The law provides no definition of what "public interest" requires. *Id.*

"rapid political and economic change."[26] Ambiguity leads to greater flexibility in interpretation and a "wide variation in application."[27] Indeed, "short-term flexibility" in lawmaking seems to be preferred over long-term policies.[28]

A. *Primary Sources of Law*[29]

The Chinese central government comprises several different levels of law-making bodies. The National People's Congress (NPC) operates as the most powerful legislative body in the central government of China.[30] Responsibilities of the NPC include supervising the enforcement of the Constitution, amending the Constitution, enacting laws, deciding "questions of war and peace," and other important powers.[31] The NPC elects the President of the PRC, who may promulgate laws, remove other heads of departments, and

---

26. Corne, *supra* note 13, at 375. "The Chinese legal system is thus, in essence, as fluid and changeable as the economy . . . which it is supposed to regulate." *Id.*

27. *Id.* at 374. There is no practice of striking down a law on the "basis of uncertainty." *Id.* at 375.

28. *Id.* at 375.

29. *See generally* Chen, *supra* note 15, at 2 (illustrating the "hierarchy of law" with a chart).

30. XIANFA art. 57. This article states, "The National People's Congress of the People's Republic of China is the highest organ of state power." *Id.*

31. *Id.* art. 62. China's constitution delineates the following powers to the NPC:

> (1) To amend the Constitution; (2) To supervise the enforcement of the Constitution; (3) To enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters; (4) To elect the President and the Vice-President of the People's Republic of China (previously translated as Chairman and Vice-Chairman of the People's Republic of China--translator's note.); (5) To decide on the choice of the Premier of the State Council upon nomination by the President of the People's Republic of China, and to decide on the choice of the Vice-Premiers, State Councillors [sic], Ministers in charge of Ministries or Commissions and the Auditor-General and the Secretary-General of the State Council upon nomination by the Premier; (6) To elect the Chairman of the Central Military Commission and, upon his nomination, to decide on the choice of the other members of the Central Military Commission; (7) To elect the President of the Supreme People's Court; (8) To elect the Procurator-General of the Supreme People's Procuratorate; (9) To examine and approve the plan for national economic and social development and the reports on its implementation; (10) To examine and approve the state budget and the report on its implementation; (11) To alter or annul inappropriate decisions of the Standing Committee of the National People's Congress; (12) To approve the establishment of provinces, autonomous regions, and municipalities directly under the Central Government; (13) To decide on the establishment of special administrative regions and the systems to be instituted there; (14) To decide on questions of war and peace; and (15) To exercise such other functions and powers as the highest organ of state power should exercise.

Id.

receive foreign diplomats.[32] The NPC also elects the President of the Supreme People's Court and all other major heads of departments.[33]

The approximately 3,000-member NPC meets once a year for two to three week periods.[34] The members, or delegates, are not directly elected by China's citizens; delegates are chosen by the people's congresses at the provincial level from an NPC-approved list of nominated candidates in each local area.[35] The actual result is that the delegates are members of the Chinese Communist Party (CCP) and do not reflect the "views and aspirations of any popular constituency."[36] Further, CCP membership is often "an essential requirement" to obtaining any influential role in the government.[37]

In addition to the NPC, the Chinese law-making branch also includes the NPC Standing Committee, which is the permanent body of the NPC.[38] The NPC Standing Committee is composed of about 200 members[39] appointed by the NPC[40] and meets regularly during the year when the NPC is not in session.[41] The NPC Standing Committee, like the NPC, may enact laws; however, they must be other than the "basic"[42] laws "which should be enacted by the National People's Congress."[43] Importantly, when the NPC or its Standing Committee makes laws, there is no public involvement or debate in the drafting process.[44]

Another primary source of law in China is the Supreme People's Court (SPC),[45] which is the "highest judicial organ" in China.[46] The court system in

---

32. *Id.* art. 80. The President's duties are carried out "in pursuance of decisions of the National People's Congress and its Standing Committee." *Id.*

33. *Id.* art. 62.

34. James M. Zimmerman, *Legislating, the Judiciary, and Lawyers in China*, *in* CHINA LAW DESKBOOK 27-28 (1999).

35. *See* Corne, *supra* note 13, at 379.

36. *Id. See also* Orts, *supra* note 22, at 66. "In practice, the formal legal and political structures very often remain subject to the will of the Communist Party leadership." *Id.*

37. *See* Zimmerman, *supra* note 34, at 31. The NPC is a "rubber-stamping body that unquestioningly follows the party line while the annual meetings and media coverage are intended to create the illusion of democracy." *Id.*

38. XIANFA art. 57. "The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress." *Id.*

39. *See* Zimmerman, *supra* note 34, at 29.

40. XIANFA art. 65. "The National People's Congress elects, and has the power to recall, all those on its Standing Committee." *Id.*

41. *See generally* Zimmerman, *supra* note 34, at 28-30 (describing the NPC and its Standing Committee and the various functions of each).

42. XIANFA art. 62. The duties of the NPC include enacting and amending "basic statutes concerning criminal offences, civil affairs, the state organs and other matters." *Id.*

43. *Id.* art. 67. The duties of the NPC Standing Committee include enacting and amending "statutes with the exception of those which should be enacted by the National People's Congress." *Id.*

44. *See* Zimmerman, *supra* note 34, at 29.

45. *See generally* Chen, *supra* note 15, at 2 (illustrating the primary and secondary sources of law with a chart).

China is divided into four levels: "(1) the Supreme People's Court is at the national level; (2) the higher people's court at the provincial level; (3) the intermediate people's court at the municipal level; and (4) basic people's court at the county level."[47] Although it is the weakest organ in the government,[48] the powers of the SPC include supervising the many local people's courts operating throughout the provinces.[49] SPC interpretations of law are binding on the lower courts,[50] but they are restricted to "clarifying and strengthening laws," as the NPC and the Standing Committee are responsible for interpreting statutes and the Constitution.[51] China does not have a system of judicial precedent, and the courts do not have the power to interpret the law[52] since the SPC is "responsible to the National People's Congress and its Standing Committee."[53] Furthermore, since CCP membership is often very important in attaining positions within the NPC and its Standing Committee,[54] the CCP has substantial influence over the courts.[55]

---

46. XIANFA art. 127. "The Supreme People's Court is the highest judicial organ." *Id.*

47. Zimmerman, *supra* note 34, at 38.

48. *See* M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUS. J. INT'L L. 507, 535 (2004). "[T]he Supreme People's Court—the highest judicial organ—is, in constitutional text, practice, and power subordinate to both the NPC and State Council in judicial interpretive powers." *Id.*

49. XIANFA art. 127. "The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels." *Id.*

50. *See* Email from David Yiping Lu, Senior Judge of the People's Republic of China, Professor of the State College of Judges of China, Advisor to the Center for Comparative and International Law at Indiana University (Feb. 4, 2005, 09:54:31 EST) (on file with author) (noting that the interpretations of the SPC should be used by the people's courts at the trial level).

51. Corne, *supra* note 13, at 409. Indeed, the NPC Standing Committee has the power to "annul or amend" SPC interpretations of law that are not in the spirit with the "original meaning of the law." *Id.* at 424; *see also* XIANFA art. 67. The NPC Standing Committee may "interpret the Constitution and supervise its enforcement." *Id.*

52. *See* Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 180, 195 (2003) (describing, in part, that the courts "do not have the power to apply the Constitution").

53. XIANFA art. 128. "The Supreme People's Court is responsible to the National People's Congress and its Standing Committee." *Id. But see id.* art. 126. Article 128 seems to contradict Article 126, which says, in part, that the people's courts shall "exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals." *Id.*

54. *See supra* note 34.

55. *See generally* Lin, *supra* note 52, at 195-214 (describing, in part, the relationship between the Communist Party and the courts); *see also* SETH GARZ, THE CARNEGIE ENDOWMENT FOR INT'L PEACE, THE CHINESE COMMUNIST PARTY'S LEADERSHIP AND JUDICIAL INDEPENDENCE (Oct. 29, 2003), *at* http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=650. Professor Li Yayun, a scholar and legal practitioner in China, gives examples of Communist Party involvement in the legal system: (1) Communist Party "committees" handle and "even decide[] some specific cases"; (2) "local CCP committees may appoint, dismiss, or rotate" leaders in the "courts"; and (3) Communist Party members are "likely to intervene" in cases that "affect local economic interests" "on behalf of the local government." *Id.*

B. *Secondary Sources of Law*[56]

Secondary law-making bodies also exist in China, which may create confusion for the foreign investor.[57] The State Council, an administrative body elected by the NPC, oversees the many "ministries, bureaus, commissions, and local governments."[58] The State Council has the power to pass "administrative rules and regulations,"[59] which are "lower in position than the Constitution and other statutes, but higher than local ordinances and regulations."[60] The State Council is considered both "legislative and executive" in its power.[61] Additionally, the many ministries, bureaus, and other administrative bodies supervised by the State Council are also granted certain law-making powers and may issue compulsory directives and rules.[62] The State Council may also authorize "tentative" or "interim" regulations[63] designed to control local situations when no current regulating legislation exists.[64] Later, after "sufficient experience" has been accumulated, the "quasi-law[s]" enacted by the State Council will be drafted into law by the NPC.[65] The regulations promulgated by the State Council or the other administrative bodies are not subject to interpretation by the judicial organs; instead, only the State Council may interpret these enactments.[66]

At the local level of administration, there are people's congresses and standing committees established throughout the "provincial, 'quite big city,' county . . . township/village and hamlet[s]" of China.[67] The local people's

---

56. *See generally* Chen, *supra* note 15, at 2 (illustrating the "hierarchy of law" with a chart).

57. *See id.* at 3 (noting the division of state powers and functions is "not always" clear between the various state organs).

58. Zimmerman, *supra* note 34, at 31.

59. XIANFA art. 89(1). "To adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes." *Id.*

60. China Internet Information Center, *Creation of Regulations by the State Council and Its Departments* (Sept. 28, 2003), http://www.china.org.cn/english/kuaixun/76340.htm [hereinafter China Information Center].

61. Corne, *supra* note 13, at 381. The State Council may "issue decisions . . . and orders . . . in accordance with the Constitution and statutes." *Id.*

62. *See* Chen, *supra* note 15, at 3. *See also* China Information Center, *supra* note 60. "The State Council has several dozen ministries, commissions, and other directly affiliated organs. Departmental regulation making is a general term for regulation making by the several dozen bodies under the State Council. The rules and regulations they make have equal validity." *Id.*

63. Corne, *supra* note 13, at 382.

64. *Id.*

65. *Id.*

66. *See* Email from David Yiping Lu, Senior Judge of the People's Republic of China, Professor of the State College of Judges of China, Advisor to the Center for Comparative and International Law at Indiana University (Feb. 4, 2005, 09:54:31) (on file with author).

67. Corne, *supra* note 13, at 388; *see also* XIANFA art. 95. "People's congresses and people's governments are established in provinces, municipalities directly under the Central

congresses and standing committees "ensure the observance and implementation of the Constitution."[68] With the approval of the State Council, they may adopt certain laws to promote local economic and cultural growth.[69] The rules and regulations enacted by local people's congresses at the provincial and quite big city level are considered law.[70] These congresses may also issue supplemental "decisions" and "resolutions" that can be used as the "basis of legal decision[s]."[71]

However, the "resolutions . . . orders . . . circulars . . . notices . . . and opinions" issued *below* the provincial and quite big city levels "lack legal status"[72] and serve only administrative purposes.[73] Complicating matters for the foreign investor, each administrative body governed by the State Council has lower units in all the local provinces, which may also issue merely normative rules to be applied "in the course of their local operations."[74]

The laws enacted by the local people's congresses, standing committees, and other administrative bodies may not be in conflict with any law enacted by the NPC or in violation of the Constitution.[75] The Constitution, however, is unclear about the line between the local directives and the central laws.[76] The State Council and the other departments do have the power to revoke unsuitable or inconsistent legislation passed by the local governments[77] but these laws are still often in conflict with higher level Chinese laws, as that power is seldom used.[78]

Government, counties, cities, municipal districts, townships, nationality townships and towns." *Id.*

68. XIANFA art. 99.

69. *Id.* "Local people's congresses at different levels ensure the observance and implementation of the Constitution" as well as the "statutes and the administrative rules and regulations in their respective administrative areas." *Id.*

70. Corne, *supra* note 13, at 389.

71. *Id.*; *see also* Chen, *supra* note 15, at 4.

72. Corne, *supra* note 13, at 391; *see also* Chen, *supra* note 15, at 4. "Legislative powers are only granted to people's congresses and their standing committees at the level of province." *Id.*

73. Corne, *supra* note 13, at 392; *see also* Chen, *supra* note 15, at 4. Even though the enactments issued by the governments below the provincial level are only "policy," they are called "local rules." *Id.* These rules are often "overturned as a matter of policy" without "legislative process." *Id.*

74. *See* Corne, *supra* note 13, at 391.

75. XIANFA art. 100. "The people's congresses of provinces and municipalities directly under the Central Government, and their standing committees, may adopt local regulations, which must not contravene the Constitution." *Id.*; *see also* Cao Jianming, *WTO and the Rule of Law in China*, 16 TEMP. INT'L & COMP. L.J. 379, 388 (2002). "All laws, regulations, decisions, and administrative policies made and implemented by each locality and governmental department that relate to foreign trade and economic cooperation should be in conformity with national laws and regulations." *Id.*

76. XIANFA art. 99. The local rules are to be issued "[w]ithin the limits of their authority." *Id.*; *see also* Chen, *supra* note 15, at 3. There is "hardly any ascertainable principles to delimit the boundary of legislative power between the central and local authorities. The Constitution has little to say about this." *Id.*

77. *See* Corne, *supra* note 13, at 370-71.

78. *See id.*, at 370-71; *see also* Chen, *supra* note 15, at 3. It is "commonplace" that the

Due to the many sources of law, issuing departments, and conflicts of law, a certain amount of confusion is inevitable.[79] Therefore, recognizing which enactments have legal status can be a problem for the foreign investor.[80] In order to ensure that a particular regulation is not just "policy" and has the force of law,[81] one solution is to make sure the issuing authority is above the county level.[82] It is important to note that it is the "authority which issue[s]" the laws that gives them validity and not the "designation of the rules."[83] The foreign investor should keep this basic understanding in mind when seeking to establish an enterprise in China.

II. FOREIGN INVESTMENT IN CHINA

Even before China's accession to the WTO, several popular FDI vehicles operated in China to infuse the country with capital, but the laws and regulations governing foreign investment were not codified and thus discouraged foreign investment.[84] Since the open-door policy in the late 1970s,[85] the NPC and its Standing Committee set out to create an environment that would encourage more foreign investment by enacting numerous laws that protect the "lawful rights and interest of those enterprises."[86] The two main

---

"rules and regulations" issued by the "central and local authorities" to be in conflict. *Id.* However, "[t]he Constitution and other organic laws do create some mechanisms for dealing with the conflict of laws, such as . . . filing with the . . . State Council which would allow superior authorities to examine possible conflict[,] . . . [but] these mechanisms . . . are rarely used." *Id.*

79. *See* Chen, *supra* note 15, at 5. "[S]ome Chinese scholars claim that inconsistency exists in every single piece of legislation." *Id.*

80. Corne, *supra* note 13, at 393. The documents issued at the lower local levels are "often expressed in a form complete with chapters and articles," making them "almost indistinguishable" from the legally binding rules and regulations. *Id.* In addition, the "titles" used by these non-legally binding documents are "readily used by local governments in their own enactments," making them very difficult to identify. *Id.*

81. *See* Corne, *supra* note 13, at 392. In order to illustrate the sometimes confusing state of the laws in China, the author gives an example of a published provision entitled, "Operational Rules for the Approval and Registration of Sino-foreign Non-legal Person Cooperative Joint Ventures" issued by the "Shanghai Foreign Investment Working Committee and the Shanghai Administration for Industry and Commerce." *Id.* The document has no legal status "before a court of law." *Id.* The document must not be approved only by the "local functional departments" but by the "Shanghai Municipal People's Government" to be valid. *Id.*

82. *See* Chen, *supra* note 15, at 3-4. "Level of authority" and "category of law" are important guides in determining whether or not the law has any legal status. *Id.* Any law issued below the "province level" will not have legal status. *Id.*

83. Chen, *supra* note 15, at 4.

84. *See* George O. White III, Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape—Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China, 3 RICH. J. GLOBAL L. & BUS. 95, 98 (2003) (describing the "unfriendly FDI environment" and the "inconsistent rulings, opaque operations, inefficiency, confusion, and lack of predictability") [hereinafter FDI Regulations & Dispute Resolution Mechanisms].

85. *See supra* notes 2 and 3.

86. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 103; *see*

groups of foreign investment vehicles in China are the foreign-investment enterprise (FIE) and the foreign enterprise.[87] Each group has specific implications for the foreign investor in terms of establishment procedures and tax implications.

A. *Common Foreign-Invested Enterprises*

The FIE is a foreign direct investment vehicle that is considered a "Chinese legal person" by the NPC[88] despite the fact that a high percentage of the enterprise may be invested with foreign capital.[89] These types of FDI vehicles are designed to encourage the transfer of advanced foreign technology to Chinese companies needing modernization.[90] Generally, to be classified as a FIE, the foreign partner's capital investment may not be lower than twenty-five percent, but "there is no upper limit."[91] The most widespread FIEs in China include joint ventures such as the equity joint venture and the cooperative joint venture, which both require one or more Chinese partners in the operation.[92] The foreign and Chinese partners in an equity joint venture share the profits and losses on a "*pro rata* basis."[93] The investors hold no stock in this type of business operation, but instead hold equity interests.[94] Cooperative joint venture partners, on the other hand, may apportion the profits and losses in any manner they agree upon.[95] This leads to "creative structuring," and it allows

---

also WFOE Law art. 1. Article 1 states the relevant law for foreign enterprises:

> With a view to expanding economic cooperation and technical exchange with foreign countries and promoting the development of China's national economy, the People's Republic of China permits foreign enterprises, other foreign economic organizations and individuals to set up enterprises with foreign capital in China and protects the lawful rights and interests of such enterprises.

Id.

87. *See generally* JONES DAY, INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA, MONDAQ BUSINESS BRIEFING (Oct. 11, 2004), http://www.mondaq.com/article.asp?articleid=28935&searchresults=1.

88. Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Sept. 20, 1983), http://www.novexcn.com/jv_use_chin_for_invest.html [hereinafter FIE Implementing Regulations]. Article Two states that "[j]oint ventures using Chinese and foreign investment . . . established within China's territory in accordance with the Law on Chinese-Foreign Joint Ventures are Chinese legal persons and are subject to the jurisdiction and protection of Chinese law." *Id.*

89. *See generally* George O. White III, *Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R.C.*, 29 N.C. J. INT'L L. & COM. REG. 35, 36-39 (2003) [hereinafter *FDI Laws and Policies*].

90. Randall Peerenboom & Shirley Xu, *Wholly Foreign-Owned Enterprises, in* 1 DOING BUSINESS IN CHINA II-3.1-3.25, 3.01 (2000).

91. Clark T. Randt, *Joint Ventures, in* 1 DOING BUSINESS IN CHINA II, § 2.04 [3] (2000).

92. *See generally id.* § 2.02.

93. *See id.* § 2.04 [3].

94. *See* JONES DAY, *supra* note 87, at 3.3.

95. *See* Randt, *supra* note 91, § 2.04[3].

the foreign investor to arrange to receive a higher portion of the profit even though it may not have a controlling stake in the operation.[96]

Having a local partner in the enterprise can be beneficial in that there is less capital required from the foreign partner, the Chinese partner brings in valuable assets,[97] and, as a result, some of the start-up costs can be reduced.[98] Distrust, and even "bias," against foreigners by local authorities can be further reasons to rely on Chinese partners and invest in an equity joint venture or cooperative joint venture when entering the market.[99] However, the most important advantage[100] for a foreign investor is the connections[101] the Chinese partner has with the community and the valuable assistance provided in dealing with the "multi-headed P.R.C. bureaucracy,"[102] which is comprised of the many contradictions and irregularities between the local and the central or provincial level government authorities.[103]

In 1986, the NPC promulgated the Wholly Foreign Owned Enterprise Law of the People's Republic of China.[104] This law governs enterprises within China with all the capital exclusively provided by foreign investors.[105] This

---

96. JONES DAY, *supra* note 87, at 3.4.

97. Randt, *supra* note 91, § 2.04[3]. "The Chinese partners to a joint venture usually contribute cash . . . rights to use land, existing buildings and structures, and Chinese-manufactured machinery and equipment." *Id. But see* Peerenboom & Xu, *supra* note 90, § 3.02[2](b). The benefits of the Chinese partner often turn out to be "illusory" and the "'assets' . . . run-down buildings and out-dated equipment." *Id.* § 3.02[2](b)(5).

98. *See* Peerenboom & Xu, *supra* note 90, § 3.02[2](a)(4).

99. Michele Lee, Note and Comment, *Franchising in China: Legal Challenges When First Entering the Chinese Market*, 19 AM. U. INT'L L. REV. 949, 975 (2004). The author notes that, especially for WFOEs, "historical bias against foreigners and large corporations can prove to be heavy burdens for a company entering the Chinese market." *Id.*

100. See *FDI Laws and Policies*, *supra* note 89, at 52.

101. *Id.*

102. Peerenboom & Xu, *supra* note 90, § 3.02[2](a)(2); *see also* Chen, *supra* note 15, at 3. "The multiple legislative authorities with no clear division of powers has now produced many inconsistencies and conflicts among Chinese laws." *Id.*

103. *See* Chen, *supra* note 15, at 3-4; *see also, e.g.*, TIM CLISSOLD, MR. CHINA 85-86 (2004). A first-hand account of an English foreign investor's experience in trying to set up a FIE illustrates some of the potential frustration:

> Once the deal was struck, the contracts had to be approved by the government . . . but the regulations were confusing; even [the Chinese partner] seemed vague about the details . . . . [I]t seemed as if the people on the inside didn't really understand the rules either . . . . There was a maze of confusing regulations requiring accountant's certificates, tax registrations and valuation reports before the joint ventures could be approved. Many government officials didn't have a clue how even to start working their way through the labyrinth and whenever we asked what to do, each one gave a different answer.

Id.

104. *See* WFOE Law.

105. *Id.* Wholly foreign owned enterprises are those "enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws. The term does not include branches set up in China by foreign enterprises and other foreign economic organizations." *Id.*

popular FIE, called the wholly foreign-owned enterprise (WFOE), allows the foreign investor to own up to 100% of the enterprise,[106] although it is still considered a Chinese legal person.[107] An important goal for the Chinese government in promulgating this type of FIE is the hope that foreign investors will be encouraged to bring in advanced technology and, in turn, develop China's national economy.[108] Some of the clear advantages of the WFOE over the joint venture types of investments include faster establishment,[109] direct management control over the enterprise,[110] technology protection,[111] and increased profit.[112]

Conversely, the absence of a local Chinese partner can be intimidating.[113] For example, local relationships may influence the approval process for the WFOE as well as affect "access to land, market sectors, raw materials and distribution networks."[114] In addition, since the nature of the WFOE makes it harder for Chinese authorities to regulate them, the application and approval process must undergo stricter scrutiny.[115] Despite the downside of not having a local partner to help navigate the sometimes confusing local customs and business practices,[116] the attraction of the WFOE is inescapable, and the WFOE is now the future of FDI in China.[117]

---

106. *See FDI Laws and Policies*, *supra* note 89, at 38.

107. WFOE Law art. 8. "An enterprise with foreign capital which meets the conditions for being considered a legal person under Chinese law shall acquire the status of a Chinese legal person, in accordance with the law." *Id.*

108. *See id.* art. 1. Article 1 provides that in order to expand "economic cooperation and technical exchanges with foreign countries and promote the development of China's national economy," enterprises with 100% foreign capital will be permitted within China. *Id.*

109. Peerenboom & Xu, *supra* note 90, § 3.02[2](b)(1). The authors note that, "negotiating a joint venture contract . . . in China is often time-consuming, expensive and frustrating. Without a joint venture partner to deal with, preparation of the documents required for approval . . . is much simpler." *Id.*

110. *Id.* §3.02[2](b)(2). "The differences in management styles, corporate culture, and fundamental goals often result in tension, conflict and in some cases deadlock and inability to continue operations." *Id.*

111. *Id.* §3.02[2](b)(4); *see also FDI Laws and Policies*, *supra* note 89, at 40. It has become "extremely controversial and quite problematic" for foreign investors to allow the Chinese partners "access to all pertinent documentation regarding . . . industrial property and know-how." *Id.*

112. Peerenboom & Xu, *supra* note 90, § 3.02[2](b)(5). "[T]here is no need to share profits with a joint venture partner." *Id.*

113. *See* JONES DAY, *supra* note 87, at 3.2 (noting that for foreign investors "without experience in China," the establishment of the WFOE can be "daunting").

114. *Id.*

115. *See FDI Laws and Policies*, *supra* note 89, at 43. "Because there is not much of a mechanism for regulatory supervision by governmental authorities once the WFOE has been approved[,] . . . [t]his form of investment vehicle must go through a stricter form of approval process." *Id.*

116. *See* Lee, *supra* note 99, at 976. The author notes "the value of the liaison's understanding of the regional cultural mores should not be underestimated. The combination of local cultural awareness and an understanding of common business practices, allows the foreign

1. FIE Establishment

The first step in establishing a FIE is for the foreign investor to apply to the local government authority.[118] For both joint ventures and WFOEs, the application procedures are similar. The foreign investor must list the following: (1) the purpose and scale of the operation; (2) what will be produced or manufactured and what types of technology and equipment will be used; (3) what percentage of the output will be overseas compared to the domestic market; (4) land area requirements; and (5) what infrastructure requirements are necessary for the enterprise to stay viable.[119] The "safest and most conducive way" to gain approval from Chinese authorities for the FIE is to specifically mention on the application that the investment project will aid in the development of the Chinese economy, help to "create an ecologically sustainable development," use "high technology and equipment," and that there are plans to export the "majority of all the products produced in China" abroad.[120]

Once the local authority approves the application, usually after about thirty days, the foreign investor must apply for final approval with the central government, which takes about ninety days.[121] This stage in the approval process requires detailed documentation.[122] The FIE is required to submit the following: (1) a feasibility study; (2) articles of association of the enterprise; (3) a list of legal representatives for the board of directors; (4) evidence of the foreign investor's legal certification and credit standing; (5) a written response of the local government in the locality of the proposed enterprise; (6) a detailed list of goods and materials needed to be imported; and (7) other documents that might be necessary.[123] All the documents must be written in or translated into Mandarin Chinese.[124] Once the application has been approved by the central

---

investor's [joint venture] to reduce the risk of overlooking critical steps in business development." *Id.*

117. *See, e.g.*, CHINA ECON. REVIEW, CHINA: FOREIGN INVESTMENT—CONFIDENCE RETURNS (May 16, 2002). In 2001, "15,640 new WFOEs were set up," with a total of "US $42.98 [billion]" invested. *Id.* On the other hand, only "8,895 joint ventures were set up," with a total of "US $17.5[billion]" invested. *Id. See also FDI Laws and Policies*, *supra* note 89, at 40. "WFOEs are now the wave of the future for FDI in China." *Id.*

118. *See FDI Laws and Policies*, *supra* note 89, at 43.

119. *See generally* Regulations for the Implementation of the law of the People's Republic of China on Joint Ventures using Chinese and Foreign Investment art. 13 (Sept. 20, 1983), http://www.novexcn.com/jv_use_chin_for_invest.html [hereinafter Implementing Rules]; *see also* WFOE Law art. 23. The Implementing Rules were established according to Article 23 of the WFOE Law, which states, "The department under the State Council which is in charge of foreign economic relations and trade shall, in accordance with this Law, formulate rules for its implementation, which shall go into effect after being submitted to and approved by the State Council." *Id.*

120. *FDI Laws and Policies*, *supra* note 89, at 44.

121. *Id.* at 43.

122. *Id.*

123. Implementing Rules ch. II.

124. *Id.* art. 9. "[T]he documents shall be written in Chinese." *Id.*

authority, the foreign investor must file, within thirty days, a written request to register its enterprise and receive a business license.[125]

As mentioned, local governments may sometimes enact rules to suit their local interests which contradict the central government.[126] At times, these conflicts of law can work to the advantage of the foreign investor going through the establishment procedures for an FIE.[127] For example, when establishing its enterprise in China, Carrefour, a French hypermarket, decided not to go through with the lengthy and difficult central government phase of the approval process.[128] Instead, Carrefour negotiated only with the local governments.[129] It hoped that once the enterprise was established and operating, the central government would not shut it down.[130] The gamble paid off.[131]

By comparison, the approval and application process for the equity joint ventures and cooperative joint ventures at the local and central level are not as extensive; the Chinese partner, rather than the foreign investor, is responsible for submitting and obtaining the proposals and approvals.[132] However, the approval process by the Chinese authorities can still be as long as several months.[133] Importantly, all FIEs may be denied if the enterprise is not conducive to the "development of China's national economy,"[134] or the project is considered to harm "the social and public interests of China."[135]

---

125. *Id.* art. 11.

126. *See* Chen, *supra* note 15, at 7. "[I]n many areas of commercial activities, business depends on local rules to implement and supplement national laws and . . . fill in the gaps." *Id.* "And in most cases, local authorities are the ones with whom the foreign investor must deal when doing business in China." *Id.* at 8.

127. *Bulls in a China Shop*, THE ECONOMIST, Mar. 18, 2004, *available at* http://www.economist.com/displaystory.cfm?story_id=2495194.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* "For those who have to battle against local, often unfairly subsidized competition, success usually requires a dash of unorthodoxy." *Id.*; *see also* Chen, *supra* note 15, at 8. Foreign investors "should not see the local rules . . . as only of secondary importance." *Id.*

132. *See* Randt, *supra* note 91, § 2.03[2].

133. *See FDI Laws and Policies*, *supra* note 89, at 53.

134. *See* Implementing Rules art. 5. The FIE will not be approved if the project is a "detriment to China's sovereignty," violates Chinese law, or is not in conformity with the "requirements of the development of China's national economy." *Id.*

135. WFOE Law art. 4. "Enterprises with foreign capital must abide by Chinese laws and regulations and must not engage in any activities detrimental to China's public interest." *Id.*; *see also* JIANG XIAOJUAN, FDI IN CHINA: CONTRIBUTIONS TO GROWTH, RESTRUCTURING AND COMPETITIVENESS 1, 2-5 (2004). There have been some major controversies regarding the use of FDI in China. Namely, that the rise of FDI in China will lead to "[m]onopolizing the [m]arket," "[t]echnology [d]ependency," "massive drain of Chinese interests," a restriction of state power, and, due to the possible political stance of the FIEs, a negative impact China's "state security." *Id.*

B. *The Foreign Enterprise in China*

A foreign enterprise, as opposed to a FIE, is a foreign legal entity[136] and is not considered a Chinese legal person.[137] Foreign enterprises can take various forms, and differing establishment procedures exist depending on the type of foreign enterprise being established.[138] This type of FDI vehicle generally takes the form of a company that is registered outside China "in accordance with foreign laws."[139] For example, a foreign enterprise can be a foreign representative office in China; a branch office; can undertake construction work; can be a presence providing training or supervising; or a foreign entity contracting with a PRC entity[140] that has no permanent presence in China.[141] In most cases, a representative office may not engage in business or trade directly, but it may act only as an intermediary.[142] Branch offices, on the other hand, may conduct business.[143] However, there are no Implementing Regulations for setting up a branch office in China, which makes it difficult it establish.[144]

---

136. *See* Detailed Rules of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) on the Approval and Control of Resident Representative Offices of Foreign Enterprises (1995), http://www.china.org.cn/english/features/investment/36746.htm [hereinafter Representative Office Law]. Article 8 provides that the foreign enterprise shall be "registered legally in its own country." *Id.*

137. *See* The Company Law of the People's Republic of China (1993), http://www.macrochina.com.cn/english/laws/investment/20010413000141.shtml (Apr. 16, 2001) [hereinafter Company Law]. Article 203 states, "[a] foreign company is a foreign legal person, so its branch established within the territory of the People's Republic of China shall not have the status of a Chinese legal person in China." *Id.*

138. *See* Representative Office Law ch. II; Company Law ch. IX.

139. Company Law art. 199. This article defines and explains the foreign company:

> A foreign company may, in accordance with this Law, establish a branch within the territory of the Peoples Republic of China to engage in production and business activities. A foreign company mentioned in this Law means a company registered and incorporated outside the territory of the Peoples Republic of China in accordance with foreign laws.

Id.

140. *See* Representative Office Law art. 2. "The detailed rules are applied to the resident representative offices which are established by foreign traders, manufacturers, freight agents, contractors, consulting companies, advertising companies, investment firms, leasing companies and other economic and trade organizations (hereinafter referred to as foreign enterprises) within the People's Republic of China." *Id.*

141. *See* Sabine Stricker-Kellerer, *Taxation of Foreign Companies in China*, *in* 1 DOING BUSINESS IN CHINA III, § 3.1.02[1][b] (2001). "Permanent presence means a fixed place of business through which the business of an enterprise is wholly or partly carried out." *Id.*

142. Representative Office Law art. 4. "The resident representative offices of the foreign enterprises may engage in non-direct business activities and may, on behalf of their enterprises, conduct business liaison activities, product introductions, market studies and technical exchanges, which are within their business scopes." *Id.*

143. Company Law art 199. The branch office may "engage in production and business activities." *Id.*

144. *See* JONES DAY, *supra* note 87, 4.4. "[T]he lack of implementing regulations (except

C. *Tax Advantages for the Foreign Investor in China*

For both the FIE and the foreign enterprise, favorable tax incentives for foreign investors in China exist.[145] The Foreign Enterprise Income Tax Law of China stipulates that foreign investors who reinvest the profits earned from their FIE or foreign enterprise may receive a refund of up to forty percent of the income paid by the enterprise.[146] A full refund is possible if the reinvestment is created by setting up or expanding an enterprise that is export-oriented or technologically advanced.[147] The average income tax rate for Chinese enterprises is about thirty-three percent,[148] while the average FIE or foreign company enjoys a rate of about seventeen percent.[149] FIEs may be taxed on their "worldwide income," while foreign enterprises with a location in China may only be taxed on the income attributed to that establishment.[150] Because it is difficult to determine the income generated within China from that generated outside, these items should be noted carefully in the initial contract to avoid problems.[151]

If the enterprise is set up in an "Economic and technical Development Zone,"[152] those areas where technological development is needed the most,[153] the tax rate for the enterprise can be as low as fifteen percent[154] or waived altogether.[155] These tax breaks afforded to the foreign investor will not last, however.[156] In order to become WTO compliant, China intends to establish a

---

for certain specified industries such as banking) usually makes the establishment of branches by foreign companies extremely difficult, if not impossible." *Id.*

145. *See generally* Stricker-Kellerer, *supra* note 141.

146. Laurence Lipsher, *Updates on Tax*, 6 CHINA L. UPDATE 1 (2003).

147. *See* Stricker-Kellerer, *supra* note 141, § 3.1.02[4][b].

148. *Id.* § 3.1.01

149. *See* Lipsher, *supra* note 146, at 2.

150. *See* Stricker-Kellerer, *supra* note 141, § 3.1.02[2][a].

151. *Id.* The author gives the example of "engineering services," where it is often difficult to "distinguish income derived from this type of service from income such as royalties from technology licensing or income from technical assistance." *Id.*

152. *See id.* §3.1.02[4](c).

153. *See, e.g.*, Markus Taube, *Main Issues on Foreign Investment in China's Regional Development: Prospects and Policy Challenges, in* OECD, FOREIGN DIRECT INVESTMENT IN CHINA 17, 35 (2002). The author describes an area in need of economic help as one that is "disadvantaged" regarding its ability to attract FDI in China. For instance, these regions may be "far removed from the world market [and] . . . handicapped by a reform and open door policy that has discriminated against them . . . . [i]n addition there was a substantial brain drain . . . observed during recent years." *Id.*

154. *See* Stricker-Kellerer, *supra* note 141, § 3.1.02 (4) (c) (1); *see also* Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (1991), http://www.china.org.cn/english/14960.htm. Article 7 of this law states, "enterprises with foreign investment of a production nature in economic, and technological development zones shall be levied at the reduced rate of fifteen percent." *Id.*

155. *See FDI Laws and Policies*, *supra* note 89, at 55.

156. *See* Lipsher, *supra* note 146, at 2. "China will raise the tax rate for most foreign firms with implementation of a unified enterprise income tax as soon as possible . . . ." *Id.*; *see also FDI Laws and Policies*, *supra* note 89, at 55. "[G]overnment ministry officials are

uniform tax provision that will do away with any preferential treatment.[157] Therefore, FIEs intending to invest in a "special economic zone" for the benefit of the tax break need to be aware of the impending change in the law.[158]

III. DISPUTE RESOLUTION FOR THE FOREIGN INVESTOR

The increase of foreign investment in China has also increased the number of disputes,[159] and the foreign investor should be aware of the various methods of dispute resolution available in China. First, the cultural differences in dispute resolution between the Chinese and many Western societies is a very important consideration.[160] Even after the establishment of the PRC, traditional Chinese notions towards resolving conflicts still influence society.[161] Unlike the Western model of dispute resolution, litigation in China is usually avoided at all costs.[162] Instead, the Confucian ideal of maintaining "harmony" usually leads the parties to seek mediation or arbitration rather than resorting to a lawsuit.[163] Instead of insisting on his own interests, the Confucian "should willingly accept any infringement" on his rights in order to achieve harmony in the society.[164] For example, the Chinese businessman would take it as an indication that the parties did not trust each other if they were to bring in lawyers during the process of FDI negotiations.[165] Other traditional philosophies in China, such as Buddhism and Taoism, also follow the

---

contemplating phasing out the preferential tax rate in order to harmonize domestic tax rates." *Id.*

157. *See* Peerenboom & Xu, *supra* note 90, § 3.02(3). The "preferential tax treatment may be eliminated as . . . tax authorities move to level the playing field for domestic and foreign companies, in part to meet the standards for . . . WTO . . . ." *Id.*

158. *See FDI Laws and Policies*, *supra* note 89, at 55. Removing the tax advantages for foreign companies "will work to the disadvantage of foreign companies already invested in SEZs and create a less attractive opportunity for potential future foreign investors." *Id.*

159. *See* Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 62 (2002). China's growing economy and the increase in "transnational business transactions" has "increased" the number of disputes. *Id.*

160. *See generally* Bobby K. Y. Wong, *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution*, 30 H.K. L.J. 304 (2000) (highlighting the philosophical and traditional origins of dispute resolution in China as well as comparing Western and Chinese methods of resolving disputes).

161. *See id.* at 305.

162. *See* Urs Martin Lauchli, *Cross-Cultural Negotiations, with a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1062 (2000). The author quotes the Chinese proverb that illustrates the Chinese dislike of litigation, "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit." *Id.*

163. *See* Wong, *supra* note 160, at 310.

164. *Id.*

165. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 130. "In fact, lawyers would normally only be brought in after the FDI contract has already been negotiated." *Id.*

preservation-of-harmony model and seek to resolve conflicts via mediation and conciliation rather than litigation.[166]

These traditional ideas have carried through to the various methods of resolving business disputes.[167] Mediation, arbitration, and litigation are all methods of dispute resolution with Chinese entities, but those that involve "amiable consultation" are the most favored.[168] Arbitration is the preferred[169] and most popular method in China for both the foreign investor, who is often uncertain about litigating in Chinese courts, and the Chinese counterpart, usually the party more inclined to the process of "friendly consultation" when faced with a business dispute.[170] As a foreign investor, resolving business disputes in China presents several issues and potential pitfalls, and it is important that some means for resolving disputes be mutually agreed upon before commencing the business relationship.[171] The advantages and disadvantages of choosing either to arbitrate a dispute before an arbitration commission or to litigate in Chinese courts revolve around issues of neutrality, the expertise involved in making that determination, and award enforcement.[172]

A. *Consultation or Mediation*

Consultation, basically an informal discussion between the parties to try to achieve a settlement, is a favored way of solving disputes and is well-suited

166. *See generally* Wong, *supra* note 160, at 308-16 (illustrating the various traditions and philosophies in Chinese history and their related dispute resolution mechanisms).

167. *See* Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract Law in China*, 40 AM. BUS. L.J. 459, 460 (2003). Cultural differences between Western and Chinese contracting parties is an important consideration. For example, a "final contract" from a Western perspective indicates a culmination of the negotiating process while from a Chinese perspective, the final contract "signifies that a relationship exists and terms-negotiation may now continue." *Id.* In other words, the "real" negotiations can now begin. *Id.*

168. *See id.*

169. *See* FRESHFIELDS BRUCKHAUS DERINGER, THE RESOLUTION OF CHINA DISPUTES THROUGH ARBITRATION, *at* http://www.freshfields.com/practice/disputeresolution/publications/pdfs/8287.pdf (2004) [hereinafter FRESHFIELDS].

170. *See id.* at 2. "Chinese businessmen," when faced with a contractual problem, expect either that the "strict terms of the contract should not be enforced" or that "the contract should be renegotiated according to the changing circumstances." *Id.* The concept of "equity" rather than "strict legal rights" guides the dispute resolution process more often in China. *Id.*

171. *See* FRESHFIELDS BRUCKHAUS DERINGER, DISPUTE RESOLUTION IN INTERNATIONAL TRANSACTIONS, *at* www.freshfields.com/practice/disputeresolution/publications/pdfs/12552.pdf (2005) [hereinafter FRESHFIELDS II]. "[T]he best opportunity to manage the resolution of any future disputes is when documentation is being prepared." *Id.* at 1.

172. *See generally* FRESHFIELDS, *supra* note 169 (explaining the various factors that influence a foreign party's decision as to which dispute resolution mechanism to choose).

to Chinese culture.[173] Usually, "people's mediation committees, administrative bodies, arbitral tribunals or courts" conduct mediations.[174] Indeed, negotiation and mediation are often compulsory phases in the dispute resolution process before beginning any arbitration or litigation in China.[175] However, because the arbitrators may meet ex parte with any of the parties during the mediation process in order to secure a settlement, the FIE or the foreign enterprise may have concerns about bias or "corruption" during the process.[176] Also, because of the "non-binding nature" of this form of dispute resolution, it works best when both parties recognize that it is in their best interests to participate in the proceedings and that it is not necessary to come to a firm agreement regarding its use beforehand.[177] Nevertheless, if this casual form of dispute resolution fails to rectify the problems, the FIE and the foreign enterprise may decide to move on to arbitration.[178]

B. Arbitration

The Arbitration Law of the People's Republic of China (Arbitration Law) was adopted on August 31, 1994, to promote the fair resolution of disputes and specifies the procedures for arbitration in China.[179] In addition to the Arbitration Law, the Law of Civil Procedure of the People's Republic of China (CPL) contains regulations that govern arbitrations in China.[180] Moreover, each arbitration commission may have its own rules.[181] However, the Arbitration Law takes precedence over other laws regarding arbitration in China.[182]

---

173. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 131. *See also* Lauchli, *supra* note 159, at 1046 (explaining that in Chinese society, mediation is a "natural extension of the Confucian ethics").

174. *See* Lauchli, *supra* note 162, at 1047.

175. *See* FRESHFIELDS, *supra* note 169, at 2.

176. Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 23 (2000) [hereinafter *Regulatory Framework*]. The problem of "biased" arbitrators usually occurs when the parties combine "mediation with arbitration," leading to the arbitrators becoming "corrupted as a result of the mediation." *Id.*

177. *See* FRESHFIELDS, *supra* note 169, at 2. "Because the success of the process depends upon both parties acknowledging throughout that it is in their best interests to participate, a prior commitment at the time the contract is signed may be ineffectual if either party has turned against it by the time the dispute has arisen." *Id.*

178. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 136.

179. Arbitration Law of the People's Republic of China (1994), http://english.sohu.com/2004/07/04/78/article220847885.shtml (last updated July 4, 2004) [hereinafter Arbitration Law]. "This law is formulated with a view to ensuring fair and timely arbitration of disputes over economic matters, safeguarding the legitimate rights and interests of the litigants and guaranteeing the sound development of the socialist market economy." *Id.* art. 1.

180. *See* The Law of Civil Procedure of the People's Republic of China (Apr. 9, 1991), http://en.chinacourt.org/public/detail.php?id=2694 (last updated June 3, 2003) [hereinafter CPL]. Chapter XXVIII discusses arbitration.

181. HUNTON & WILLIAMS LLP, CHINA: A PERSPECTIVE ON INTERNATIONAL ARBITRATION,

In order for the foreign investor to bring a dispute to arbitration, there must be an "arbitration agreement," or arbitration clause, written into the parties' contract.[183] The arbitration agreement must contain *all* of the following elements to be valid.[184] First, "an expressed intent to request arbitration" must be noted in the arbitration clause.[185] Second, the "items for arbitration"[186] must be mentioned. Finally, "the chosen arbitration commission"[187] must be indicated specifically.[188] As with choosing the arbitration commission, the party who negotiates the most favorable arbitration clause usually depends on the relative bargaining strength of the parties.[189] The arbitration clause is independent of the contract and any "changes to, rescission, termination or invalidity of the contract" will not affect the arbitration clause's validity.[190] However, there are certain circumstances that may invalidate an arbitration clause, such as coercion,[191] of which the foreign investor must be aware. Both the FIE and the foreign enterprise are affected in certain strategic aspects of arbitration, such as the arbitration commission chosen, the composition of the arbitration panel, and award enforcement options.

---

at http://www.hunton.com/files/tbl_s47Details/FileUpload265/144/Int_Arb_Newsletter_winter2003-04.pdf (2004); see also, e.g., China International Economic and Trade Arbitration Commission, Arbitration Rules (2004), http://www.cietac.org.cn/english/rules/rules.htm [hereinafter CIETAC Rules]. These are the rules to the CIETAC's arbitration.

182. Arbitration Law art. 78. "In the event of conflict between the provisions on arbitration formulated before the coming into effect of this Law and the provisions of this Law, the provisions of this Law shall prevail." *Id.*

183. *Id.* art. 5. Article 5 states that when the parties try to settle their disputes through arbitration and the arbitration clause is absent from the contract, the arbitrating body "shall not accept" any application for arbitration. *Id.*

184. *Id.* art. 16.

185. *Id.*

186. *Id.*

187. *Id.* For examples of suggested arbitration agreements, see FRESHFIELDS, *supra* note 169, at 24 and 46.

188. *See* Li Zhang, *The Enforcement of CIETAC Arbitration Awards*, CHINA PRACTICE, *at* http://www.hk-lawyer.com/2002-2/Feb02-china.htm (n.d.) (last visited Mar. 30, 2006) (mentioning that even specifying "CIETAC Beijing" or CIETAC Shanghai" rather than just "CIETAC" will prevent the clause being considered "imprecise" by the courts).

189. *See* FRESHFIELDS, *supra* note 169, at 34 (finding that foreigners will "naturally prefer to maximize the prospects of neutrality by opting for arbitration outside China").

190. Arbitration Law art. 19. However, this provision does not address what happens to the arbitration clause if the contract never comes into effect.

191. Arbitration Law art. 17. The circumstances for invalidating an arbitration clause are as follows:

> (1) the items for arbitration agreed upon are beyond the scope of arbitration as prescribed by law; (2) a party to the arbitration agreement is a person having no capacity or with limited capacity for civil conduct; or (3) the arbitration agreement is imposed by one party on the other party by means of coercion.

Id.

1. Arbitration Commission

All arbitrations are conducted through arbitration commissions, either domestic or international, depending on the legal status of the parties to the dispute.[192] Currently, there are over 140 local arbitration commissions established in China that hear solely domestic cases.[193] The most active local arbitration commission is the Beijing Arbitration Commission.[194] The most popular international arbitration commission in China is the China International Economic and Trade Arbitration Commission (CIETAC).[195] CIETAC was established in 1956[196] and handled about 850 cases in 2004 alone.[197]

In the past, FIEs were not considered sufficiently international by Chinese courts for purposes of availing themselves of an international arbitration commission.[198] Therefore, only domestic arbitration was open to them.[199] Chinese legal persons, such as FIEs, may arbitrate with other Chinese entities or other FIEs as domestic disputes, rather than as international disputes.[200] Even WFOEs are considered domestic in China despite being wholly foreign-owned.[201] In contrast, the foreign enterprise is considered a foreign body and therefore falls under the international classification.[202]

---

192. *See generally* Arbitration Law arts. 10-12 (defining the arbitration commission, the composition of the arbitration commission and how they are established).

193. *See* HUNTON & WILLIAMS LLP, *supra* note 181.

194. *Id.* However, now the local arbitration commissions may hear "all kinds of disputes as agreed by the parties." *Id.* For more information on the Beijing Arbitration Commission, *see* http://www.bjac.org.cn/en/index.asp.

195. *See* FRESHFIELDS, *supra* note 169, at 11 (noting that parties to an international dispute in China will "almost inevitably do so according to the rules of CIETAC").

196. *See* China International and Economic Trade Arbitration Commission, Introduction, *at* http://www.cietac.org/.

197. DARREN FITZGERALD, MINTERELLISON, CIETAC'S NEW RULES: DO THE REFORMS GO FAR ENOUGH? (Aug. 11, 2005), *at* http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Articles/A+-+CIETACs+new+rules+-+do+the+reforms+go+far+enough.

198. *See* Li, *supra* note 188.

199. *See id.* In the 1992 case of China International Engineering Consultancy Corp. v. Beijing Lido Hotel Co., an intermediate People's Court held that China International Engineering Consultancy Corp., as an FIE party and thus a domestic entity, did not render the case sufficiently foreign-related. *Id.* Therefore, CIETAC did not have proper jurisdiction over the case. *Id.* As a result, the arbitration agreement naming CIETAC as the arbitration commission was invalid and the award against Beijing Lido was not enforced. It should be mentioned, however, that CIETAC has since amended its rules to include FIEs as falling under its jurisdiction. *Id.*

200. LAETITIA TJOA, COUDERT BROTHERS LLP, ARBITRATION IN CIETAC - AN UPDATE, *at* http://www.coudert.com/publications/?action=displayarticle&id=248 (Oct. 15, 2003).

201. WFOE Law art. 8. "An enterprise with foreign capital which meets the conditions for being considered a legal person under Chinese law shall acquire the status of a Chinese legal person, in accordance with the law." *Id.*

202. *See* TJOA, *supra* note 200. "According to PRC law," if parties are "foreign or domiciled in a foreign country," then the parties are " 'foreign-related.' " *Id.*; *see also* Bonnie Hobbs, *CIETAC Arbitration Rules and Procedure: Recent Developments and Practical*

In 1998, CIETAC amended its rules to include "international or foreign-related" and "domestic" disputes within its jurisdiction.[203] These amendments to CIETAC were seen as beneficial to the FIE because it could now choose to arbitrate in an international arbitration commission and have access to non-Chinese arbitrators.[204] In addition to CIETAC, other popular international arbitration commissions include the Arbitration Institute of Stockholm Chamber of Commerce,[205] the American Arbitration Association,[206] and the International Chamber of Commerce.[207] There are certain perceived advantages to arbitrating in an international arbitration commission rather than in a domestic arbitration commission in China that relate to issues of neutrality and arbitration expertise.[208] However, even if the foreign enterprise included an arbitration clause stipulating an arbitration commission outside China, it is still possible that the Chinese government may not approve of such a contract.[209]

Guidelines (Apr. 1999), *available at* http://www.omm.com/webcode/webdata/content/publications/CIETAC.PDF (last visited Mar. 30, 2006). Article 304 of the Opinion of the Supreme People's Court on Certain Questions Concerning the Application of the Civil Procedure Law states that a case involving a "foreign element" is either: "i. A party to the dispute is a foreigner or a foreign enterprise or organization; ii. Either the establishment or variation and termination of a legal relationship is made outside the PRC; iii. The subject matter in dispute is located outside the PRC." *Id.*

203. CIETAC Rules art. 3.

204. *See* Hobbs, *supra* note 202. "[W]hile the 1998 Amendments seem to broaden access to CIETAC by FIEs," practically, the results are not so attractive. *Id.*

205. *See* FRESHFIELDS, *supra* note 169, at 39. For "historical reasons," this institute is "most favored by Chinese parties" as a neutral venue. *Id.*

206. *See generally id.* The American Arbitration Association is based in New York. For more information, see http://www.adr.org/index2.1.jsp. *See also* COVINGTON & BURLING, A PRIMER ON INTERNATIONAL ARBITRATION 6 (May 1998), *available at* http://www.cov.com/publications/download/oid6181/PRIMER.PDF. Non-American parties to a dispute may not consider the American Arbitration Association as neutral if one of the parties is American. *Id.*

207. *See generally* FRESHFIELDS, *supra* note 169. The International Chamber of Commerce arbitral procedures are subject to "scrutiny," which "enhances enforceability and ensure[s] against cases of procedural irregularities." *Id.* at 40. The International Chamber of Commerce is based in Paris. For more information, see http://www.iccwbo.org (last visited Mar. 30, 2006).

208. *See* FRESHFIELDS, *supra* note 169, at 8 (noting that with domestic arbitration commissions "old problems of lack of competence and political interference have not entirely disappeared" and that the rules for domestic arbitration "are less sophisticated" than those designed for international arbitration).

209. Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y J. 393, 402 (1999). "In practice, foreigners must agree to arbitration in a Chinese tribunal, because the Chinese government need not approve contracts with arbitration agreements that provide for tribunals outside of China, and the Chinese courts may void those agreements." *Id. But see* FRESHFIELDS BRUCKAUS DERINGER, ASIA ARBITRATION 3 (May 2004) (noting that the new draft provisions on foreign arbitration issued by the SPC on Dec. 31, 2003, clearly mention "Chinese law presently permits only foreign-related contracts to provide for arbitration by arbitral institutions outside China"), *available at* http://www.freshfields.com/places/asia/publications/pdfs/8281.pdf; *see also* CIETAC Guide: How to Conduct Arbitration in CIETAC, *at* http://www.cietac.org.cn/english/guide/guide.htm (2004). Section IV, Hearing of Cases, mentions that "[w]ith the approval of the Secretary-General of the Arbitration Commission, the cases can be heard in other places in or outside

2. *Arbitration Panel selection*

The Arbitration Commission shall appoint "fair minded and respectable persons" to be arbitrators[210] in addition to the other qualifications necessary for acting as an arbitrator.[211] The disputes are decided either by a tribunal or a single arbitrator chosen by the parties from a list of arbitrators.[212] Each party selects an official of the arbitration commission to choose one arbitrator from the list, and the third arbitrator is chosen by agreement between the parties.[213] If no agreement can be reached, the third arbitrator is chosen by the arbitration commission director.[214] According to CIETAC arbitration rules, the arbitrating panel may be chosen from a list of arbitrators, foreign and domestic,[215] and the selected arbitrators do not necessarily have to be from the location where the dispute took place.[216] Revisions to the CIETAC rules, effective May 1, 2005, allow the parties, by agreement, to choose arbitrators from outside of

---

China." *Id.* However, CIETAC does not mention what happens if the Secretary-General does not approve of an outside location for the arbitration.

210. Arbitration Law art. 13.

211. *Id.* Arbitrators in China must meet at least one of the following conditions:

> 1. they have been engaged in arbitration work for at least eight years; 2. they have worked as a lawyer for at least eight years; 3. they have been a judge for at least eight years; 4. they are engaged in legal research or legal teaching and in senior positions; and 5. they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level. The arbitration commission shall establish a list of arbitrators according to different professionals.

Id.

212. *See id.* art. 30. "An arbitration tribunal may comprise three arbitrators or one arbitrator. If an arbitration tribunal comprises three arbitrators, a presiding arbitrator shall be appointed." *Id.*

213. *See id.* art. 31.

> If the parties agree to form an arbitration tribunal comprising three arbitrators, each party shall select or authorize the chairmen of the arbitration commission to appoint one arbitrator. . . . If the parties agree to have one arbitrator to form an arbitration tribunal, the arbitrator shall be selected jointly by the parties or be nominated by the chairman of the arbitration commission in accordance with a joint mandate given by the parties.

Id.

214. *See id.* art. 31. "The third arbitrator shall be selected jointly by the parties or be nominated by the chairman of the arbitration commission in accordance with a joint mandate given by the parties. The third arbitrator shall be the presiding arbitrator." *Id.*

215. *See* CIETAC's list of arbitrators at http://www.cietac.org.cn/english/arbitrators/arbitrators.htm. The list includes both Chinese and foreign arbitrators." *Id.*

216. *See* FRESHFIELDS, *supra* note 169, at 8. Choosing an arbitration commission from another jurisdiction is aimed at eliminating the "influence of local protectionism." *Id.*

"CIETAC's [p]anel of [a]rbitrators."[217] However, these arbitrators must still be "confirmed" by CIETAC.[218]

It must be noted, however, that in the past it was unclear whether or not FIEs, as Chinese legal persons, would have the same access to the international[219] list of arbitrators as the foreign enterprises or instead would have to choose from the domestic[220] list. Some authorities said the FIEs would have to choose from the list of Chinese arbitrators reserved for domestic cases, which would greatly reduce the proposed benefits for the FIE to arbitrate with CIETAC.[221] However, the new 2005 CIETAC rules provide separate arbitrator lists for domestic and international cases. Notably, both lists appear to be available for the foreign enterprise *and* the FIE.[222] In any case, for both the FIE and the foreign enterprise, the failure to reach an agreement in choosing the third arbitrator means that the third member of the panel often ends up being chosen[223] by CIETAC[224] or whichever arbitration commission is being

---

217. *See* CIETAC Rules art 21, ¶ 2. *See also* FITZGERALD, *supra* note 197. The author notes that the "loosening of CIETAC's panel system is the most significant of the reforms" because of the "increase" in the "pool of foreigners and experts available to serve on a CITAC tribunal." *Id.*

218. CIETAC Rules art 21, ¶ 2 provides:

> Where the parties have agreed to appoint arbitrators from outside of the CIETAC's Panel of Arbitrators, the arbitrators so appointed by the parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law.

Id.; *see also* Julius Melnitzer, *Reforms Make Arbitration in China A Safer Bet*, INSIDE COUNSEL (July 2005), http://www.insidecounsel.com/issues/insidecounsel/15_164/global_views/101-1.html. The article points out that, even with the new 2005 rules, "CIETAC still has the power to reject the parties' choice" and does not "state the criteria for approval" of arbitrators. *Id.*

219. *See* CIETAC "Panel of Arbitrators for International (Foreign-related) Disputes," *at* http://www.cietac.org.cn/english/arbitrators/arbitrators_n1.htm (n.d.) (last visited Apr. 3, 2006).

220. *See* CIETAC "Panel of Arbitrators for Domestic Disputes," *at* http://www.cietac.org.cn/english/arbitrators/arbitrators_n2.htm (n.d.) (last visited Apr. 3, 2006).

221. *See* HUNTON & WILLIAMS LLP, *supra* note 181 (noting that the "full panel of CIETAC arbitrators . . . will only be available for selection by the parties in a foreign-related arbitration"); *see also* Hobbs, *supra* note 202 (noting that the CIETAC arbitrator list "for parties to a dispute involving an FIE does not include foreign arbitrators"). *But see* FRESHFIELDS, *supra* note 169, at 13 (stating that in "domestic cases involving an FIE, foreign arbitrators may be selected").

222. *See* CIETAC "Instructions on the Application of the Panels of Arbitrators," *at* http://www.cietac.org.cn/english/arbitrators/arbitrators_n8.htm (n.d.) (last visited Apr. 3, 2006). Instruction Two provides, "[t]he Panel of Arbitrators for Domestic Disputes shall apply to domestic arbitration cases. But if one party or both parties are enterprises with foreign investment, the Panel of Arbitrators for International (Foreign-related) Disputes shall also apply." *Id.*

223. *See* Jerome A. Cohen, *Time to Fix China's Arbitration*, FAR E. ECON. REV. (Jan/Feb 2005), http://www.feer.com/articles1/2005/0501/free/p031.html. While the third arbitrator in a CIETAC arbitration "is most probably going to be Chinese," the Beijing Arbitration Commission requires each party to submit "lists of names of persons" each party "could accept" and the presiding arbitrator is chosen from among these names. *Id.; see also* FITZGERALD, *supra* note 197. The author notes that even the new rules do not require the "sole or presiding

employed. This scheme may create an opportunity for bias.[225] Therefore, the foreign investor must be aware that even with the 2005 CIETAC amendments, issues of unfairness[226] and non-neutrality within the arbitration proceeding can still exist.[227]

3. *Award enforcement*

Arbitration award enforcement is governed by the Arbitration Law and the CPL.[228] The Arbitration Law of China recognizes a type of res judicata[229] with respect to decisions made by an arbitration commission.[230] However, a party may still challenge the award rendered by the arbitration commission on certain grounds and ask that the arbitration award be "set aside" or cancelled.[231]

---

arbitrator" to be of a neutral third country. *Id.* If the parties fail to expressly name the presiding or sole arbitrator in the arbitration clause, CIETAC will most likely appoint a "Mainland Chinese" arbitrator. *Id.*

224. *See* Arbitration Law arts. 30-33; *see also* CIETAC Rules arts. 20-22.

225. *See* FRESHFIELDS, *supra* note 169, at 17. In the absence of an agreement for the third panelist, the rules do "not stipulate that if the choice is left in the hands of that institution, the appointee must be neutral" and the "general trend has been for the CIETAC appointee to be Chinese." *Id.*

226 *See* Cole Sternberg, *Chinese Courts: More of a Gamble than Arbitration?*, 4 INT'L BUS. L. REV. 31, 36 (2004). The problem is not that CIETAC itself is biased, only that the system of "internal panelist review" is faulty and the commission does not always conduct "due diligence investigations into the case and potential panelists prior to selection." *Id.*; *see also* Cohen, *supra* note 223. The author criticizes CIETAC's use of "its own personnel as arbitrators, especially the presiding arbitrator" since it "creates an obvious opportunity for the exercise of administrative influence and even control over the arbitration panel and its decision." *Id.*; *see also* Melnitzer, *supra* note 218. The new rules "continue to allow CIETAC to use its own personnel as arbitrators." *Id. But cf.* Johnson Tan, *A Look at CIETAC: Is it Fair and Efficient?*, 17 CHINA L. & PRAC. 24, 25 (Apr. 2003) (noting that there is "no evidence" that a Chinese arbitrator would "favor a fellow national" but an American would not).

227. CIETAC is organized under the China Chamber of International Commerce, which is supervised by the PRC State Council. *See* CIETAC organization, *at* http://www.cietac.org.cn/english/organization/organization.htm (2004); *see also* TIMOTHY STRATFORD, THE AM. CHAMBER OF COMMERCE-P.R.C., VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (2001), *available at* www.AmCham-China.org.cn. In response to an American Chamber of Commerce survey, U.S. Embassy officials mention, "[i]t has been reported that certain arbitrators have had outside relationships to parties in the case that have not been disclosed." *Id.*

228. *See generally* Arbitration Law; CPL.

229. *See* HUNTON & WILLIAMS LLP, *supra* note 181.

230. Arbitraton Law art. 9. A "single ruling system shall be applied in arbitration" in China. *Id.*

231. *See* HUNTON & WILLIAMS LLP, *supra* note 181; *see also* Arbitration Law art. 58. There are specific grounds for applying to cancel an arbitration decision:

> The parties may apply to the intermediate people's court at the place where the arbitration commission is located for cancellation of an award if they provide evidence proving that the award involves one of the following circumstances: 1. there is no arbitration agreement between the parties; 2. the matters of the award are beyond the extent of the arbitration agreement or not within the jurisdiction of the arbitration commission; 3. the composition of the arbitration tribunal or the arbitration procedure is in contrary to the legal procedure; 4. the evidence on

Accordingly, it is important for the foreign investor to include the arbitration clause in the main contract and any collateral contract to avoid invalidation and forfeiture of any award earned.[232]

Article 63 of the Arbitration Law governs enforcement of arbitral awards for the domestic entity.[233] It stipulates that under the circumstances of CPL Article 217,[234] the court may not enforce the award against the losing party.[235] In a domestic dispute, which includes the FIE, if a party fails to abide by the arbitral award, the winning party must apply to the people's court to enforce the award.[236] However, it is "notoriously difficult" for judges to enforce awards in such circumstances.[237] Significantly, the court may not only review the procedure carried out by the arbitration commission, but also the substantive legal issues of the case when deciding whether to enforce the award.[238] The

---

> which the award is based is falsified; 5. the other party has concealed evidence which is sufficient to affect the impartiality of the award; and 6. the arbitrator(s) has (have) demanded or accepted bribes, committed graft or perverted the law in making the arbitral award. The peoples' court shall rule to cancel the award if the existence of one of the circumstances prescribed in the preceding clause is confirmed by its collegiate bench. The people's court shall rule to cancel the award if it holds that the award is contrary to the social and public interests.

Id.

232. *See* Li, *supra* note 188 (having an arbitration clause in the main contract "does not necessarily imply" that all collateral contracts are covered by that agreement).

233. Arbitration Law art. 63. The Arbitration Law has "special provisions" for foreign related awards starting with article 65 of the law. *Id.* art 65.

234. CPL art. 217. The following are grounds for refusing to enforce an arbitral award for a domestic entity:

> (1) The litigants neither stipulated arbitration provisions in their contract nor reached a written agreement of arbitration afterwards; (2) The matter being adjudicated falls neither within the limits of the agreement of arbitration nor the limits of the arbitration organ's authority; (3) The formation of the arbitration tribunal or the arbitrating procedure violate the legal procedure; (4) The crucial evidence is found to be insufficient; (5) The application of the law is found to be erroneous; (6) The arbitrator is found to have taken bribes, conducted malpractice out of personal considerations, and misused the law in rendering a verdict in the course of arbitration. The people's court shall rule that the verdict is not to be executed should it certify that the execution runs counter to the society's public interests.

Id.

235. Arbitration Law art. 63. "A people's court shall, after examination and verification by its collegiate bench, rule not to enforce an award if the party against whom an application for enforcement is made provides evidence proving that the award involves one of the circumstances prescribed in Clause 2, Article 217 of the Civil procedure Law." *Id.*

236. Arbitration Law art. 62. "When one litigant fails to abide by the ruling, the other litigant may, in accordance with provisions in the Law of Civil Procedure, request the people's court execute the ruling, and the people's court that accepts the request shall execute the ruling." *Id.*

237. *Regulatory Framework*, *supra* note 176, at 53.

238. *See generally* Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 289 (2001) (comparing domestic and foreign enforcements regulations) [hereinafter *Empirical Study of Enforcement*]; *see also* CPL art. 217. The court may refuse to enforce an arbitral award if "[t]he crucial evidence is found to be insufficient" or "[t]he application of the law is found to be erroneous."

fact that a Chinese court may review a case on the merits seriously weakens the effect of finality of an arbitral award for the FIE.[239]

On the other hand, for the foreign enterprise, which is considered a dispute involving a foreign element,[240] challenges to the arbitral award are governed by Article 260 of the CPL.[241] Article 260 of the CPL, like Article 58 of the Arbitration Law, sets forth the circumstances for invalidating or setting aside an arbitration award for "disputes involving foreigners."[242] Refusal of the courts to enforce a foreign arbitral award is based on procedural errors in the arbitration process, rather than a review of the substantive issues of the dispute.[243] In addition, as opposed to domestic arbitration, if the foreign investor arbitrates a dispute through CIETAC or another international arbitration commission and loses, the Chinese party may apply to enforce the award in the foreigner's country[244] whereas "local protectionism and nationalism weigh against foreign applicants seeking enforcement in China."[245] This makes it difficult for the losing party to secure its assets.[246] However, as with domestic and international enforcement applications, a people's court "shall decide not to enforce an arbitration ruling which it deems contrary to social and public interests."[247] The social and public interests that would cause

---

Id. The CPL has special provisions for foreigners starting at article 237. *Id.* art. 237.

239. *See* Hobbs, *supra* note 202.

240. *See supra* note 202.

241. Arbitration Law art. 71. Under "Chapter VII Special provisions on Foreign-Related Arbitration": "A people's court shall, after examination and verification by its collegiate bench, rule not to enforce an award-if the party against whom an application is made provides evidence proving that the arbitration award involves one of the circumstances prescribed in Clause 1, Article 260 of the Civil Procedure Law." *Id.*

242. *See* CPL art. 260. The circumstances for invalidating an arbitration clause are:

> (1) Where the contract does not contain an arbitration clause, or where the parties concerned do not conclude a written agreement on arbitration subsequently; (2) Where the object of the application is not informed of the need to designate an arbitrator or initiate arbitration proceedings, or where the object of the application cannot state his opinions due to reasons for which he cannot be held accountable; (3) Where the creation of an arbitration court, or the initiation of arbitration proceedings, does not conform to arbitration rules; (4) Where the matter to be arbitrated falls outside the scope of the arbitration agreement or the jurisdiction of the arbitration agency.

Id.

243. *See generally* CPL art. 260.

244. *See* Harer, *supra* note 209, at 397. "If a foreign party loses in an arbitration tribunal to a Chinese party, the Chinese courts will likely enforce the award, and the Chinese party stands an excellent chance of pursuing enforcement of an award in the foreigner's home country." *Id.*

245. *Empirical Study of Enforcement*, *supra* note 238, at 270; *see also* Harer, *supra* note 209, at 397. The author mentions that if the foreign party is successful in the arbitration, it is "not likely collect absent enforcement through the courts." *Id.*

246. *Empirical Study of Enforcement*, *supra* note 238, at 292; *see also Regulatory Framework*, *supra* note 176, at 46. "[L]ocal protectionism means that local governments help companies in which they have economic interest hide assets or dodge debts." *Id.*

247. CPL art. 260. *See also id.* art. 217. "The people's court shall rule that the verdict is not to be executed should it certify that the execution runs counter to the society's public

an award not to be enforced are not defined in the law.[248] In addition, decisions to enforce or refuse to enforce an award "cannot be appealed."[249]

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides that China will recognize arbitral awards made in countries of other signatories.[250] The New York Convention rules do not allow a substantive review of the case before enforcing an award.[251] Interestingly, the New York Convention specifies that apart from serious procedural errors in the arbitration process,[252] the courts "may" refuse to recognize an award if it meets certain criteria.[253] However, the

---

interests." *Id.*; *see also Empirical Study of Enforcement*, *supra* note 238, at 289 (pointing out that fears that this clause would be used to invalidate any award in favor of a foreign party were "not entirely groundless").

248. *See generally* CPL arts. 1-270.

249. *Regulatory Framework*, *supra* note 176, at 38.

250. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html [hereinafter New York Convention]. Article 1 states that

> [t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Id. China is a 1987 signatory to the New York Convention. *Id.*

251. *Empirical Study of Enforcement*, *supra* note 238, at 265. The "grounds for refusing to enforce [New York] Convention . . . awards are limited to procedural violations." *Id.*; *see also* New York Convention art. V. Refusal to recognize an award is based on the following:

> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Id.

252. *See* Li, *supra* note 188.

253. *See generally id.* (comparing the language of the New York Convention regulations with the language of the Arbitration Law in regards to award enforcement); *see also* New York Convention art. V. "Recognition and enforcement of the award may be refused . . . where the recognition and enforcement is sought." *Id.*

language in the Arbitration Law instructs that courts "shall" refuse to enforce the award if it meets the specified criteria.[254] The New York Convention rules seem to allow the courts discretion to excuse minor infractions and to enforce the award anyway, while the Arbitration Law does not allow for such interpretation.[255]

C. *Litigation*

Both the FIE and the foreign enterprise have the "same ability" to bring an action in Chinese court,[256] although it is not the most favorable dispute resolution method.[257] However, in the past several decades, the number of civil cases in Chinese courts has increased despite the aversion to conflict.[258] The adversarial system, judicial precedent, and the jury system are frequently absent in Chinese courts.[259] Instead, the Chinese judicial system is based on the "inquisitorial model,"[260] where the judge takes an active role[261] in the fact-finding process without the use of a jury.[262]

Judges in China also often "fail to meet the minimum educational requirements"[263] and are often chosen by the CCP as military veterans.[264] Although the SPC and people's courts are supposed to "exercise judicial power independently,"[265] they are still subject to the NPC and the Standing Committee, and the local people's courts are supervised by the legislatures that "created them."[266] This lack of judicial independence is one of the main concerns of foreign parties litigating in China as well as the "Chinese citizenry."[267] Although the Constitution provides for the courts to be able to

---

254. Arbitration Law arts. 70-71. "A people's court shall . . . rule to cancel an award if . . . the arbitration award involves one of the circumstances prescribed in Clause 1, Article 260 of the Civil Procedure Law." *Id.*

255. *See Regulatory Framework*, *supra* note 176, at 16. Article V of the New York Convention rules gives the courts "some discretionary power to disregard minor defects" when deciding whether to enforce an award. *Id.*

256. U.S. GOVERNMENT EXPORT PORTAL, CHINA BUSINESS INFORMATION CENTER, *at* http://www.export.gov/china/exporting_to_china/disputeavoidanceandresolution.pdf (last updated Apr. 2003).

257. FRESHFIELDS II, *supra* note 171, at 11.

258. *See* Mo, *supra* note 159, at 62.

259. *See* Pattison & Herron, *supra* note 167, at 505.

260. Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 400 (2004).

261. *Id.* at 393.

262. *Id.* at 394. "Chinese judges not only decide issues of law but also those of fact." *Id.*

263. *See id.* at 438; *see also* Mo, *supra* note 159, at 94. "Among the presidents and vice-presidents of the people's courts, only 19.1%" have a bachelor degree or higher" and "many of them have not graduated from law school." *Id.*

264. *Regulatory Framework*, *supra* note 176, at 9.

265. XIANFA art. 126.

266. *Id.* art. 128.

267. Mo, *supra* note 159, at 92.

exercise judicial powers independently, it does not work this way in fact.[268] For example, the CCP may "exert[] its pervasive influence and control over the judiciary" through a committee[269] headed by government officials.[270] While this committee does not directly hear the cases, it may "discuss" and "make decisions about cases" that it identifies as "politically sensitive," and it has the power to remove judges.[271]

Although required to protect the legal rights of the parties they represent,[272] Chinese "lawyers, law firms and lawyer's associations" are still supervised by the central government.[273] Therefore, attorneys in China will refrain from vigorously representing their clients in court litigation "because they risk damaging their careers."[274] More troubling for the foreign investor is that neither FIEs nor foreign enterprises have the option of procuring a foreign lawyer to represent them in a suit[275] because foreign lawyers may not practice Chinese law.[276] Foreign lawyers may, however, offer "legal consulting service," such as recommending Chinese law firms to clients in China.[277] Further, due to historical reasons,[278] there is a shortage of lawyers in China, they are poorly trained,[279] and they lack independence.[280]

---

268. *Id.* at 93.

269. Zhong & Yu, *supra* note 260, at 414. The committee is called the "Political and Legal Committee" and it is chaired by the "head of the Public Security Bureau." *Id.* at 415.

270. *Id.* at 414-15.

271. *Id.* at 415; *see also* XIANFA art. 63. "The National People's Congress has the power to recall or remove from office the following persons . . . [t]he President of the Supreme People's Court." *Id.*

272. *See* Zimmerman, *supra* note 34, at 39.

273. *Id.* at 40. In a 1993 survey of Chinese lawyers, "94 percent of the 127 interviewed" said the government "interfered" with their "legal work." *Id.*

274. *Id.*

275. CPL art. 241. "Where foreigners, stateless persons, foreign enterprises and organizations want to have legal representatives in taking or responding to actions in the people's court, they must entrust their cases to lawyers of the PRC." *Id.*

276. *See* Charles Chao Liu, Note and Comment, *China's Lawyer System: Dawning Upon The World Through A Tortuous Process*, 23 WHITTIER L. REV. 1037, 1071 (2002).

277. *Id.* at 1070.

278. *See* Zhong & Yu, *supra* note 260, at 438. During the Cultural Revolution, law schools were closed and the judicial system was "virtually wiped out." *Id.*; *see also* Chengyuan Lu, *Legal Services in China: Facing the WTO*, 20 UCLA PAC. BASIN L.J. 278, 322 (2003). The ratio of Chinese lawyers to the entire population is "0.8/10,000," whereas in the United States, it is about "32/10,000." *Id.*

279. *See* Pattison & Herron, *supra* note 167, at 507. Approximately one fifth of Chinese lawyers have a legal education. In addition, even fewer judges have any "formal university education in law." *Id.*

280. *See Regulatory Framework*, *supra* note 176, at 9. "[A]lthough direct intervention by the CCP . . . is lessening, judges still discuss important political cases or cases involving difficult legal issues with the Political-Legal Committee. More generally, the CCP exercises control over the court by setting general policies . . . within which the courts must operate." *Id.*; *see also* Zhong & Yu, *supra* note 260, at 414. The "Chinese judiciary . . . is vulnerable to outside interference, particularly from the Party . . . . [T]he Party is China's major decision maker." *Id.*

In addition, problems with enforcement of legal judgments continue to plague China.[281] When the losing party to a judgment refuses to comply with a judgment handed down by a people's court, the procedure begins with filing a petition in a people's court.[282] An "enforcement officer" handles the enforcement of the judgment, and then notifies the nonpayer and directs it to comply with the judgment.[283] If the debtor still does not obey the judgment, the enforcement officer may "explore other enforcement devices to compel the debtor to satisfy the judgment."[284] However, it is "difficult" to enforce legal judgments in China.[285] Much of the resistance to complying with legal judgments is due to local protectionism.[286] Also, because disputes involving an FIE are considered domestic,[287] enforcement is usually left to trial courts.[288] When "different counties or prefectures" are involved, local government desire to "protect local industries or business" makes it hard for the trial court to enforce judgments.[289]

A full discussion of the intricacies of the advantages of arbitration over litigation in China is beyond the scope of this Note. Overall, among the advantages of arbitration over litigation in court is that arbitration is usually confidential[290] and more impartial.[291] Arbitration tends to be "less adversarial" than litigation, so the future of the business relationship can be protected.[292] Also, the expertise of the arbitrators is an attractive characteristic of arbitration

---

281. *See Winning is Only Half the Battle*, THE ECONOMIST, Mar. 23, 2005, *available at* http://www.economist.com/research/articlesBySubject/displayStory.cfm?story_ID=3797564&subject=HK [hereinafter *Winning*].

282. *See* Mo, *supra* note 159, at 86.

283. *Id.* at 87.

284. *Id.*

285. *Id.* at 90; *see also* FRESHFIELDS II, *supra* note 171, at 10 (noting that "particularly in transactions involving emerging markets, arbitration may be the only option to ensure that you can obtain an enforceable result").

286. Mo, *supra* note 159, at 91. "Local protectionism is the main obstacle to enforcement." *Id.*

287. *See supra* note 200.

288. Mo, *supra* note 159, at 91.

289. *See id.*

290. *See* FRESHFIELDS, *supra* note 169, at 21 (noting that international arbitration hearings "take place behind closed doors"). *Cf.* Sternberg, *supra* note 226, at 44 (describing that what remains private is the panel's decision making process and not the final award itself).

291. FRESHFIELDS, *supra* note 169, at 21; *see also* Arbitration Law art. 14. This provisions states that the Arbitration Commissions are "independent from administrative organs" and are not "subordinate" to any administrative organs. *Id.*; *see also* STRATFORD, *supra* note 227. Sixty percent of the American companies who responded to the American Chamber of Commerce survey on arbitration in China said that arbitration in "major Chinese arbitration centers" tended to be "more fair" than litigation in Chinese courts. *Id.*; *see also* GARZ, *supra* note 55. "[L]ocal governments and local CCP committees control the personnel and financial arrangements of the local courts. Appointment and dismissal of judges and provision of salaries are determined by local government and CCP committees." *Id.*

292. Franki Cheung, *CIETAC Opens Doors to Financial Arbitration*, 17 CHINA L. & PRAC. 22 (2003).

compared to litigation in Chinese courts.[293] An indication of this expertise is illustrated by the CIETAC requirement that each arbitrator display "professional knowledge of law, economy and trade, science and technology or maritime affairs, and . . . working experience."[294]

It is important to know that decisions made by Chinese courts in litigation are subject to appeal,[295] while arbitral decisions are final.[296] The foreign investor also has the perception that there is more "control" over the proceedings in terms of drafting the arbitration clause, choosing the arbitration commission, and selecting the arbitrators.[297] Furthermore, *The Economist* estimates that "[n]ationwide," approximately "60% of court rulings are enforced";[298] and this number can "drop to 10%" when court officers from other jurisdictions are trusted to enforce the rulings.[299] It is no wonder that some authorities advise that litigation in Chinese courts is "not a suitable venue" for foreign investors resolving disputes with a Chinese entity—"[a]rbitration is preferred."[300]

IV. FUTURE CONSIDERATIONS[301]

China has shown a great willingness to reform its "weak and developing legal system" to attract foreign investment and create a more favorable and predictable climate for investors by amending its Constitution.[302] In 1999, China added a phrase to its Constitution: "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law."[303] While it is true that most Western foreign investors may still not be clear about the definition of a "socialist country of law," this

---

293. *Id.* at 22.

294. *See* CIETAC's "Conditions for the Appointment of Arbitrators" Foreign arbitrators, ¶ 2, *at* http://www.cietac.org.cn/english/arbitrators/arbitrators.htm (2004); *see also* Arbitration Law art. 13.

295. CPL art. 147. "A litigant contesting a judgment of first instance rendered by a local people's court has the right to appeal to the people's court at the next higher level within 15 days upon the delivery of the court verdict." *Id.*

296. Arbitration Law art. 9. Article 9 states, "The single ruling system shall be applied in arbitration. The arbitration commission shall not accept any application for arbitration, nor shall a people's court accept any action submitted by the party in respect of the same dispute after an arbitration award has already been given in relation to that matter." *Id.*

297. Sternberg, *supra* note 226, at 39 (mentioning "control" in international arbitration as a way for parties to "privatize certain powers of the judiciary").

298. *Winning*, *supra* note 281.

299. *Id.*; *see also* Zhong & Yu, *supra* note 260, at 431. Indeed, local protectionism is "one of the reasons" the Chinese Supreme Court "withdrew jurisdiction over foreign-related commercial cases from all basic and some intermediate courts." *Id.* at 431.

300. FRESHFIELDS II, *supra* note 171, at 11.

301. Famous remark by Deng Xiaoping. *See* Excerpt from a talk with Susumu Nikaido, Vice-President of the Liberal Democratic Party of Japan (1985), *available at* http://www.chinadaily.com.cn/english/doc/2004-08/09/content_363585.htm.

302. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 99.

303. XIANFA art. 5.

Constitutional amendment is an important step. Indeed, the Constitution makes clear that "[n]o organization or individual may enjoy the privilege of being above the Constitution and the law."[304] However true in practice this might be,[305] these additions to the Constitution can be seen as an eagerness by China to enter a rule of law state.

A. *Legal Reform*

China's WTO accession also provides a strong impetus to amend the national laws and to progress toward a rule of law.[306] Since there are no specific clauses in the WTO agreement as to how a country should apply the new rules, Cao Jianming, Justice and Vice-President of the Supreme People's Court of the People's Republic of China,[307] recommends that China adopt a "transformational" approach to the problem of applying the WTO rules to domestic law.[308] Transformational application requires that the domestic law be revised to comply with WTO regulations.[309] This would require all departments and local governments to "clear" their existing internal policies and to "abolish and amend" all those regulations that are not in conformity with the WTO.[310] Further, to respond to the increased "international commercial and political activity, many new laws and regulations should be made."[311] Moreover, the SPC has requested that all the courts in China "make public" all their decisions.[312]

---

304. *Id.*

305. *See Empirical Study of Enforcement*, *supra* note 238, at 307. "[T]here remains a wide gap between the laws on the books and actual practice. To be sure there is a gap in every system" but it is "wider in China." *Id.*

306. Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97 (2003). By the end of the year 2000, in anticipation of WTO accession, the Ministry of Foreign Trade and Economic Cooperation achieved:

> the review of over 1400 laws, regulations, and similar documents, including six statutes (of which five were revised), 164 State Council regulations (of which 114 were to be repealed and 25 amended), 887 of its own ministry regulations (of which 459 were to be repealed and 95 amended), 191bilateral trade agreements, 72 bilateral investment treaties, and 93 tax treaties. In the first two months of 2001, the various ministries and commissions of the State Council reportedly reviewed some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision.

Id. at 104.

307. *See* Cao, *supra* note 75, at 388.

308. *See id.* at 379. "The best way for China to apply the WTO agreement during China's period of transition is to amend its national laws or to transform the WTO agreement into national laws." *Id.* at 380.

309. *Id.* at 379.

310. *See id.* at 386.

311. *Id.* at 381.

312. *Id.* at 388. When certain policies were issued, no information was exchanged or published, and foreign-invested enterprises only became "aware of the policy changes until they were faced with a particular problem." *Id.* at 386.

China's entry into the WTO can not be viewed simply a means to attract more foreign investment or export more Chinese products, but also as a way to "force through difficult changes in the domestic economic system."[313] Reasons for this idea may include the difficulty the central government has with supervising the local governments.[314] The central government has the obligation to ensure that the local governments do not engage in local protectionism by continuing to issue laws inconsistent with the WTO.[315]

Accession to the WTO may be seen as "a central government decision essentially imposed on local governments."[316] In addition, the benefits that China derives from the growing economic alliance with the West include the "advancements in Chinese commercial law ... [,] slimmed-down bureaucracies, and adherence to international safety and environmental standards."[317] WTO accession for China means that the economic reforms that benefit investors can be "lock[ed] in" and become "irrevocable."[318] It remains to be seen whether China will fully comply with these ambitious plans,[319] but they are a step in the right direction.

B. Foreign Investment Law Reform

It is in the interest of China's central government to implement the WTO reforms and bring the local sectors into compliance in order to increase foreign investor confidence.[320] In April 2001, due to pressure from the WTO[321] and

---

313. Clarke, *supra* note 306, at 97. WTO accession is seen as a part of a "larger strategy of massive and fundamental economic change." *Id.*; *see also* Halverson, *supra* note 9, at 333. WTO accession is seen as "generating necessary momentum to complete the most politically difficult stage of China's move to a market economy." *Id.*

314. *See Empirical Study of Enforcement*, *supra* note 238, at 325. "The Party itself wants to rein in the wayward local governments and ensure that central laws and policies are implemented." *Id.*

315. *See* Clarke, *supra* note 306, at 107.

> The main factor behind local economic protectionism is the dependence of local government upon local enterprises for revenue. To the extent a government collects revenues, whether in the form of taxes or profits from an enterprise, it is similar to an owner and has an interest in protecting those revenues.

Id.

316. *Id.* at 98.

317. George J. Gilboy, *The Myth Behind China's Miracle*, 83 FOREIGN AFF. 4 (2004), *available at* http://www.foreignaffairs.org/20040701faessay83405/george-j-gilboy/the-myth-behind-china-s-miracle.html.

318. Halverson, *supra* note 9, at 334 (noting that the "WTO framework acts as a sort of constitution" and imposes a standard on the Chinese government).

319. *See Empirical Study of Enforcement*, *supra* note 238, at 325-26. The article posits that "entry into WTO will not have an immediate impact" on the "types of rule of law problems that make doing business in China difficult" because "WTO rules assume a government limited by laws and in particular legal limits on executive actions." *Id.*

320. *See* Halverson, *supra* note 9, at 332. "There are obvious reasons why China would view WTO membership as beneficial. China stands to benefit from the recognition and prestige

other sources,[322] China further relaxed its attitudes toward WFOEs and made significant changes to the regulations. New regulations relating to FIEs in China are an improvement for the foreign investor.[323] For example, the "Regulations on Foreign Investment Guidelines," promulgated by the State Council on February 11, 2002, lay out various categories of newly-permitted industries for the investor.[324] However, the regulations still forbid any investment in the media, including newspapers, movies, and telecommunications.[325]

Several of the most important changes directly affecting the foreign investor include the repeal or modification of the following: the requirement that the WFOE export a certain percentage of its products and advanced technology is no longer required but only discretionary;[326] the prohibition on the direct sale of products to the domestic market "without government approval;"[327] the requirement that all raw materials and fuel be purchased within China unless unobtainable from domestic sources;[328] that WFOEs must sell products according to China's price control rules; and the restricting of WFOE investment to certain business lines.[329] Further restrictions on WFOEs (and other FDI vehicles) were scheduled to be lifted on December 11, 2004.[330]

Foreign investors are free to set up wholly foreign owned commercial enterprises (not only production or manufacturing enterprises), and therefore

---

that WTO membership brings. WTO membership will deepen China's integration into the world economy and signal its status as a world economic power." *Id.*

321. Peerenboom & Xu, *supra* note 90, § 3.02(1).

322. *Id.* The following are some reasons for the trend towards WFOEs: the "gradual elimination of the discriminatory treatment' of the WFOEs under Chinese law, "competition for foreign investment among local governments," reluctance of foreign investors to transfer technology for fear of intellectual property leaks, and "increased investor sophistication" in dealing with local business practices and customs. *Id.*

323. *See generally FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 98-99. The author notes that foreign investment in China is seen as "risky" and "have caused many to question the ability of the Chinese government . . . to reform the rather unfriendly FDI environment." *Id.*

324. JONES DAY, *supra* note 87.

325. Implementation Regulations for the Wholly Foreign Owned Enterprise Law of the People's Republic of China (Dec. 12, 1990), http://english.ibd.com.cn/news/readcredit.asp?newsid=68. Article 4 states: "No foreign-capital enterprise shall be established in the following trades: (1) the press, publication, broadcasting, television, and movies; (2) domestic commerce, foreign trade, and insurance; (3) post and telecommunications; (4)other trades in which the establishment of foreign-capital enterprises of foreign-capital enterprise is forbidden, as prescribed by Chinese government ." *Id.*

326. *See FDI Regulations & Dispute Resolution Mechanisms*, *supra* note 84, at 107.

327. *Id.* at 108.

328. *Id.*

329. *FDI Laws and Policies*, *supra* note 89, at 41. The restricted business lines include: "media, real estate, communications and transportation and public utilities." *Id.*

330. Julie Walton, *WTO: China Enters Year Three*, CHINA BUS. REV., http://www.chinabusinessreview.com/public/0401/01.html (n.d.) (last visited Mar. 31, 2006). *See also* THE U.S. CHINA BUSINESS COUNCIL, FOREIGN INVESTMENT IN CHINA (Jan. 2006), *at* http://www.uschina.org/public/documents/2006/02/foreign-direct-investment-2006.html. In 2006, China is scheduled to open more business sectors to foreign investment. *Id.*

the business scope for retail, franchise, and wholesale will be expanded.[331] The procedures and laws for setting up and operating an enterprise in China are becoming more clear and understandable for the foreign investor and going it alone is much less overwhelming.[332] These significant changes are a welcome sign that China is dedicated to its WTO commitments and is taking reform seriously.

C. *Dispute Resolution Reform*

It seems that the recent May 2005 reforms to CIETAC aim to increase the perception of fairness during arbitration. Specifically, the 2005 reforms have attempted to eliminate the criticisms regarding CIETAC's perceived conflicts of interest[333] by requiring arbitrators to "disclose" any "facts or circumstances" that may raise suspicion about the neutrality of the arbitrator.[334] In addition, the reforms provide an additional option for agreement upon a third arbitrator.[335] Now, even when the parties are unable to reach an agreement with respect to a third arbitrator, CIETAC now allows each party to submit a separate list of nominees, and if there is "only one common candidate on the list," that person will be the third arbitrator.[336] And, as mentioned above, "non-panel" arbitrators may now be chosen.[337] These are important steps in bringing international arbitration in China up to international standards.[338]

In 1995, the Judges Law required that after July 1, 1995, all judges must have a college education and pass a national examination.[339] Similarly, the Lawyer's Law of 1996 provided that lawyers in China must meet certain

---

331. Walton, *supra* note 330.

332. Cao, *supra* note 75, at 388. China's WTO commitment that "all laws, regulations, decisions and administrative policies made . . . by each locality . . . that relate to . . . economic cooperation should be in conformity with national laws and regulations" is being implemented by new unifying laws passed by the National Peoples Congress. *Id.*

333. *See* Melnitzer, *supra* note 218. The "most common complaint was that CIETAC required parties to appoint arbitrators from [CIETAC's] panel. . . . [m]easured by the standards of the international arbitration community . . . CIETAC still has a ways to go." *Id.*

334. *See* CIETAC Rules art. 25:

> 1. An arbitrator appointed by the parties or by the Chairman of the CIETAC shall sign a Declaration and disclose to the CIETAC in writing any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. 2. If circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall promptly disclose such circumstances in writing to the CIETAC. 3. The CIETAC shall communicate the Declaration and/or the disclosure to the parties.

Id.

335. *See id.* art. 22

336. *See id.*

337. *Id.* art. 21.

338. *See* Melnitzer, *supra* note 218 (noting that these 2005 reforms demonstrate the Chinese authorities "commitment to bringing Chinese arbitration in line with international standards").

339. *See* Halverson, *supra* note 9, at 349.

professional standards to practice law in China.[340] Chinese lawyers are no longer defined as "'state legal workers' " and are given a more independent status.[341] In addition, China is sending many lawyers to the United States and other European countries to be trained to handle "international legal service business" disputes.[342] In 1992, the Chinese government allowed foreign law firms to set up representative offices in China; however, they still must be registered as "consulting firms," and they may not interpret Chinese law.[343]

The legal industry is still highly regulated by the Chinese government,[344] but it is partly a result of the need to protect China's "fledgling" legal service industry from more developed competitors.[345] China's WTO commitments to allow more legal service competition may force China's legal service sector to "improve . . . [its] own competence" as the restrictions of foreign law firms are lifted;[346] a welcome improvement for foreign investors. In addition, efforts have been made to reduce the effects of local protectionism on the court system by proposing different models of reform,[347] such as "merging high courts of several neighboring provinces" to form a "cross-provincial judicial district court."[348] All these reforms should make dispute resolution a less forbidding procedure for both the FIE and the foreign enterprise in China.

CONCLUSION

Can China ever fully implement these reforms while operating under the "dictatorship"[349] that is the current Communist Party? The WTO-compliant

---

340. *See id.*; *see also* Lu, *supra* note 278, at 323. Because Chinese lawyers must now have at least a bachelor's degree, the prospects for increasing the education level of lawyers in China "will improve greatly in the next decade." *Id.*

341. Liu, *supra* note 276 at 1074. "The law stresses the need for lawyers to 'pursue independently the practice' under the law, and to exercise a high degree of professionalism and personal ethics." *Id.*

342. Lu, *supra* note 278, at 325.

343. Jane Heller, Comment, *China's New Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 758 (2003).

344. *See* Lu, *supra* note 278, at 278.

345. *Id.* at 318.

346. *Id.*

347. *See generally* Vernon Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 123-132 (2004).

348. *Id.* at 126.

349. XIANFA pmbl. The preamble reads, in part:

> Under the leadership of the Communist Party of China and the guidance of Marxism- Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy.

Id.

economic reforms that have been instituted strongly support the state-owned enterprises, while slowing the rise of an independent private sector.[350] In addition, the "business risks inherent in China's unreformed political system" cause Chinese businessmen to develop relationships with Communist Party members.[351] China's political system also continues to be implicated as an impediment to further liberalization of the economy and further advancements in the judicial branch.[352] And, for the time being, the President of China, Hu Jintao, does not seem willing to make changes to the current Communist system in China.[353]

However, it must be noted that the Communist Party is rarely to blame for local protectionism.[354] Most leaders in the central government are more concerned with attracting foreign investment and do not want China's "reputation sullied by negative publicity."[355] It is important that China is seen as a "work in progress" and one that has not yet reached the level of other "advanced industrialized economies."[356] Indeed, China's move toward a more law-based state does not necessarily require a "full transition to a Western-style democratic government."[357] Strengthening the rule of law in China can remain

---

350. *See* Gilboy, *supra* note 317. The Chinese government gives preferential treatment to the SOEs, and the economic reforms favor the foreign investor. As a result, the private sector is "unable to compete with either on equal terms." *Id.*; *see also* Ahmad, *supra* note 11. State owned enterprises (SOE) in China are more concerned with maintaining "patronage and employment than . . . generat[ing] profits," and the private businesses remain too small to "offer an effective counterweight to the state sector." *Id.*

351. Gilboy, *supra* note 317. This "horizontal association" prevents "long term technology development and diffusion." *Id.* The result is "technological and economic weakness." *Id.*

352. *Empirical Study of Enforcement*, *supra* note 238, at 286; *see also* Halverson, *supra* note 9, at 363. "While China has undergone dramatic economic and even legal changes in the process of joining the WTO, the CCP has endeavored to maintain rigid control over other spheres of Chinese society." *Id.*

353. *What Price Reform?*, THE ECONOMIST, Sept. 25, 2004, at 53. Mr. Hu, in a speech on September 15, 2004, is quoted as saying, "history has proved that in China copying the model of western political systems is a dead-end road." *Id.*; *see also Hu's in Charge*, THE ECONOMIST, Aug. 18, 2005, *available at* http://www.economist.com/world/asia/displayStory.cfm?story_id=4300177. "Mr. Hu has shown no sign of retreat from the core belief of party leaders since the early 1990s," and he is "widely regarded as a conservative authoritarian." *Id.*

354. *See Empirical Study of Enforcement*, *supra* note 238, at 285. Studies have shown that "government officials are three times as likely to interfere with the courts as the CCP." *Id.*

355. *Id.* at 286. In fact, the "Party" is often a valuable ally in the fight against "local protectionism." *Id.* at 286; *see also* Ahmad, *supra* note 11. The Chinese government is "well aware that its political acceptance derives solely from rapid economic growth, and will do whatever is necessary to meet its internal benchmark, an annual rise of 7%." *Id.*

356. Gilboy, *supra* note 317.

357. Orts, *supra* note 22, at 86. "The rule of law in this political and normative sense presumes a corresponding development of a relatively autonomous legal and judicial system—that is, judges and lawyers who function independently of the government and, in particular, of the Chinese Communist Party." *Id.*

a separate goal to power the major shift to a democratic government.[358] For a developing country like China, perhaps the "prioritization of socioeconomic rights over civilpolitical [sic] rights" is justified because without economic modernization and development, the "citizens will neither enjoy the benefits of the rule of law nor civil-political rights."[359]

China remains an attractive location for investment and the future outlook appears bright for the foreign investor. It is undeniable that the institution of communism is an impediment on the path to future reforms, but however constrained, there has been a steady progress toward a rule of law and a more transparent and less perplexing legal system. The reforms to the Chinese legal system as they impact foreign investors are substantial. The nature of these reforms imply that the advancements are not only interim measures, but reflect an institutional change in attitude toward foreign investment. For the foreign investor deciding whether an FIE or a foreign enterprise is the best FDI vehicle, a close scrutiny of the legal implications of each FDI vehicle, the array of laws that can aversely or favorably affect the investor, and an appreciation of the tangle of laws and cultural norms that regulate dispute resolution with Chinese parties are essential starting points. Truly, investing in China involves "patience, patience and more patience,"[360] but the rewards for the foreign investor can be glorious.[361]

358. *See id.* at 87. "Given the historical antipathy toward Western-style democracy in China, it may make sense for Western policymakers, as well as the Chinese themselves, to focus instead on the rule of law as an orienting ideal. Democracy might remain a long-term objective." *Id.*

359. Killion, *supra* note 48, at 548. "Prompting China to expediently implement a modern legal system" is like putting the "proverbial cart before the horse." *Id.* The need for "stability" in China's "fragile infrastructure" calls for a "steady yet gradual approach to modernity." *Id.* at 550.

360. *See* Lauchli, *supra* note 162, at 1045.

361. "Poverty is not socialism. To get rich is glorious" is a famous saying by Deng Xiaoping. *See* Thomas Hon Wing Polin & Tim Healy, *Man of the Century*, ASIAWEEK (2001), *at* http://www.asiaweek.com/asiaweek/97/0307/cs6.html.

THE COURT OF LAST RESORT: SEEKING REDRESS FOR VICTIMS OF ABU-GHRAIB TORTURE THROUGH THE ALIEN TORT CLAIMS ACT

Atif Rehman*

INTRODUCTION

> [W]e have got people whose basic human rights are being violated by American corporations for profit. And we're interested in holding these companies accountable for their war crimes ... [J]ust because we are at war doesn't mean it's the wild, wild west and the rules don't apply.
>
> -Craig T. Jones – An attorney representing victims of Abu-Ghraib prison abuse.

Imagine returning to your native homeland in search of peace and prosperity after your people are "liberated" by the removal of a brutal dictator. Imagine after returning home, you are driving and U.S. military officers, whom you believe are your friends, stop your car as part of a random check. To your surprise, they confiscate your car, cash, and jewelry. You are then thrown into a prison, but you are never told why. In prison, things quickly take a turn for the worse; you are urinated on, beaten, and sodomized. The abuse is all part of a plan to break you down so that you will provide better intelligence during interrogations. But you do not know anything. You profess your innocence, but no one will listen. The abuse continues. Several weeks later you are released, battered and broken. You still do not know why you were picked up in the first place. No explanation. No apology. Imagine the shock. Imagine the outrage.

This was the horror a Swedish citizen named Saleh faced after returning to Iraq following the removal of Saddam Hussein.[1] Saleh is not a terrorist, insurgent, or Baathist.[2] He is just a regular Iraqi, one of many who were picked

---

*J.D. Candidate 2006, Indiana University School of Law – Indianapolis; BBA 2000, Wilfrid Laurier University. I would like thank Professor Maria Pabon Lopez as well as the members of the Indiana International and Comparative Law Review for all of their guidance and feedback. Most importantly, I would like to thank my wife, Aisha, for her unconditional support, encouragement, and patience throughout law school.

1. *See* Seth Hettena, *Iraqi in Abu Ghraib Saw Captors Rape, Kill Detainees, at* www.indymedia.org.uk/en/2004/07/294376.html (July 01, 2004).

2. *See id.*

up in random stops throughout Iraq and thrown into the Abu-Ghraib prison.[3] While at Abu-Ghraib, he was allegedly abused by U.S. military personnel and civilian contractors from U.S. corporations.[4]

To make matters worse, upon returning home, Saleh learned that the civilian contractors responsible for his abuse would go unpunished because, as non-soldiers, they are immune from prosecution under military law.[5] A civil suit against his aggressors in an Iraqi court is also impossible because of an executive order passed by the Coalition Provisional Authority (CPA) which provides immunity from prosecution to all contractors in Iraqi courts.[6] The civilian contractors in Iraq are essentially operating in lawlessness.[7]

Fortunately, Saleh and others like him may find solace in an old statute, 28 U.S.C. § 1350, the Alien Tort Claims Act (ATCA).[8] The ATCA enables aliens to bring claims in U.S. courts for certain actions that fall into a narrow category defined as violations of "laws of nations." Violations of "laws of nations" are limited to a small number of egregious human rights violations, such as torture, genocide, and summary execution.[9]

The ATCA has been used to promote justice by bringing perpetrators of human rights violations in other countries before the U.S. legal system. Specifically, it potentially provides victims of abuse at Abu-Ghraib with an avenue to bring civil actions against the corporations who had a hand in their abuse, corporations that otherwise would go unpunished.

This Note will argue that claims by victims of Abu-Ghraib prison abuse are within the scope of the ATCA. Part I will focus on the background of Abu-Ghraib, the problems that arose at the prison, the role of the civilian contractors, and the legal remedies available to victims. Part II will focus on the modern history of the ATCA and its past use. Part III will focus on the Supreme Court decision in *Sosa v. Alvarez Machain*, the recent decision that sought to clarify the interpretation of the ATCA.[10] Part IV will discuss how the victims of Abu-Ghraib prison abuse may be able to establish the liability of their abusers. Finally, Part V will briefly explain some of the claims that have already been filed on behalf of Abu-Ghraib victims and highlight some of the defenses that have been raised by the private contractor defendants.

---

3. *Id.*

4. *Id.*

5. Joanne Mariner, *Private Contractors Who Torture*, *at* http://writ.news.findlaw.com/mariner/20040510.html (May 10, 2004).

6. *Id.*

7. *See id.*

8. Marie Beaudette, *Seeking Payback; Money for Abused Iraqis Won't Come Easily Nor Without Some Creative Legal Arguments*, LEGAL TIMES, June 28, 2004, at 1.

9. Warren Richey, *Ruling Makes it Harder for Foreigners to Sue in US Courts*, CHRISTIAN SCIENCE MONITOR, (June 30, 2004), *available at* http://www.globalpolicy.org/intljustice/atca/2004/0630hard.htm.

10. *See* Sosa v. Alvarez-Machain 542 U.S. 692 (2004).

I. BACKGROUND

On March 19, 2003, the President of the United States, George W. Bush, acting with Congressional authorization, commenced military operations against Iraq.[11] The operation involved over 460,000 ground troops and 41,000 aircraft sorties.[12] Just twenty-one days later, on April 9, 2003, the city of Baghdad fell.[13] Once the U.S. military established control over Iraq, they established several facilities to house and interrogate detainees who had potential intelligence value.[14] There were at least seven of these facilities; the largest facility was Abu-Ghraib.[15]

Abu-Ghraib, while operating under the rule of Saddam Hussein, was notorious for torture, weekly executions, and vile living conditions.[16] However, the looting that followed the fall of Saddam left Abu-Ghraib deserted and barren.[17]

In the spring of 2003, in the face of a growing insurgency, U.S.-led coalition forces needed facilities to detain suspected insurgents and gather intelligence.[18] As a result, the coalition forces took control of Abu-Ghraib. They had the floors tiled and the cells cleaned and repaired.[19] They added toilets, showers, and a new medical center.[20] Abu-Ghraib became a U.S. military prison.[21]

By the fall of 2003 the U.S. military was housing several thousand prisoners at Abu-Ghraib, including women and teenagers.[22] Most of the prisoners were civilians, many of whom were picked up, like Saleh, in random military sweeps and at highway checkpoints.[23] The prisoners fell into three loosely defined categories: "common criminals, security detainees suspected of

---

11. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R. REP. No. 107-243, at 1 (2001), *available at* http://www.house.gov/international_relations/democratic/hjres114.pdf (last visited Feb. 18, 2006).

12. T. Michael Moseley, U.S. Air Force Operation Iraqi Freedom by the Numbers, 3,7 (April 30, 2003), *at* http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

13. *Id.* at 15.

14. Memorandum of Points and Authorities in Support of the Motion of Defendant Titan's Motion to Dismiss Saleh v. Titan Corp. (S.D. Cal. 2004) (NO.04-CV-1143) [hereinafter Titan's Motion to Dismiss].

15. *Id.*

16. SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 20 (Harper Collins 2004).

17. *Id.* at 21.

18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Seymour M. Hersh, *Torture at Abu Ghraib,* THE NEW YORKER, May 10, 2004, http://www.newyorker.com/fact/content/?040510fa_fact (posted Apr. 30 2004).

23. *See* HERSH, *supra* note 16, *at* 21.

'crimes against the Coalition', and a small number of suspected 'high-value' leaders of the insurgency against the coalition forces."[24]

The 800th Military Police Brigade, an army unit based in Uniondale, New York, was responsible for running the Abu-Ghraib prison.[25] Although Abu-Ghraib was a U.S. military prison, due to the shortage of interrogators and interpreters, the U.S. government outsourced interrogation and translation duties to private, "for-profit" corporations.[26] In fact, of the thirty-seven interrogators at Abu-Ghraib prison, twenty-seven did not belong to the U.S. military.[27] Those twenty-seven interrogators were employees of a Virginia-based company, CACI International ("CACI").[28] Additionally, twenty-two of the linguists who assisted in the translation of interrogations were employees of another corporation, Titan International ("Titan").[29]

In June 2003, Janis Karpinski, an Army Reserve General, was put in charge of the 800th Military Police Brigade.[30] Karpinski had no prior experience running a prison system.[31] She quickly lost control of the prison, and numerous reports of prison mistreatment began to surface.[32] The International Committee of the Red Cross (ICRC) began to express concerns about the treatment of detainees.[33] Karpinski wrote to the ICRC in response to their concerns, stating that military necessity required the isolation of some prisoners and that they were not entitled to full Geneva Convention protections.[34] The reports of abuse of Iraqi detainees continued, as well as reports of escapes and a lack of accountability of U.S. personnel.[35] In January 2004, General Karpinski was suspended and a major investigation into the Army's prison system was authorized by the Senior Commander in Iraq, Lieutenant General Richard S. Sanchez.[36]

On January 31, 2004, the U.S. Central Command appointed an officer, Major General Antonio M. Taguba, to investigate the conduct of the 800th Military Police Brigade at Abu-Ghraib.[37] Over the course of a month, Taguba and his team reviewed numerous photos and videos taken by U.S. personnel at the prison. In addition, they analyzed witness statements by military police and

---

24. *Id.*
25. *See* Sean Murphy, *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591, 594 (2004).
26. Lynda Hurst, *The Privatization of Abu Ghraib*, THE TORONTO STAR, May 16, 2004, http://www.commondreams.org/headlines04/0516-02.htm.
27. *Id.*
28. *Id.*
29. *Id.*
30. Hersh, *supra* note 22.
31. *Id.*
32. *Id.*
33. Murphy, *supra* note 25, at 593.
34. *Id.*
35. *Id.*
36. HERSH, *supra* note 16, at 21-22.
37. Murphy, *supra* note 25, at 594.

intelligence personnel, potential suspects, and detainees.[38] In late February 2004, Major General Antonio M. Taguba's findings were published.[39] The findings were startling. He found that between October and December of 2003, there were numerous instances of "sadistic, blatant, and wanton criminal abuses" at Abu-Ghraib.[40] Some of the abuses included:

> Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.[41]

According to the report, military intelligence officers, CIA personnel, and private contactors "actively requested that MP [Military Police] guards set physical and mental conditions for favorable interrogation of witnesses."[42] The Taguba report provided concrete evidence substantiating the allegations that victims like Saleh had been making.[43] The findings of the report also exposed the extent of private corporation involvement in the interrogation and abuse of prisoners.[44]

Private contractors have played an unprecedented role in many aspects of the Iraqi conflict, including detention and interrogation of prisoners at Abu-Ghraib. Private companies like CACI and Titan paid their employees salaries far greater than the U.S. Military paid its soldiers for similar tasks. [45] Furthermore, since these private contractors are U.S. civilians, they are not bound by military rules or the Geneva Convention.[46] While soldiers involved in wrongdoings can face a court martial, contractors are considered mercenaries operating outside of the military chain of command.[47] In addition to immunity from military law, contractors in Iraq operate outside the reach of Iraqi law.

---

38. HERSH, *supra* note 16, at 22.
39. *Id.*
40. *Id.*
41. *Id.*
42. Murphy, *supra* note 25, at 595.
43. *See generally* Maj. Gen. Antonio M. Taguba, Article 15-6, *Investigation of the 800th Military Policy Brigade*, (2004) (on file with author) (describing the abuse inflicted on prisoners while being held at Abu-Ghraib) [hereinafter Taguba Report].
44. *See id.*
45. HERSH, *supra* note 16, at 33.
46. Robin Rowland, *The Privatization of War Crimes*, CBC News Online (May 6, 2004), *at* http://www.cbc.ca/news/background/iraq/abughraib_privatization.html.
47. Steve Sanders, *A Tool For Torture Cases*, 45 BROWARD DAILY BUS. REV. 135, June 21, 2004, at 6.

Before Ambassador Paul Bremer left Iraq on June 28, 2004, he passed Order 17[48] giving complete immunity to contractors and military personnel from prosecution in Iraqi courts for killing Iraqis or destroying local property.[49]

Ever since the uncovering and subsequent media exposure of the abuse at Abu-Ghraib, several soldiers have been charged. The charges brought by the U.S. Army against its soldiers include physical and sexual abuse, conspiracy, dereliction of duty, cruelty, maltreatment, assault, and indecent acts.[50] Soldiers

---

48. Coalition Provisional Authority Order Number 17 (June 27, 2004) (revised) (on file with author):

> Pursuant to my authority as head of Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 (2003), 1511 (2003) and 1546 (2004), ...I hereby promulgate the following:
>
> Sec 2. Iraqi Legal Process
>
> 1) Unless provided otherwise herein, the MNF [Multinational Force], the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from the Iraqi legal process.
>
> 2) All MNF, CPA and Foreign Liaison Mission Personnel and International Consultants shall respect the Iraqi laws relevant to those Personnel and Consultants in Iraq including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.
>
> 3) All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States, except that nothing in this provisions shall prohibit MNF Personnel from preventing acts of serious misconduct by the above-mentioned Personnel or Consultants, or otherwise temporarily detaining such Personnel or Consultants who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the detained person's Sending State in Iraq shall be notified immediately.
>
> 4) The Sending States of the MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State.
>
> Sec 4. Contractors
>
> 1) Sending States may contract for any services, equipment, provisions, supplies, material, other goods, or construction work to be furnished or undertaken in Iraq without restriction as to choice of supplier or Contractor. Such contracts may be awarded in accordance with the Sending State's laws and regulations.
>
> 3) Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.

Id.

49. Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A1, http://www.washingtonpost.com/wp-dyn/articles/A757-2004Jun23.html.

50. *Id.*

have defended themselves by claiming they were just following orders from military intelligence personnel, which include interrogators and translators from CACI and Titan.[51]

The ATCA may play a unique role in holding civilian contractors, like CACI and Titan, liable for their alleged conduct, as well as provide civil remedies to the victims of the abuse.[52] The ATCA was passed as part of the Judiciary Act of 1789.[53] The Act has enabled aliens who have been victims of certain international human rights abuses sustained abroad to bring suit against their abusers.[54]

The ATCA, however, is both old and vague.[55] The language of the statute makes no assertion about legal rights. It simply provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations. . . ."[56] This has left much room for interpretation.

Although the ATCA has been surrounded with debate over its intended interpretation, recent rulings have helped clarify its interpretation. If victims of Abu-Ghraib prison abuse are able to prove that civilian contractors were directly involved in their abuse, and that the abuse amounted to "torture" in violation of the "laws of nations," they will likely be successful in using the ATCA as a tool for recovery. The decisions in three major ATCA cases provide legal precedent for victims, like Saleh, to draw upon in establishing a case against their alleged corporate abusers. First, *Filartiga v. Pena-Irala*,[57] a case that outlined the present day violation of "laws of nations," provides the foundation for a modern ATCA action.[58] Second, *Kadic v. Karadzic*,[59] the first case to allow an ATCA action against a private party, was instrumental in broadening the scope of the ATCA to include violations by non-state actors.[60] Finally, *Sosa v. Alvarez-Machain*[61] re-affirmed that the ATCA is available to be used for a limited number of violations, including torture.[62]

II. MODERN HISTORY OF ATCA

Congress passed the ATCA in 1789, and President George Washington

51. Julian Borger, *U.S. Military in Torture Scandal*, GUARDIAN UNLIMITED, Apr. 30, 2004, www.guardian.co.uk/Iraq/Story/0.2763.1206725.00.html.

52. *See* Filartiga v. Pena-Irala, 630 F. 2d 876 (2d. Cir. 1980).

53. Sanders, *supra* note 47.

54. Gina Bateson, *Alien Tort Claims Act in Jeopardy*, SIX DEGREES 42, *at* http://www.stanford.edu/group/sixdegrees/journal/spring04.pdf (Spring 2004).

55. *Id.*

56. 28 U.S.C. § 1350 (2005).

57. *Filartiga*, 630 F.2d at 876.

58. *See id.*

59. Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).

60. *See id.*

61. 542 U.S. 692 (2004).

62. *See id.*

signed it into law.[63] The original Act held that district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[64] The statute has seen slight modifications since its original enactment.[65] "[The ATCA] now reads . . . 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'"[66]

Congress enacted the ATCA soon after the ratification of the U.S. Constitution.[67] Many legal scholars believe the Act was enacted to deal with the problem of piracy committed at sea.[68] The ATCA was seldom used for nearly 200 years. Between 1789 and 1979, the ATCA was used less than twenty-five times, and only two courts ever upheld jurisdiction under Act.[69] Then, in the 1979 case of *Filartiga v. Pena Irala*,[70] the plaintiffs won a judgment under the ATCA. Suddenly, the ATCA captured the attention of human rights activists in the United States.[71]

The *Filartiga* story is a remarkable one, involving the 1976 murder of a young man, Joelito Filartiga, by an agent of Paraguayan dictator, Alfredo Stroessner.[72] The agent who supervised the torture and murder of Joelito was Americ Noerberto Pena-Irala.[73] Pena-Irala eventually moved to New York from Paraguay.[74] Jolelito's sister, Dolly, who also later came to the United States, learned that there was a possibility of bringing a civil suit against her brother's killer.[75] With the help of the Center for Constitutional Rights (CCR), Dolly filed a suit under the ATCA against Pena-Irala.[76]

Federal Judge Eugene Nickerson was the first to hear the case.[77] Judge Nickerson declined to extend jurisdiction to the civil suit.[78] In his view, the statute did not give jurisdiction to a foreign national for a tort committed in Paraguay.[79]

---

63. Bateson, *supra* note 54, at 42.
64. *Sosa*, 542 U.S. at 713 (citation omitted).
65. *Id.*
66. *Id.* (*quoting* 28 U.S.C. § 1350).
67. Gary Hufbauer & Nicholos Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004).
68. Bateson, *supra* note 54, at 42.
69. Hufbauer & Mitrokostas, *supra* note 67, at 609.
70. *Filartiga*, 630 F. 2d at 876.
71. Hufbauer & Mitrokostas, *supra* note 67, at 610.
72. RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS xi (Georgetown University Press 2004).
73. Bateson, *supra* note 54, at 43.
74. *Id.*
75. WHITE, *supra* note 72, at xi.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

The CCR lawyers and Dolly were successful in their appeal to the Second Circuit.[80] The Appellate Court reversed the trial judge and remanded the case to the District Court for a hearing.[81] In reversing, the appellate court ruled that Joelito was tortured and killed by a public official, conduct which was in clear violation of the norms of international law.[82] The Court relied on Article 5 of the Universal Declaration of Human Rights, which states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[83] The ensuing trial resulted in a decision that ordered the defendant to pay $10.375 million to the Filartigas in compensatory and punitive damages.[84]

The *Filartiga* case was instrumental in establishing the reach of the ATCA and in identifying torture as a violation of the law of nations. The court acknowledged the universal condemnation of torture in numerous international agreements and its renunciation by most of the world.[85] The court held that torture committed by a state official against one held in detention violates international human rights law and, hence, the law of nations.[86] Second Circuit Justice Irving Kaufman explained, "[t]he torturer has become like the pirate and slave trader before him – *hostis humanis generis*, an enemy of all mankind."[87] *Filartiga* established that the ATCA would provide jurisdiction over a state torturer found and served with due process by an alien within U.S. borders.[88]

Fifteen years after the *Filartiga* decision, the reach of the ATCA was extended to include private parties in the landmark decision *Kadic v. Karadzic.*[89] In *Kadic,* the plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina, formerly a republic of Yugoslavia.[90] The Croats and Muslims were victims of various atrocities, including rape, forced prostitution, forced impregnation, torture, and summary execution.[91] This genocidal campaign by Serbian military forces occurred during the Bosnian civil war.[92] The defendant, Karadzic, was one of three Presidents of a self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina.[93] In his command, Karadzic had authority

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Filartiga*, 630 F.2d at 880.
86. *Id.* at 884.
87. *Id.* at 890.
88. *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2034 (2001).
89. *Kadic*, 70 F.3d at 232.
90. *Id.* at 236.
91. *Id.*
92. *Id.*
93. *Id.*

over the Bosnian-Serb military forces and was directly responsible for the human rights violations.[94]

In 1993, Karadzic was admitted to the United States as an invitee of the United Nations in New York.[95] While in New York, he was personally served with the summons and complaint in an ATCA action brought by the Bosnian victims of his abuse.[96] The U.S. District Court for the Southern District of New York dismissed the suit for lack of subject matter jurisdiction.[97] The court concluded that "acts committed by non-state actors do not violate the law of nations."[98] The Bosnian-Serb warring military faction was not a recognized state, and members of Karadzic's faction did not act under the color of any recognized state law; accordingly, the ATCA could not provide a remedy for their actions.[99]

The issue on appeal concerned the scope of the ATCA, specifically whether violations of the law of nations may be remedied when committed by non-state actors.[100] Karadzic claimed that his alleged actions were not violations of international law because he was a private individual, not a state or a person acting under color of state law.[101]

The court ruled that the law of nations, as understood in the modern era, does not confine its reach to state actors.[102] It stated, "we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[103] The court then went on to identify genocide and war crimes as violations of the law of nations that did not require state action.[104] The court recognized that murder, rape, torture, and arbitrary detention of civilians committed in the course of hostilities are war crimes.[105]

Based on *Kadic*'s precedent, the victims of Abu-Ghraib can justify ATCA jurisdiction over private contractors. Even though the contractors are not state actors, the victims were allegedly tortured during the course of a war. If the abuse imposed by private contractors during the war was severe enough to be classified as torture, it would meet the *Kadic* definition of a war crime.

The *Kadic* decision, which for the first time permitted actions against private entities, opened up the possibility of suing corporations.[106] Naturally,

---

94. *Id.*
95. *Id.* at 237.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 236.
101. *Id.* at 239.
102. *Id.* at 239.
103. *Id.*
104. *Id.* at 241-43.
105. *Id.* at 242.
106. Francisco Rivera, *A Response to the Corporate Campaign Against the Alien Tort Claims Act*, 14 IND. INT'L & COMP. L. REV. 251, 254 (2003).

this caught the attention of the business community, particularly those doing business abroad. Corporations suddenly feared lawsuits arising from human rights violations in countries in which they did business.[107] In the years since *Kadic*, a few companies have been named as defendants in suits alleging that they abetted human rights violations through their activities in countries governed by repressive regimes.[108] To date, however, no U.S. corporation has ever been held liable under the Act.[109] Nevertheless, the opposition from the business community is strong.

The opponents of the ATCA fear that it is being used too expansively, and they are determined to limit its use.[110] Large corporations fear that they will be an easy target by plaintiffs who see them as deep pockets for recovery.[111] Opponents suggest that the ATCA is being used to abuse the U.S. judicial system and that such abuse will result in enormous legal costs to corporations that engage in business abroad.[112] According to John E. Howard, Vice President of International Policy and Programs for the U.S. Chamber of Commerce, "U.S. national interests require that we not allow the continuing misapplication of this 18th century statute to 21st century problems by latter day pirates of the plaintiffs' bar."[113]

On the other hand, human rights activists believe that the Act should be interpreted broadly and used as a tool to defend human rights violations abroad.[114] ATCA proponents advocate civil lawsuits as an appropriate method of holding companies accountable for their role in international human rights violations.[115]

Parties on both sides of the issue anxiously awaited the Supreme Court decision of *Sosa v. Alvarez-Machain,*[116] which promised to clarify the scope of the ATCA.

---

107. *See id.*

108. Sanders, *supra*, note 47; *see* Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002) (plaintiffs allege that Unocal was complicit in forced labor, forced relocation, and torture carried out by the Burmese military in the building of the Yadana natural gas pipeline); *see also* Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 92 (2000) (defendants, owners of Shell Nigeria, were charged with complicity in the 1995 hanging of Ken Saro-Wiwa and John Kpuinen, two Nigerian activists).

109. Rivera, *supra* note 106, at 254.

110. *See id.* at 255.

111. *See id.* at 258.

112. *Id.*

113. *Id.*

114. *See id.* at 259-60.

115. *Id.*

116. 542 U.S. 692 (2004).

III. SOSA V. ALVAREZ MACHAIN

In 1990, a federal grand jury indicted Dr. Alvarez-Machain for the torture and murder of a U.S. Drug Enforcement Agency (DEA) agent.[117] The Mexican government refused to comply with the DEA's request to extradite Dr. Alvarez-Machain.[118] The DEA then decided to take matters into its own hands, and hired several Mexican nationals, including Francisco Sosa, in an attempt to bring Dr. Alvarez-Machain to the United States for trial.[119]

Francisco Sosa, along with the help of other Mexican nationals, abducted Dr. Alvarez-Machain from his home, held him overnight in a motel, and took him in a private plane to El Paso, Texas for arrest.[120] In 1992, after the case went to trial, Dr. Alvarez-Machain was acquitted.[121] Upon acquittal, Dr. Alvarez-Machain returned to Mexico and sued Francisco Sosa under the ATCA.[122]

The trial court awarded $25,000 to Dr. Alvarez-Machain.[123] The U.S. Court of Appeals for the Ninth Circuit upheld the trial court.[124] As part of his abduction to the United States, the detention of Dr. Alvarez-Machain violated a clear and universal norm prohibiting arbitrary arrest and detention. This was, therefore, a violation of the law of nations.[125]

On September 2, 2003, Sosa filed a petition for writ of certiorari to the U.S. Supreme Court on the issue of whether the ATCA creates a cause of action.[126] In October 2003, certiorari was granted, and on March 30, 2004, oral arguments were heard.[127]

Sosa's argument was that the ATCA provided no relief; rather, it merely vested federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action.[128] Essentially, Sosa argued that the ATCA was not designed to be a tool to enforce international laws in U.S. courts.[129]

Lawyers for the U.S. Justice Department, under the George W. Bush administration, filed amicus briefs in support of Sosa's position.[130] The Justice

---

117. *U.S. Supreme Court Denies False Arrest Claim Under Alien Tort Claim Act*, INTERNATIONAL CLIENT ALERT (Powell, Goldstein, Frazer & Murphy LLP Newsletter, Atlanta, GA), Aug. 3, 2004, at 7, http://www.pogolaw.com/articles/767.pdf.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See Sosa*, 542 U.S. at 692.

128. *Id.* at 712.

129. *See id.*

130. *See Sanders, supra* note 47, at 6.

Department argued that the ATCA was being misconstrued and that the Ninth Circuit's interpretation could cause a constitutional separation of powers issue.[131] A federal judge could make an independent determination of whether international laws, like the Geneva Conventions, apply in a given circumstance, regardless of the executive branch opinion.[132] The Bush Justice Department argued that ATCA cases should be heard only where Congress has, by separate act, expressly given permission to file suit.[133]

The position of the Bush Justice Department was a reversal from the position the Department took in *Filartiga* during the Jimmy Carter administration.[134] At that time, the Department intervened on behalf of the Filartigas to argue that human rights standards invoked by the victim reflected President Carter's view on the importance of human rights in foreign policy.[135]

Alvarez's position was that the ATCA is not simply a jurisdictional grant, but that it provides authority for the creation of a new cause of action for torts in violation of international law.[136]

On June 29, 2004, almost three months after the oral arguments, the Supreme Court handed down its decision. In a 6-3 ruling, the court reversed the $25,000 judgment won by Dr. Alvarez-Machain.[137] The Justices agreed that the ATCA is only jurisdictional.[138] When it was enacted in 1789, the ATCA gave district courts "cognizance" of certain causes of action.[139] The term "cognizance" signaled a grant of jurisdiction rather than power to create substantive law.[140] The Court pointed out that the ATCA was in section nine of the judiciary act, which is a statute otherwise exclusively concerned with federal jurisdiction.[141]

The Court then addressed the interaction between the ATCA at the time it was enacted and the surrounding law at that time. The Court ruled that federal courts could hear claims once a jurisdictional grant was "on the books" because torts in violation of the law of nations would have been recognized within the common law of that time.[142] At the time of enactment, ATCA jurisdiction enabled federal courts to hear claims in a very limited category: those defined by the law of nations and recognized at common law.[143] Unfortunately for Dr.

---

131. *Id.*
132. *Id.*
133. WHITE, *supra* note 72, at xii.
134. *Id.*
135. *Id.*
136. Warren Richey, *When Can Foreigners Sue In US Courts?*, CHRISTIAN SCI. MONITOR, Mar. 30, 2004, www.globalpolicy.org/intljustice/atca/2004/0330when.htm.
137. Richey, *supra* note 9.
138. *Sosa*, 542 U.S. at 714.
139. *Id.* at 713.
140. *Id.*
141. *Id.*
142. *Id.* at 714.
143. *Id.*

Alvarez-Machain, his illegal one-day detention did not fall into this limited category of violations.[144]

Although Alvarez-Machain may have lost his battle, human rights activists may have won the war to ensure accountability for human rights violations.[145] Six of the nine justices upheld the use of the ATCA statute to bring cases for serious human rights violations.[146] In doing so, they may have kept the door open to allow cases by Abu-Ghraib victims, like Saleh, to proceed.[147]

The Court rejected arguments from the Bush administration and the business community that any claim for relief under the ATCA, a jurisdictional statute only, should require a separate statute by Congress expressly authorizing a cause of action.[148] Justice Souter, writing for the majority, examined the history of cases and other legal material surrounding the ATCA and concluded that the First Congress had not passed the ATCA to be "placed on a shelf" for the future when Congress might authorize the creation of a cause of action.[149]

> In sum, although the ATS [ATCA] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[150]

Most importantly, the Court stood by the *Filartiga* decision, recognizing torture as an act that was a violation of the law of nations.[151] "The position we take today has been assumed by some federal courts for [twenty-four] years, ever since the Second Circuit decided *Filartiga v. Pena-Irala* . . . ."[152] However, Justice Souter directed the exercise of caution when evaluating an ATCA action and recommended giving serious weight to a case's potential impact on foreign policy.[153]

Justice Scalia concurred in the judgment, but he wrote a separate opinion expressing his view that a cause of action should not be heard under the ATCA

---

144. *Id.* at 2762.

145. Marcia Coyle, *Justices Open Door with Alien Tort Case; What Kind of Claims Remain is Contested*, 26 NAT'L L. J. 1 (July 5, 2004).

146. Sosa, 542 U.S. at 724.

147. *See id.*

148. Coyle, *supra* note 145.

149. *Sosa*, 542 U.S. at 719.

150. *Id.* at 724.

151. *Id.* at 731.

152. *Id.*

153. Press Release, EarthRights International, ATCA Lives! (June 29, 2004), *at* http://www.earthrights.org/news/atcalives.shtml.

without specific congressional action.[154] Scalia did not dispute that ATCA jurisdiction was originally available to enforce a small number of international norms without further statutory authority. [155] He argued, however, that since *Erie Railroad Co. v. Tompkins*,[156] there has been a limitation on federal judicial power. According to *Erie*, federal courts have no authority to derive "general" common law.[157] *Erie* reversed the holding of *Swift v. Tyson*,[158] which allowed federal courts to express their own opinions on general commercial law.[159]

Erie recognized the problems that existed when federal courts choose general common law[160] and ruled that "[t]here is no federal general common law."[161] The lesson of *Erie*, according to Scalia, is that grants of jurisdiction by themselves are not grants of lawmaking authority. Since the ATCA is only jurisdictional in nature, there can be no claims recognized under the Act.[162] Scalia believes that unless Congress authorizes each ATCA cause of action, it is an unlawful exception to the *Erie* rule that general common law does not exist.[163]

The majority disagreed with Scalia's interpretation of *Erie*, responding: "*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."[164]

The First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations.[165] According to *Sosa*, any claim based on the present-day law of nations should "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century . . . ."[166] The *Sosa* Court reasoned that the First Congress knew that federal courts could properly identify some international norms as enforceable in the exercise of ATCA jurisdiction.[167] It would be unreasonable to assume that the First Congress, in enacting the ATCA, expected federal courts to lose their ability to recognize enforceable international norms and require special congressional authorization.[168]

---

154. *See Sosa*, 542 U.S. at 750.
155. *Id.* at 739.
156. Erie Railroad. Co. v. Tompkins, 304 U.S. 64 (1938).
157. *Sosa*, 542 U.S. at 729.
158. Swift v. Tyson, 16 Pet. 1 (1842).
159. *Sosa*, 542 U.S. at 740.
160. *Id.* at 741
161. *Id.* (*quoting Erie* 304 U.S. at 78).
162. *Id.* at 744.
163. *Id.*
164. *Id.* at 729.
165. *Id.* at 724.
166. *Id.* at 725.
167. *Id.* at 724.
168. *Id.* at 730

The *Sosa* decision also reinforced the standard of identifying the law of nations set forth in *Filartiga*.[169] Alvarez's detention claim needed to be gauged against the sources of international law that had been recognized in the past.[170] The Law of nations come primarily from treaties, the legislature, or judicial decisions. If these do not exist, one must look to the customs of civilized nations.[171]

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence to these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[172]

The significance of the *Sosa* decision is that ATCA claims limited to violations of certain widely accepted international norms, like torture, are actionable in U.S. courts.[173]

IV. ESTABLISHING LIABILITY UNDER THE ATCA

The landmark rulings in *Filartiga*, *Kadic*, and *Sosa* suggest that victims of Abu-Ghraib have a two-prong test to determine if they have a valid ATCA claim. First, they need to establish that the violations were enough to be considered modern day violations of the law of nations. Second, according to the standard established in *Kadic*, they need to establish that their abuse was sufficient to warrant action against private actors. If victims of Abu-Ghraib prove that they were tortured by private contractors in the course of a war, they will have satisfied both prongs of this test. The court in *Filartiga* acknowledged torture as a violation of the laws of nations.[174] In *Kadic*, the court identified torture conducted during hostilities as serious enough to allow a claim against a non-state actor.[175] Perhaps the biggest obstacle for victims of Abu-Ghraib will be to establish that their treatment went beyond humiliating and rose to the level universally accepted as torture.[176]

Defense attorneys for the soldiers who have been charged under military law for their role in the abuse at Abu-Ghraib have raised doubts as to the

169. *See id.* at 732.
170. *Id*
171. *Id.* at 734.
172. *Id.*
173. *See id.* at 732.
174. *Filartiga*, 630 F.2d at 880.
175. *Kadic*, 70 F.3d at 242.
176. *See infra* section V.

severity of the abuse that took place.[177] In opening statements heard on January 10, 2004, in the criminal proceedings against Specialist Charles Graner, Graner's defense attorney argued that the actions of his client fell short of torture.[178] He compared stacking nude prisoners in a pyramid to stacking cheerleaders in pyramids at sporting events throughout the United States.[179] According to Graner's defense, a prisoner with dog leashes around his neck is no different than a parent attaching a tether to their child at a mall.[180]

The defense raised by Graner was ultimately unsuccessful. Nevertheless, it should caution potential plaintiffs in ATCA actions against military contractors of the obstacles they will surely face. Plaintiffs will have to distinguish between acts that were actually torture and those, although humiliating, that fall short of torture.

The exact definition of torture is a question that came up during the 2004 confirmation hearings of U.S. Attorney General Alberto Gonzales. Mr. Gonzales was questioned about his judgment in endorsing the Justice Department's controversial definition of torture while he served as White House Counsel.[181] The Justice Department has since shied away from their original definition on torture. On December 30, 2004, the Justice Department published a revised definition of acts that constitute torture under domestic and international law.[182] The previous memo, dated August 2002, stated that only actions that cause organ failure, impairment of bodily functions, or death constitute torture punishable by law.[183] According to the new memo, torture may consist of acts that fall short of provoking excruciating and agonizing pain and may include physical suffering or lasting mental anguish.[184] The new memorandum declares that "torture is abhorrent both to American law and values and to international norms."[185] This statement encapsulates the position that U.S. courts have taken on torture. The document directly contradicts the previous version and says that torture need not be limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[186] Instead, the memo concludes that anti-torture laws passed by Congress equate torture with physical suffering "even if it does not involve severe physical pain," but it still must be

177. BBC News, *Abu Ghraib Troops 'Did Not Abuse'* (Jan. 11, 2005), *at* http://news.bbc.co.uk/2/hi/middle_east/4155375.stm.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition*, WASHINGTON POST, Dec. 31, 2004, at A1, http://www.washingtonpost.com/wp-dyn/articles/A37687-2004Dec30.html.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. CNN Online, *U.S. revises its definition of torture* (Dec 31, 2004), *at* http://www.cnn.com/2004/LAW/12/31/justice.torture.memo.ap.

more than "mild and transitory."[187] In addition, the memo states that U.S. personnel involved in interrogations cannot contend that their actions were motivated by national security needs or other reasons.[188] This revised definition brings the U.S. definition of torture in line with the definition under the United Nations Universal Declaration of Human Rights, the same declaration the *Filartiga* court referred to in defining torture.[189] The U.N. declaration reads:

> Article 1
>
> 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman of degrading treatment or punishment.
>
> Article 3
>
> No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.[190]

Plaintiffs in an action against military contractors may be able to establish that they were tortured if they are able to provide evidence showing that they were inflicted with severe pain in an attempt to get intelligence information.

The evidence of the alleged abuse at Abu-Ghraib that has surfaced thus

---

187. *Id.*
188. *Id.*
189. *Filartiga*, 630 F.2d at 882.
190. *Id.* at 883 (*quoting* General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

far suggests that prisoners in Iraq were indeed tortured. Sheriff Akeel, an attorney involved in a lawsuit against CACI and Titan on behalf of Abu-Ghraib victims, has found disturbing evidence about the extent of abuse.[191] Akeel went on a fact-finding mission in Baghdad, uncovering dozens of cases of psychological abuse, sexual humiliation, religious desecration, and rape in prisons run by the United States throughout Iraq, including Abu-Ghraib.[192] His team documented abuse dating from July 2003 to as recently as August 2004.[193] The most recent incident is that of a fifteen-year-old Iraqi boy who claims he was raped by his captors.[194] In one case, a naked woman wearing a strap-on sexual device raped an elderly Iraqi man.[195] In another instance, a woman claimed that during her first night of incarceration, she witnessed an imprisoned man and woman raped.[196] In another account, a doctor was taken to Abu-Ghraib prison where he watched a naked prisoner forced onto the running engine of a Humvee, leaving the man with severe burns.[197] The cases of abuse go on, and they are extremely disturbing.

Saleh, the Swedish citizen who was thrown into Abu-Ghraib, is now a client of Akeel.[198] Saleh claims he was dragged for seventy feet with a belt tied around his neck.[199] He was also left naked and hooded for extended periods of time.[200] He was urinated on and sodomized while his hands were tied over his head.[201] At one point, Saleh was shot in the chest with plastic bullets as he tried to pray.[202] Saleh also claims that that he was roped by the genitals to twelve other naked prisoners; his penis was stretched with a rope and beaten with a stick.[203] He also claims that one night he heard the screams of a female prisoner whom he believes was being raped.[204] The statements of these victims will play an important role in establishing that the abuse at Abu-Ghraib rose to the level of torture.

Allegations of the abuse at Abu-Ghraib have also been substantiated through the discovery of extremely graphic photographic evidence.[205] Some of these pictures were seen around the world after first being aired on a CBS 60

---

191. Lisa Ashkenaz Croke, *American Lawyer Finds New Evidence of Recent Torture in Iraq*, THE NEW STANDARD, Sept. 27, 2004, http://newstandardnews.net/content?action=show_item&itemid=911.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Seth Hettena, *Iraqi in Abu Ghraib Saw Captors Rape, Kill Detainees*, Associated Press, July 4, 2004, *at* http://www.indymedia.org.uk/en/2004/07/294376.html.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Taguba Report, *supra* note 43, at 14.

Minutes Two broadcast on April 28, 2004.[206] There was one photo which showed the battered face of a deceased prisoner, No. 153399.[207] Another photo was of the bloodied body of a dead prisoner wrapped in cellophane and packed in ice.[208] According to U.S. Defense Secretary Donald Rumsfeld's statement before a Senate Armed Services panel, there are many more photos and videotapes related to the Iraq abuse scandal.[209] "There are a lot more photographs and videos that exist. If these are released to the public, obviously it's going to make matters worse."[210] The photographic evidence will play an important role in verifying the horrific stories of the abused at Abu-Ghraib.

Prison victims will also need to prove that the torture they suffered was at the hands of the civilian contractors. Distinguishing between which acts of abuse were committed by U.S. military personnel and which ones were committed by civilian contractors will be difficult. Interrogators often wore U.S. military uniforms, and the abusers usually approached victims from behind, which makes identification difficult.[211]

Findings from the criminal proceedings against soldiers who have been charged for their roles in the abuse can aid in implicating private contractors. Also, independent military investigations, such as those conducted by General Taguba, describe the involvement of private contractors and will be essential in proving their culpability.

For instance, investigators involved in the prosecution of Sergeant Chip Fredrick uncovered letters and emails written by Fredrick implicating private contractors.[212] In his letters, Fredrick noted that the Military Intelligence teams, which included linguists and interrogation specialists from private defense contractors, were the dominant force inside Abu-Ghraib.[213] He wrote about Military Intelligence encouraging soldiers to continue with their abuse of prisoners, as it was providing positive results and information.[214]

In one letter, written in November 2003, Fredrick describes the great lengths taken to cover up evidence of abuse.[215] An Iraqi prisoner under the control of the CIA and its paramilitary employees, including private contractors, died in the course of interrogations.[216] Fredrick described the cover up: "[T]hey put his body in a bag and packed him in ice for approximately twenty four hours in the shower. . . . The next day the medics came and put his

206. Hersh, *supra* note 22.
207. *Id.*
208. *Id.*
209. People's Daily Online, *Rumsfeld Says More Photos, Videos in Abuse Scandal Exist, at* http://english.people.com.cn/200405/08/eng20040508_142575.html (May 8, 2004).
210. *Id.*
211. Croke, *supra* note 191.
212. *See* Hersh, *supra* note 22.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*

body on a stretcher, placed a fake IV in his arm and took him away."[217] The inmate was never entered into the prison's inmate control system.[218]

Fredrick claims that contractors were directing U.S. soldiers.[219] He specifically identified two CACI employees as having instructed him.[220] Steven A. Stefanowicz, a CACI interrogator, ordered him to use dogs to threaten prisoners.[221] In one instance, Stefanowicz said: "Treat 'em like [expletive]. Put the dog on this one if you can."[222] Fredrick also testified that another CACI employee, Mr. Johnson, instructed him to apply pressure under the jaw and behind the ears, or on the cheeks of Iraqi prisoners during interrogations.[223] These accounts illustrate that private contractors were directly involved in the abuse and had a great deal of control over the prison.[224]

Independent military investigation findings such as the Taguba Report and Fay Report also verify the abuse that went on inside Abu-Ghraib. According to the Taguba Report, between October and December 2003, there were numerous instances of abuse of prisoners held at Abu-Ghraib.[225] The Taguba Report notes that U.S. civilian contract personnel were not properly supervised within the detention facility at Abu-Ghraib.[226] During General Taguba's onsite inspection, he observed contractors wandering about with too much unsupervised free access in the detainee area.[227]

The Taguba report made numerous recommendations relating to the private contractors. For instance, it recommended that Mr. Steven Stephanowicz, a CACI interrogator in the 205th Military Intelligence Brigade, be given an official reprimand to be placed in his employment file, termination of employment, and the revocation of his security clearance.[228] The report found that Stephanowicz made false statements to the investigation team regarding the locations of his interrogations, his involvement in the interrogations, and his knowledge of abuse.[229] Stephanowicz allowed and instructed Military Police, who were not trained in interrogation techniques, to facilitate interrogations by "setting conditions" that were neither authorized nor

---

217. *Id.*
218. *Id.*
219. Jackie Spinner, *MP Gets 8 years for Iraq Abuse*, THE WASHINGTON POST, Oct. 22, 2004, at A20.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. Taguba Report, *supra* note 43, at 14.
226. *See generally* Taguba Report, *supra* note 43.
227. *Id.* at 24.
228. *Id.* at 41-42.
229. *Id.* at 42.

in accordance with applicable regulations.[230] Taguba notes that Stephanowicz clearly knew his instructions equated to physical abuse.[231]

The report also implicated Mr. John Israel, a contract U.S. civilian interpreter from the 205th Military Intelligence Brigade, also an employee of CACI.[232] It was recommended that he be given an official reprimand to be placed in his employment file and have his security clearance reviewed.[233] General Taguba concluded that Stephanowicz and Israel were either directly or indirectly to blame for some of the abuses at Abu-Ghraib and recommended immediate disciplinary action. [234]

Another military investigation conducted by Major General George Fay and published in the Fay Report also details the extent of private contractor involvement at Abu-Ghraib.[235] His investigation concluded that fifty-four military intelligence officers, military police, medical soldiers, and civilian contractors had some degree of responsibility in the alleged Abu Ghraib abuse.[236] The report states that soldiers were actually supervised by private contractors.[237] The Fay Report graphically details forty-four incidents of alleged abuse at Abu-Ghraib involving military intelligence personnel and contractors.[238] Of the forty-four documented incidents from July 2003 to February 2004, employees from CACI and Titan are accused of involvement in fourteen of them.[239] The report also describes findings of stripping prisoners, forcing detainees to masturbate, perform sex acts, and the use of un-muzzled dogs to threaten detainees.[240] The Fay Report states that thirty-five percent of the interrogators provided on contract by CACI did not have formal military training as interrogators.[241] One disturbing account in the Fay Report describes a CACI contractor who was dragging a handcuffed prisoner at Abu-Ghraib while drinking alcohol.[242] The contractor is cited as being belligerent to military command and, at one point, was so angered because someone had questioned his conduct that he responded by saying, "I have been doing my job for 20 years and do not need a 20-year old to tell me how to do my job."[243]

---

230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. Marty Logan, *Victims' Lawyers Laud Abu Ghraib Reports*, Inter Press Service News Agency, *at* http://www.ipsnews.net/interna.asp?idnews=25287 (Aug. 31, 2004).
236. *Id.*
237. *Id.*
238. Mike Lee, *Private Contractors Face Legal Action for Crimes in Abu Ghraib*, The Mail Archive, *at* http://www.mail-archive.com/osint@yahoogroups.com/msg00383.html (Sept 15. 2004).
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*

The specific tactics used to abuse prisoners suggest that the abuse was part of a well-planned scheme to break down prisoners. This was more than a few renegade soldiers acting on their own.[244] Some of the reported cases of abuse suggest a unique understanding of Arab culture and Islamic law.[245] The particular methods of abuse appear to have been planned with an eye towards the particular sensitivities of people from the Arab and Muslim world.[246] For instance, forcing Muslim prisoners to pray to a pig or pouring alcohol on a Muslim prisoner suggests that abusers knew that both pork and alcohol are forbidden under Islamic law.[247] There is also an account of a prisoner being raped while he was fasting, which violates an Islamic law requiring a Muslim to refrain from any sexual activity while fasting.[248] Having men photographed nude as they partake in homosexual acts is also particularly dehumanizing in the Arab world.[249] Homosexual acts are against Islamic law, and it is considered humiliating for men to be naked in front of other men.[250]

Gary Myers, a defense attorney for Sergeant Chip Fredrick, believes that there was a higher level of involvement in determining which abusive practices to use.[251] In a statement in defense of his client he said, "Do you really think a group of kids from rural Virginia decided to do this on their own? Decided that the best way to embarrass Arabs and make them talk was to have them walk around nude?"[252] Plaintiffs can point to this almost methodical approach in deciding which interrogation techniques to use in order to establish a higher level of corporate involvement.

The combination of victim accounts, graphic photos, findings from the criminal prosecution of soldiers, and the military investigation reports establish a pattern of abuse at Abu-Ghraib. This evidence will be instrumental in demonstrating the extent of private contractor involvement in the abuse. It will also be necessary to show that the abuse at Abu-Ghraib reached the threshold necessary to bring an ATCA action.

V. PENDING LITIGATION

In June 2004, a human rights group, the Centre for Constitutional Rights (CCR) -the same group that helped Dolly Filartiga with her lawsuit - and other lawyers filed a class action suit in San Diego, California against Titan and

244. *See generally* Hersh, *supra* note 22.
245. *See id.*
246. *See id.*
247. Croke, *supra* note 185.
248. *Id.*
249. *See* Hersh, *supra* note 22.
250. *Id.*
251. *Id.*
252. *Id.* (*quoting* Gary Myers, a defense attorney for Chip Fredrick).

CACI for abuses committed by their employees at prisons in Iraq.[253] Most of the accounts of abuse are tied to Abu-Ghraib and range from beatings and sleep deprivation, to interference with prayers and sexual humiliation.[254] One plaintiff claims that a female conspirator raped him.[255] Another plaintiff claims that his father was beaten to death.[256] The complaint alleges that the companies knew that the amount of interrogation contracts they would win from the government was related to the amount of information obtained during the interrogations.[257]

Plaintiffs contend that CACI and Titan did not want efforts to acquire information hampered by the mandates of the U.S. domestic and international law.[258] Plaintiffs are trying to establish that the contractors intended to create an environment where prisoners were being tortured, abused, and mistreated so that they would provide more intelligence, which would ultimately lead to more government contracts.[259]

The motions to dismiss, which have been filed by CACI and Titan, provide an idea of the obstacles that plaintiffs will face in prosecuting these companies. For instance, in its motion to dismiss, Titan shifts the blame to the U.S. government.[260] The motion states that the government was closely involved in recruiting the Titan translators.[261] Titan claims that the government dictated detailed translator qualifications and conducted investigations and security screenings of translators before hiring.[262] Once hired, the government provided required training and briefings to the civilian translators.[263] Titan says that the government had the authority to remove a contract employee and should hold ultimate responsibility.[264]

There is also some case law which provides immunity to contractors and military personnel in times of combat. Although holding military contractors liable under the ATCA will be a case of first impression, defendants will insist that courts look to other statutes, such as the Federal Tort Claims Act (FTCA) for guidance on how to apply the ATCA.[265]

---

253. Shannon O'Leary, *Iraq Prison Abuse Suit Targets U.S. Companies*, CORPORATE LEGAL TIMES, Sept. 2004, at 82.

254. *Id.*

255. *Id.*

256. *Id.*

257. Class Action Complaint filed against Titan and CACI by victims of Abu Ghraib, 12 (2004) (on file with author).

258. *Id.* at 16.

259. *Id.*

260. Titan's Motion to Dismiss, *supra* note 14, at 8.

261. *Id.* at 8-9.

262. *Id.* at 9.

263. *Id.*

264. *See id.*

265. *Id.* at 12-13.

According to the FTCA, the government can be sued only where a private person could be liable for the same offense.[266] However, the FTCA bars claims where they arise out of combatant activities.[267] This is meant to prevent dragging the government into court for the damage and suffering that is inevitable during war.[268] Defendants are trying to persuade the court that the same rationale for preventing a lawsuit as a result of combatant activities under the FTCA should apply to the ATCA because the government has the same interests during a time of war. Titan raised this argument in its motion to dismiss and cited to its success in the Ninth Circuit in *Koohi v. United States.*[269]

The *Koohi* case stems from an incident that occurred on July 3, 1988.[270] The USS Vincennes, a naval cruiser which was equipped with a computerized Aegis air defense system, mistook a civilian aircraft, Iran Air Flight 655, for an Iranian F-14 and shot it down over the Persian Gulf, killing all 290 persons aboard.[271] The heirs of some of the deceased passengers and crew filed suit, seeking compensation from the United States and several private companies who were involved in the construction of the Aegis Air Defense System.[272] The plaintiffs claimed that the weapons manufacturers were responsible for design defects that caused the misidentification of the civilian aircraft.[273]

The *Koohi* court held that contractors who provide support to the military in a time of war owe no duty of care to enemy civilians injured as a result of military operations.[274] The court ruled that because the incident took place during "combatant activities," the U.S. government had immunity.[275]

The purpose of providing the combatant exception to U.S. military forces is to ensure that the government will not be liable for negligent conduct by armed forces in times of combat.[276] The court perceived three reasons for the combatant activities exception.[277] First, tort law is based on the theory that the prospect of liability is a deterrent and causes people to exercise caution.[278] Congress would not want our military personnel to exercise great caution during battle when they may need to overcome enemy forces.[279] Second, tort law is based on a desire to provide a remedy for the innocent victim of wrongful conduct.[280] War produces many innocent victims on all sides, and it

266. Federal Tort Claims Act, § 28 U.S.C. § 1346(b).
267. Titan's Motion to Dismiss, *supra* note 14, at 13.
268. *See* Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992).
269. *Id.*
270. *Id.* at 1330.
271. *Koohi*, 976 F.2d at 1330.
272. *Id.*
273. *Id.*
274. *Id.* at 1336.
275. *Id.* at 1335.
276. *Id.* at 1334.
277. *Id.*
278. *Id.*
279. *Id.* at 1334-35.
280. *Id.* at 1335.

would make little sense to single out for special compensation enemy citizens on the idea that they have suffered negligence from the military.[281] Third, tort law is often used to obtain punitive damages.[282] It is unlikely that Americans would support punishing our servicemen for injuring members of the enemy population in an effort to preserve their own lives.[283] These are the main reasons that tort law is inappropriate during military operations.[284]

The court held that the action against Aegis was preempted by the "combatant activities" exception.[285] "While the purpose of the Aegis system may have been, in part, to protect the lives of United States servicemen, its purpose surely was not to protect the lives of enemy forces or persons associated with those forces."[286] According to *Koohi,* the FTCA provides a military contractor protection under all circumstances for actions in support of combatant activities, whether the challenged actions were taken "carefully or negligently, properly or improperly."[287] The court dismissed the claims against the government contractor on the basis that "[t]he imposition of such liability on the [contractors] would create a duty of care where the combatant activities exception is intended to ensure that none exists."[288]

CACI, in its motion to dismiss, raises similar arguments, accusing the plaintiffs of seeking recovery through the "back door" for injuries supposedly caused by the U.S. government's invasion of Iraq.[289] CACI asserts that the suit must be dismissed because the claims present a nonjusticiable political question.[290] It argues that the plaintiffs are seeking compensation for injuries allegedly received during the prosecution of a war, and this type of compensation is for the political branches of government to resolve.[291] CACI points to precedent from both the Supreme Court and the Ninth Circuit which prevents evasion of the federal government's immunity through suits against government contractors.[292]

---

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1337.

286. *Id.*

287. Titan's Motion to Dismiss, *supra* note 14, at 14 (*quoting Koohi*, 976 F.2d at 1335) (dismissing tort claims against military contractors for war related deaths of civilians when the military fired missiles upon an Iranian civilian airliner).

288. *Id.* (*quoting Koohi*, 976 F2d at 1337).

289. Memorandum of Points and Authorities in Support of the Motion of Defendants CACI Inc.'s Motion to Dismiss, 14 (September 14, 2004) (on file with author) [hereinafter CACI's Motion to Dismiss].

290. *Contractors move to Dismiss Iraqi Prisoners' Suit*, ANDREWS CLASS ACTION LITIGATION REPORTER, Oct. 21, 2004.

291. *Id.*

292. CACI's Motion to Dismiss, *supra* note 292, at 14 (*quoting* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977)); *see* McKay v. Rockwell Int'l Corp, 704 F.2d 444, 449 (9th Cir. 1983). "To permit [petitioner] to proceed here would be to judicially admit at the

However, it can be argued that Abu-Ghraib went beyond what is considered "authorized military action." When the limits on the FTCA were set out, the court was probably thinking about conduct that was within the boundaries of the laws of war. The court did not want contractors to be sued for injuries that take place in the ordinary course of a war.[293] In *Koohi*, the action was a negligence action against weapons manufactures who may have built a faulty weapons system that failed to detect a civilian airliner.[294] The court was correct to rule that there was no duty of care owed by the manufacturers of weapons systems to enemies. The torture at Abu-Ghraib is distinguishable; it crosses the line of what is acceptable, even in times of war. Torture is a violation of the laws of war.[295] The limitations of the FTCA, with respect to contractors in war that were discussed in *Koohi*, should not provide immunity for those involved in the torture at Abu-Ghraib.

Another defense for the civilian contractors will come from the dicta in Justice Souter's opinion in *Sosa*. In *Sosa*, the Court spoke of exercising judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the ATCA.[296] The main concern was the possibility of lawsuits infringing on the U.S. government's ability to conduct foreign affairs.[297] Private contractors argue that the handling of prisoners in a time of war involves issues that deal with the particularly sensitive area of foreign relations.[298] Claims arising out of the manner in which the United States wages an external war may be inappropriate for the creation of a private cause of action under the ATCA.[299] The defendants assert that claims arising out of war have always been resolved on a government-to-government basis and that allowing a private cause of action infringes on the executive branch's role of establishing American foreign policy.[300]

It is quite probable that the justices had the current "war on terror" on their minds when they issued the *Sosa* opinion. If Abu-Ghraib prisoners are awarded damages, it may open the floodgates for other prisoners in U.S. custody, like those in Guantanamo Bay, being held in the United States's prosecution of the "war on terror." The United States may be forced to spread its military thin in this new kind of war, resulting in an increased reliance on private companies in the future. Any court will have to consider what a victory for the prisoners against civilian contractors assisting U.S. military personnel will have on the United States's ability to carry out its foreign policy objectives.

This author contends that any argument suggesting that holding private

---

back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims Act] permits such a result." *Id.*

293. *See* Koohi, 976 F.2d at 1336.

294. *Id.* at 1330.

295. *Kadic*, 70 F.3d at 242.

296. *Sosa*, 542 U.S. at 725.

297. *Id.* at 727.

298. CACI's Motion to Dismiss, *supra* note 292, at 26.

299. *Id.*

300. *Id.*

corporations accountable for acts of torture will somehow hinder the U.S.-led War on Terror is weak. American military personnel and military contractors should not be engaged in torture under any circumstances; this is now the official policy of the Justice Department.[301] Providing immunity in cases where Americans have committed torture may prove to be more harmful to U.S. foreign policy because it harms the United States's reputation abroad and questions the authenticity of any intentions to spread liberty.

Furthermore, if the U.S. protects torturers in the name of foreign policy, it may endanger the safety of Americans who may one day find themselves in enemy prisons.[302] Perhaps Brigadier General Mark Kimmitt, deputy director of operations for the U.S. military in Iraq, said it best: "If we can't hold ourselves up as an example of how to treat people with dignity and respect, we can't ask that other nations to do that to our soldiers."[303]

In an article written to the New York Times dated August 7, 2003, Arlen Specter, who is now the Chairman of the U.S. Senate Judiciary Committee, expressed his opposition to the Justice Department's view that ATCA litigation may affect the "War on Terror."

> There is no room for moral relativism. American credibility in the war on terrorism depends on a strong stand against all terrorist acts, whether committed by foe or friend. Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent victims. We then send the right message to the world: The United States is serious about human rights.[304]

CONCLUSION

Litigation under the ATCA has an important impact on an alien plaintiff's ability to receive civil remedies.[305] The importance of the ATCA to victims and their families, however, goes beyond just monetary damages.[306] For years, the ATCA has been a tool to allow plaintiffs to tell their stories to a court and give them an opportunity to confront their abusers and create an

---

301. *See* CNN Online, *U.S. revises its definition of torture*, *at* http://www.cnn.com/2004/LAW/12/31/justice.torture.memo.ap/ (Dec 31, 2004).

302. *See generally* Borger, *supra* note 51.

303. *Id.*

304. Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, August 7, 2003, *available at* www.globalpolicy.org/intljustice/atca/2003/0807specter.htm.

305. *See generally Filartiga*, 630 F.2d at 876 (sister of torture victim who brought ATCA action was awarded over ten million dollars).

306. Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, *at* http://www.humanrightsnow.org/Ratner2%20david%20ratner%20corrections%20final%20numbered.htm (last visited Feb 20, 2005).

official record of their persecutions.[307] Filing civil suits empowers victims.[308] It gives them a means for fighting back.[309] It can also help them heal.[310] Recent decisions involving the ATCA have helped to establish the scope of the Act and have made it a likely avenue for victims of the alleged Abu-Ghraib prison abuse to seek relief in U.S. courts.

Attempts by the Bush Administration and some multinational corporations to severely limit the scope of the ATCA failed in the recent decision of *Sosa v. Alvarez-Machain.* The *Sosa* Court ruled that although the ATCA is only jurisdictional, it may provide a cause of action in a limited number of cases involving violations of the law of nations.[311] The *Sosa* decision will be instrumental for victims of Abu-Ghraib prison abuse to demonstrate that the ATCA is a legitimate avenue for them to seek compensation for the wrongs they suffered at the hands of civilian contractors.

The evidence of the abuses suffered by the Iraqis who were held at the Abu-Ghraib prison illustrates that the treatment of the prisoners may very well have been severe enough to classify as torture. It also seems apparent that at least some of this torture was directed by civilian contractors. If not for the ATCA, these contractors would go unpunished because they are immune from both military law and prosecution in Iraqi courts.[312] The ATCA may enable U.S. courts to serve as a court of last resort and help victims like Saleh bring their abusers to justice.

On May 6, 2004, President George W. Bush expressing his sorrow to the victims of Iraqi prison abuse stated that "wrongdoers will be brought to justice" and "the actions of those folks in Iraq do not represent the values of the United States of America."[313] Ironically, it may be the ATCA, to which the Bush administration was adamantly opposed, that actually helps the President keep his promise to the Iraqis.

---

307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. See *Sosa,* 542 U.S. at 729.
312. Mariner, *supra* note 5.
313. Sean Murphy, *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison,* 98 AM. J. INT'L L. 591, 596 (2004).

EQUITY AND INNOVATION: USING TRADITIONAL ISLAMIC BANKING MODELS TO REINVIGORATE MICROLENDING IN URBAN AMERICA

Jay Lee*

> "Anticipate charity by preventing poverty; assist the reduced fellowman, either by a considerable gift, or a sum of money, or by teaching him a trade, or by putting him in the way of business, so that he may earn an honest livelihood, and not be forced to the dreadful alternative of holding out his hand for charity. This is the highest step and the summit of charity's golden ladder."
>
> --Maimonides [Moses ben Maimon], 1135-1204.[1]

I. INTRODUCTION

The United Nations declared 2005 the International Year of Microcredit.[2] Arising in the Third World in the early 1970s, microcredit[3] developed as a means to provide extremely poor people, especially women, with access to credit and an alternative to charity.[4] Commenting on the significance of the resolution, Mark Malloch Brown, Administrator of the U.N. Development

---

* J.D. Candidate, 2006, Indiana University School of Law, Indianapolis, Indiana; BA Germanic Studies, Slavic Languages & Literatures, Russian/Eastern European Institute Area Certificate, 1996, Indiana University, Bloomington, Indiana.

1. JOHN BARTLETT, FAMILIAR QUOTATIONS 122 (Justin Kaplan ed., 16th ed. 1992); *see* SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT 65-66 (2004). "[A]ccording to Maimonides, a Jewish sage, the greatest level of tzedekah 'is to strengthen the hand of the poor by means of gift or loan or by going into partnership with him so that he can become self-sufficient.'" *Id.* (quoting *Faith Based Microenterprise, Part II: How is Faith-Based Microenterprise Different?*, 9 AEO EXCHANGE, Jan.-Mar. 2003, at 1, *available at* http://www.microenterpriseworks.org/newsletter/Jan-Mar2003/Jan.Mar2003web.pdf).

2. *General Assembly Greenlights Programme for the International Year of Microcredit 2005: Observance Will Promote Access to Financial Services and Empowerment of Poor, Especially Women*, M2 PRESSWIRE, Dec. 31, 2003 [hereinafter *Greenlights*].

3. The terms microcredit, microfinance, and microlending are used interchangeably throughout the literature. Microcredit and microlending are more commonly used internationally, where proponents stress the extension of credit as a means to empower the extremely poor whereas American sources are more likely to stress the entrepreneurial aspects of credit extension with such terms as microfinance, microbusiness, or microentrepreneurship.

4. *See Microcredit's Limits*, INT'L HERALD TRIBUNE, May 26, 2004, at 8 [hereinafter, *Microcredit's Limits*]; *see also Microcredit Could Lift Millions Out of Poverty*, DEUTSCHE PRESSE-AGENTUR, Sept. 8, 1995 [hereinafter, *Millions out of Poverty*].

Program, noted that sustainable access to microfinance is a central strategy in the United Nations' goal to "halv[e] extreme poverty and hunger by 2015."[5] According to Secretary General Kofi Annan, such access "helps alleviate poverty by generating income, creating jobs, allowing children to go to school, enabling families to obtain health care, and empowering people to make the choices that best serve their needs."[6] By the end of 2001, the number of people in extreme poverty who benefited from microcredit programs rose to 26.8 million.[7] This marks a fourfold expansion in microcredit since 1997.[8] The goal for 2005 is to have helped 100 million poor people start their own business.[9] This number encompasses about one-fifth of the world's population living in poverty.[10] The thirty-four largest microlending programs serve a total of 7.5 million people, of whom seventy-seven percent are female.[11] Thus, microcredit also serves as a means to combat the "feminization of poverty."[12] Esther Ocloo, the founder of Women's World Banking, a non-profit lending institution that has expanded into fifty nations in Africa, Asia, Latin, and North America since its founding in 1979,[13] stresses the importance of female involvement: "Credit for women is our right and we must fight for it."[14]

This Note explores applications of microcredit in the United States and suggests an approach to extend the benefits of such programs to a wider clientele by means of a program that is both novel and traditional: equity lending based on Islamic banking models. By effectively sharing the profits of fledgling businesses, microlenders who adopt an equity lending model can lower interest rates without substantially increasing lender risk, offer their services to more microentrepreneurs, and support their infrastructure through an influx of capital from their clients. This final benefit, in turn, allows the microentrepreneur to give back to the group of people who had the faith in her to make the original loan.[15]

This Note comprises three parts that analyze microcredit and its current application in the United States, and it suggests a method of interest reduction

---

5. *Greenlights*, *supra* note 2, at 1.

6. *Id.*

7. *UN Under-Secretary General Lauds Effectiveness of Microcredit as Second Committee Takes Up Implementation of Decade for Eradication of Poverty; Millions, Particularly Women, Lifted Out of Extreme Poverty, Delegates Told*, M2 PRESSWIRE, Oct. 10, 2003.

8. *Greenlights*, *supra* note 2, at 1.

9. Gordon Platt, Changes Urged in Microcredit Lending, Journal of Commerce, Sept. 15, 1999.

10. *Millions Out of Poverty*, *supra* note 4, at 1.

11. Platt, *supra* note 9, at 9.

12. *UN Second Committee Panel Discussion Hears Experts Underline Important Role of Microcredit in Raising Housing Incomes, Boosting Living Standards*, M2 PRESSWIRE, Oct. 24, 2003; *see also*, Platt, *supra* note 9, at 9 (noting that 1 billion of the 1.5 billion people living worldwide on less than $1 per day are women).

13. *Millions Out of Poverty*, *supra* note 4, at 1.

14. *Id.*

15. *See* JONES, *supra* note 1, at 41.

that could enable U.S. microlenders to serve a greater number of poor microentrepreneurs. Part I provides a general introduction to microcredit and the evolution of the Grameen Model, pioneered by the Bangladeshi economist Muhammad Yunus. Part II explores microlending in the United States and the niche microlending provides in the broader realm of fringe lending. This section also describes various governmental and non-profit applications that target specific groups, such as refugees, mothers receiving assistance, and the disabled. An important component of this section is the welfare transition from Aid to Families with Dependent Children (AFDC) to Temporary Assistance for Needy Families (TANF) and its effect on microcredit programs.

Part III examines equity lending under traditional Islamic banking practices and how such lending might be applied in an urban context in the United States. Several caveats are raised by such an approach. First, such practice would complicate the lender-borrower relationship, increasing the cost per loan in terms of work hours and decreasing the borrower-to-lender ratio.[16] In other words, despite lower interest rates attracting more clients, the general quality of service might be compromised. Second, the Islamic provenance of equity lending might inhibit its application in a society currently beset with anti-Muslim sentiment.[17] Finally, proponents of microcredit stress that it is not a panacea. People who only lack seed money but who have the requisite skill, stamina, and luck can create a successful business. As a result, those who cannot participate in such programs may be further stigmatized.

Despite these concerns, equity lending in a microcredit context bears closer scrutiny. Although such an approach may initially seem exotic, in many ways such ideas are extensions of practices already in place in U.S. microcredit programs. Also, while equity lending might be impractical on a larger scale, microlenders typically have closer relationships with their clientele and offer far more services and support than traditional financial institutions. In such an environment, equity lending is a natural addition to the family. Additionally, it can serve as a means to foster skills and relationships within communities that have been traditionally shut out from other avenues of economic development.[18]

---

16. Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465, 1527 (1994).

17. *See, e.g.*, *Slayings Spark New Wave of Anti-Muslim Sentiment*, AUGUSTA CHRON., Jan. 23, 2005, at A9; Jack Encarnacao, *Officials Say Arson Was Cause of Fire in Springfield Mosque*, BOSTON GLOBE, Dec. 12, 2005, at B1; Shaik Ubaid, *American Muslims Hope for the Best: Despite Promises by President Bush, this Community's Fears of a Backlash Are as Strong as Ever*, NEWSDAY, Dec. 7, 2004, at A43.

18. *See, e.g.*, MUHAMMAD YUNUS, BANKER TO THE POOR: MICROLENDING AND THE BATTLE AGAINST WORLD POVERTY 180-88 (1999) (describing microcredit initiatives among the Lakota Sioux as well as centers of rural and urban poverty).

II. MICROCREDIT AND THE EVOLUTION OF THE GRAMEEN MODEL.

The idea of microcredit arose in the Third World as a formalized version of traditional methods of credit extension.[19] There are three overarching points to remember regarding microcredit: it is not new, it is not simply about money, and it is not enough.[20] In many circles, at least in the mid- to late-1990s, it was haled as a panacea to cure world poverty.[21] While it is a useful tool for combating poverty, both abroad and at home, microcredit has its limitations.[22] Small loans are a means by which people can bring themselves out of poverty, but such loans can only benefit those who are in a position to use them productively.[23] Thus, microcredit is not a means to assist the estimated 40.3 million people living with HIV/AIDS[24] or the world's 35.5 million refugees and displaced persons.[25] Moreover, some donor states might confuse the promise of microcredit with the need for aid,[26] thereby preventing organizations from serving those who might benefit most effectively.[27]

Another important aspect of microcredit is the empowerment of women it engenders.[28] Ninety-four percent of the Grameen Bank's clients in Bangladesh are women.[29] By fostering this participation, microcredit allows women to develop financial autonomy, thereby promoting gender-equity and improving

---

19. *Microfinance-Credit Lending Models*, *at* http://www.grameen-info.org/mcredit/cmodel.html (last modified Aug. 1, 2000) [hereinafter *Lending Models*].

20. *The Virtual Library on Microcredit: Documents and Reports*, *available at* http://www.gdrc.org/icm/icm-documents.html (n.d.) (last visited Mar. 19, 2006).

21. *See generally* Kathy McKenna, *Little Loans Mean a Lot*, N.Y. TIMES, June 3, 1987, at A26 (letter to the editor from an activist in the fight against world hunger in which the activist points to low default rates as proof that the poor are "bankable.").

22. *See Microcredit's Limits*, *supra* note 4, at 1. The United States and other donor nations should not "use this program as a substitute for other more basic ways of helping the poorest of the poor." *Id.*

23. *Microcredit Alone Won't Reduce Poverty: WB Study*, THE INDEPENDENT, Jan. 15, 1999, *available at* LEXIS, News Library, Emerging Markets Datafile.

24. *World HIV and AIDS Statistics*, *available at* http://www.avert.org/worldstats.htm (last updated Feb. 9, 2006).

25. *Key Statistics*, *World Refugee Survey*, 2004, Table 1, *at* http://www.refugees.org/data/wrs/04/pdf/key_statistics.pdf (last visited Mar. 19, 2006).

26. *Microcredit's Limits*, *supra* note 4, at 1.

> Starting next year, half of U.S. support for microfinance groups must go to those living well below their nations' poverty lines, or earning less than $1 a day. . . . [T]he program could well force loans on people who may not be ready for them or who may really need outright aid instead.

Id.

27. *See id.*

28. *See Millions Out of Poverty*, *supra* note 4; *see generally* Jude L. Fernando, *The Role of NGOs: Charity and Empowerment: Nongovernmental Organizations, Micro-Credit, and Empowerment of Women*, 554 ANNALS AM. ACAD. POL. & SOC. SCI. 150 (1997).

29. *Basic Facts About Microfinance*, *at* http://www.uncdf.org/english/microfinance/facts.php (n.d.) (last visited Mar. 19, 2006) [hereinafter *Basic Facts*].

household and community stability.[30] Ironically, these successes are due, in part, to institutions like larger sponsor banks and corporations, which are not usually positively associated with social justice issues.[31] In fact, these institutions are considered to be "obstacles to women's empowerment."[32]

A. *The Grameen Model*

The Grameen[33] Banking Model was developed in Bangladesh by the economist Muhammad Yunus in 1977.[34] The first clients were stool makers.[35] These women used their loan to purchase raw materials, thereby breaking the cycle of subsistence caused by moneylenders charging high rates of interest.[36] Since its inception, the Grameen Bank has grown to the point of serving 1.8 million needy clients, lending $30 million per month.[37] Pointing to the high rates of repayment, critics within Bangladesh have called on Grameen to move closer to commercial banks and charge lower interest rates.[38]

Inspired by the good news from Bangladesh, programs based on the Grameen model were established throughout the world.[39] Sponsored by nongovernmental organizations, corporations, and governmental aid programs, these programs appeared both in underdeveloped as well as highly industrialized nations.[40] Muhammad Yunus's theory was that wherever there was poverty, microcredit could fight it.[41] The application of microcredit in American urban centers has been turbulent.[42] Gary Hattem, president of the Deutsche Bank Americas Foundation, for example, expressed concern that the publicity and excitement surrounding microcredit could burn itself out: "Microfinancing has to grow as an industry as a bottom-up strategy. The potential problem is too much enthusiasm and having it explode."[43] Another drawback to the American application is that there are many small microlenders "[w]ith limited organizational infrastructure and management teams consumed

---

30. *Id.*

31. Fernando, *supra* note 28, at 151.

32. *Id.*

33. Grameen is the Bengali word for villages. *See* "Grameen Bank," *at* http://en.wikipedia.org/wiki/Grameen (last modified Feb. 26, 2006).

34. YUNUS, *supra* note 18, at 61.

35. ALEX COUNTS, GIVE US CREDIT 39 (1996).

36. YUNUS, *supra* note 18, at 44-56.

37. *Basic Facts*, *supra* note 29.

38. *Hasina - Microcredit*, UNITED NEWS OF BANGLADESH, Feb. 19, 2004.

39. *See* YUNUS, *supra* note 18, at 155.

40. *See, e.g.*, Bruce Clark, *Big Role for the Small Loan*, FIN. TIMES (London, England), Feb. 6, 1997, at 3.

41. YUNUS, *supra* note 18, at 175.

42. *See* Valjean McLenighan & Jean Pogge, THE BUSINESS OF SELF-SUFFICIENCY: MICROCREDIT PROGRAMS IN THE UNITED STATES 8 (1991) (listing common problems experienced in U.S. programs).

43. Adrian Murdoch, *Value for Money: Microfinancing Can Change the Way Poorer Populations Develop*, 14 WORLDLINK 52 (Sept. 1, 2001) (quoting Stephanie Lowell).

by an incessant search for funding . . . ."[44] These lenders devote little time to improving effectiveness or growth.[45] As a result, more than 40% of American microlenders have annual budgets under $100,000, and these groups work in isolation and often duplicate each other's efforts.[46]

There are several theories to account for the success of microcredit.[47] First, the reliance on peer pressure or other social and religious norms prove to be as effective an incentive for repayment as traditional physical collateral.[48] Second, microlenders succeed where there is a "credit-conducive culture,"[49] a theory tested in markets where there is a high degree of consumer credit and indebtedness, such as the United States.[50] Third, conventional financial wisdom may simply have miscalculated the need or profitability of microlending and the ability of the poor to repay their debts.[51] Furthermore, three factors have been advanced to account for the Grameen Bank's success in Bangladesh: it serves the extremely poor; it can be used by the poor, who are often illiterate and uneducated; and the rigidity of its rules prevents cooption and subversion by local elites.[52] Theories explaining the initial success of microcredit in the United States are explored below.[53]

1. Grameen I

Under the original Grameen system, banks are responsible for territories of fifteen to twenty-two villages.[54] The bank workers familiarize themselves with the villagers and assess their needs.[55] Peer groups of five unrelated individuals[56] are formed from each of the villages.[57] At this stage, these groups are potential borrowers.[58] Membership is limited to persons whose net worth is less than the equivalent of one-half acre of land.[59] Only two of the five are

---

44. *Id.*
45. *Id.*
46. *Id.*
47. Jameel Jaffer, *Microfinance and the Mechanics of Solidarity Lending: Improving Access to Credit Through Innovations in Contract Structure*, 9 J. TRANSNAT'L L. & POL'Y 183, 186 (1999).
48. *Id.*
49. *Id.*
50. *See* Justin Lahart, *Spending Our Way to Disaster: The Consumer Debt Bubble in the United States Could Make the Stock Bubble Look Like Nothing*, CNN/MONEY, Oct. 3, 2003, available at http://money.cnn.com/2003/10/02/markets/consumerbubble/.
51. Jaffer, *supra* note 47, at 186.
52. Philip M. Nichols, *Swapping Debt for Development*, 27 N.Y.U.J. INT'L L. & POL. 43, 74-78 (1994).
53. *See id.* at Section II-B.
54. *Lending Models*, *supra* note 19.
55. *Id.*
56. Jaffer, *supra* note 47, at 198.
57. *Lending Models*, supra note 19.
58. *Id.*
59. Jaffer, *supra* note 47, at 198.

eligible to receive funds.[60] The local bank observes the borrowers for a month to ensure that they are adhering to the lending rules.[61] Only if these original borrowers successfully repay their loans and interest do other members of the group become eligible.[62] The typical life of a Grameen loan is fifty weeks, which produces an interesting symbiotic effect between the borrowers and potential borrowers within the group.[63] During this time, the other members exert substantial pressure to guarantee that the original loans are repaid.[64] On the other hand, the economic benefit the borrowers derive serves as an incentive for the others to remain in the program.[65] Interest rates on Grameen loans range between sixteen[66] and twenty percent.[67]

Despite the greater individual isolation and potential mobility of poor urban Americans, this double mechanism of peer lending has also worked in the United States.[68] When pressed about delinquency rates, the director of Project Enterprise, a microcredit program operating in Harlem and Brooklyn, New York and serving a predominantly African American female clientele, indicated the project's total current default amount was $202, and that one client had been delinquent, "but we got the money in the end. It was not just a bank going after the money, it was her peers too."[69]

2. *Grameen II*

In 2002, Muhammad Yunus and the Grameen Bank developed the Grameen Generalized System, commonly referred to as GGS, or Grameen II.[70] GGS was viewed as an adaptive improvement upon the original system.[71] It added four new characteristics to the original framework: loan flexibility, pension plans, self-guaranteed loan insurance, and the community star system.[72] Not all of these can be easily transferred to an urban American context.

Precipitated by a devastating cyclone in 1998,[73] Grameen II introduced flexibility to the original Grameen framework, thereby protecting borrowers

60. YUNUS, *supra* note 18, at 63.
61. *Lending Models*, *supra* note 19.
62. *Id.*
63. *See id.*
64. *Id.*
65. *Id.*
66. Jaffer, *supra* note 47, at 198.
67. YUNUS, *supra* note 18, at 68.
68. Murdoch, *supra* note 43.
69. *Id.*
70. YUNUS, *supra* note 18, at 237.
71. *Id.*
72. *Id.* at 237-43; *see also* Muhammad Yunus, *Grameen Bank II Designed to Open New Possibilities*, *at* http://www.grameen-info.org/bank/bank2.html (last modified Sept. 13, 2003) (updating developments of the Grameen Generalized System as of October 2002) [hereinafter *Grameen II*].
73. *Grameen II.*

from unforeseen crises, and insulating the bank from failure.[74] Under this new loan regime, borrowers who find themselves in financial straits can get a "rescheduled basic loan with its own separate set of rules."[75] While this innovation makes a certain amount of sense, critics have pointed to it as an example of bookkeeping legerdemain that inflates the touted repayment rates.[76] To the Bangladeshis in need of help, this criticism is irrelevant. It is important to keep in mind, however, that American microlenders do not necessarily practice this form of rescheduling, which in turn may contribute to higher default rates.[77]

The second and third innovations are the introduction of pension plans and self-guaranteed loan insurance, the applicability of which to the urban American microcredit market will be explored elsewhere.[78] Basically, all Grameen borrowers with a loan greater than a certain fixed amount must contribute to a pension fund.[79] Unlike the American social security system, borrowers who contribute to the general fund are guaranteed a set amount after ten years when their pension account matures.[80] The rate of return is envisaged to be nearly 200%.[81]

Self-guaranteed loan insurance was developed to address the fear of borrowers that their debt might remain after they die.[82] Here, the borrower contributes 2.5% of the outstanding amount on the last day of each calendar year.[83] Should the borrower die during the following year, the debt is paid out of the general fund *and* the borrower's survivors are refunded all contributions to the fund the borrower made.[84] If the borrower outlives her loan, then the contributions are not refunded.[85] This, perhaps, serves as an incentive for the bank and its branches to take a greater interest in the community and work toward an increased standard of living for their villages.

---

74. YUNUS, *supra* note 18, at 238.

75. *Id.*

76. *See* Harry Hurt, *A Path to Helping the Poor, and his Investors*, N.Y. TIMES, Aug. 10, 2003, at 3-4.

77. *Cf.* Murdoch, *supra* note 43. "The way that some organisations report defaulted loans also raises eyebrows . . . continuing transparency in the sector is crucial." *Id.* (internal citation omitted). *See also* ELAINE EDGCOMB ET AL., THE PRACTICE OF MICROENTERPRISE IN THE U.S.: STRATEGIES, COSTS, AND EFFECTIVENESS 52 (1996) (noting that default rates for the period of the study, 1992-94, have commonly been above 10%).

78. *See infra* Section II.

79. YUNUS, *supra* note 18, at 240.

80. *Id.*

81. *Id.*

82. This fear apparently arises primarily out of concern that the soul will not be at rest, rather than the more temporal fear that the family might be forced to assume the debt. *See id.* at 241.

83. *Id.* In this respect, the system resembles the Muslim practice of mudaraba. *See infra* Part II.B.

84. YUNUS, *supra* note 18, at 241.

85. *Id.*

As a means of both improving village conditions and monitoring those improvements, Grameen II includes a five-star registration component.[86] Each star represents a separate achievement for the branch and its villages.[87] A green star represents a zero percent default rate.[88] A blue star represents a branch turning a profit.[89] A violet star represents a branch with a deposit surplus greater than its outstanding loans.[90] A brown star represents a branch that ensured an education for 100% of its borrowers' children.[91] Finally, a red star represents a branch that succeeded in bringing 100% of its borrowers above the poverty line.[92] At the end of 2002, there were 1,178 Grameen bank branches operating in Bangladesh.[93] Of this number, 772 earned a total of 1,346 stars, or 1.74 stars per branch.[94] Staff members earn their stars according to the achievements of the lending centers for which they are responsible.[95] These stars are a matter of pride and social status[96] - there is no monetary advantage in receiving them.[97]

B. Venture Philanthropy and the International Focus

In his address to delegates at a microcredit conference held in London, Muhammad Yunus proclaimed: "[P]overty does not belong in a civilised human society. It belongs in museums."[98] While this sentiment is shared by activists, NGOs, and the United Nations, the costs involved in relegating poverty to the collective world memory are staggering.[99] It was estimated that $21.6 billion would be required to expand microcredit initiatives to the 100,000 poorest families by 2005.[100] As Carter Garber, a development consultant from the United States, points out, such a goal is a "very steep challenge."[101] In the period 1987 to 1997, microcredit proponents raised only five hundred million dollars in private funds.[102]

---

86. *Id.* at 242.
87. *Id.*
88. There were 696 green stars awarded in 2002. *Id.* at 242.
89. There were 437 blue stars awarded in 2002. *Id.*
90. There were 213 violet stars awarded in 2002. *Id.*
91. Sixty-one branches applied for brown stars in 2002. *Id.*
92. Twenty-one branches applied for red stars in 2002. *Id.* at 243. It is unclear whether the indicated poverty line is national or international. *Id.*
93. *Id.*
94. *Id.* at 243.
95. *Grameen II*, *supra* note 72.
96. *Id.*
97. A similar program could be introduced on a state or federal level in the United States, with each star earned translating directly into tax credits or some other benefit for the sponsor bank and microlender.
98. Clark, *supra* note 18, at 3.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

Fortunately, private donations are not the only source of funding that microcredit enjoys.[103] The U.S. government and various corporate charitable foundations provide support and guidance to microcredit initiatives.[104] However, the focus of this support has been primarily on foreign aid. For example, one of the motivations behind the Microenterprise for Self Reliance and International Anti-Corruption Act of 2000[105] was a push by Congress to "reaffirm[] the traditional humanitarian ideals of the American people and renew[] its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance."[106]

Domestically, a large amount of microcredit funding has gone to the assistance of refugee resettlement within the United States.[107] In fiscal year 2000, the Office of Refugee Relocation awarded $2,850,851 to develop and administer microenterprise programs for the benefit of refugees.[108] These programs were intended not only to aid in the resettlement of newly arrived non-citizens, but also to aid refugees who have been in the United States for a number of years and who seek microcredit as a means to supplement their incomes.[109] This is not to gainsay the importance of such foreign investment; in fact, one proponent has suggested that microcredit, with its twin goals of economic opportunity and poverty alleviation, is the most effective way to wage a war against terrorism.[110] Under the Clinton presidency, the Small Business Administration (SBA) expanded its microcredit initiatives.[111] By 1997, the SBA had awarded $70 million in grants to nonprofit organizations.[112] The loans ranged in amount from $125 to $15,000, with half of the loans awarded to women.[113] This progress has been subsequently imperiled by current

---

103. *See About FIELD: Advisory Board, at* http://www.fieldus.org/about/advisory_board.html (last visited Mar. 20, 2006) (FIELD, a national board of microlenders, lists among its donors the Charles Stewart Mott Foundation, Citigroup Foundation, the Ford Foundation, the Levi Strauss Foundation, and the U.S. Small Business Administration).

104. *Id.*

105. 22 U.S.C.S. § 2151 (2005).

106. *Id.*

107. *2000 Off. of Refugee Resettlement Ann. Rep., available at* http://www.acf.dhhs.gov/programs/orr/policy/00arc6.htm (last updated Sept. 26, 2002).

108. *Id.*

109. *Id. See, e.g.*, PEGGY CLARK ET AL., MICROENTERPRISE AND THE POOR: FINDINGS FROM THE SELF-EMPLOYMENT LEARNING PROJECT, FIVE YEAR SURVEY OF MICROENTREPRENEURS vi-vii (1999) (indicating a parallel practice of income patching among urban microentrepreneurs).

110. Hurt, *supra* note 76, at 4. (quoting Alexandre de Lesseps, co-founder of BlueOrchard Finance and "one of the leading figures in the world of microfinance. . . .) "The only way to solve the problems of poverty and terrorism in the world today . . . is through investment." *Id.*

111. Taibi, *supra* note 16, at 1527.

112. Hillary Clinton, Remarks at the Microcredit Summit, Washington, D.C. (Feb. 6, 1997).

113. *Id.*

economic policies:[114]

> The Bush administration removed the Small Business Association from the cabinet and proposed cutting the agency's funding by over 20 percent. Worse, it aims to reduce the agency's lending capacity by 50 percent. [In 2002], there is $9.4 billion available for small-business loans guaranteed by the agency. For [2003], the administration is proposing less than $5 billion.[115]

To fill this breach, a new force has emerged: the venture philanthropist. Under this paradigm, philanthropists are to "think like businesspeople."[116] They should seek out efficiency and innovation, and not merely cut a check to a worthy cause.[117] While the idea of using market forces to affect social change is "anathema" to some,[118] venture philanthropy has won some high profile proponents.[119] Of the approximately 3,000 microcredit programs operating worldwide, seventy percent serve fewer than 2,500 clients.[120] Part of what motivates private investors such as Vinod Khosla, co-founder of Sun Microsystems,[121] are the images of personal triumph over poverty: "I was completely blown [away] as I listened to the stories of these tenacious women . . . I started crying."[122] As far as investment potential, microcredit programs might not be "as profitable as Google, but they have the same level of social impact."[123] Such endorsements bring significant attention to microcredit, and investors such as Khosla afford microcredit programs to grow beyond the current levels.[124]

A more muted investment outlook is expressed by Alexandre de Lesseps,[125] founder of BlueOrchard, a Swiss microcredit investment

---

114. *See* Fred P. Hochberg, *American Capitalism's Other Side*, N.Y. TIMES, July 25, 2002, at A17 (the author was deputy and then acting administrator of the Small Business Administration from 1998 to 2001).

115. *Id.*

116. *In 2005, How to Align Your Money with Your Values*, CHRISTIAN SCI. MONITOR, Jan. 24, 2005, at 13 [hereinafter *How to Align*].

117. *Id.*

118. Murdoch, *supra* note 42.

119. *How to Align*, *supra* note 116 (Charles Harper, executive director of the John Templeton Foundation outline venture philanthropy and lists VISA and MBNA as groups currently involved).

120. Saritha Rai, *Tiny Loans Have Big Impact on Poor*, N.Y. TIMES, April 12, 2004, at C3.

121. *Vinod Khosla*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, *at* http://en.wikipedia.org/wiki/Vinod_Khosla (last modified Mar. 6, 2006).

122. Rai, *supra* note 120, at 3.

123. *Id.*

124. *Id.*

125. Hurt, *supra* note 76, at 4.

consultancy firm.[126] Microfinance investment is not a way to accumulate rapid sums of wealth, but with an average return of four percent, it outperforms money market accounts and is safer than the market.[127] "If you're a blue-chip investor sitting on a lot of cash, it makes sense to put up to [four] percent of your net worth into this type of fund."[128] De Lesseps also stresses the satisfaction derived from aiding in the alleviation of world poverty.[129] Much of the excitement surrounding microcredit is not only its perceived novelty, but the promise that current efforts will "become one of the great humanitarian movements of history, allowing people to free themselves from the bondage of poverty."[130]

As seen in the comments above, microcredit is widely viewed as a program with global, specifically Third World, applications. Microcredit in the United States remains in the early stages of its development.[131] Venture philanthropy may not be able to provide the same support to U.S. programs as it can in nations such as Bangladesh or Sri Lanka. Venture capital generally retains an equity interest in the companies it funds,[132] which in turn might reduce local control and work against those characteristics which contribute to the success of urban microcredit, such as a sense of community and local responsibility.[133] Also, venture capital might prefer companies that can demonstrate "significant unrealized market potential or the ability to develop new markets"[134] rather than microentrepreneurs, who require ongoing training and support to succeed.[135]

---

126. BlueOrchard Finance s.a. - Microfinance Investment Advisers, *at* http://www.blueorchard.ch/en/home.asp (n.d.) (last visited Mar. 20, 2006).

127. Hurt, *supra* note 76, at 4.

128. *Id.*

129. *Id.*

130. Fernando, *supra* note 28, at 159.

131. *See generally* CLARK, *supra* note 109, at viii (describing some of the problems U.S. programs have experienced and certain adaptations they have undertaken).

132. JONES, *supra* note 1, at 77.

133. EDGCOMB, *supra* note 77, at 5.

134. JONES, *supra* note 1, at 77.

135. *See* CLARK, *supra* note 109, at viii. "Low-income entrepreneurs need ongoing technical assistance and specialized consulting to help them implement and grow their businesses." *Id.*

II. MICROCREDIT IN THE UNITED STATES

A. *Microfinance*[136] *in the Fringe Lending Context*

Microentrepreneurs and, more generally, consumers often face insurmountable hurdles in their quest for credit: they lack credit histories, their credit is poor, their income is low, or they have a high debt-to-income ratio.[137] Furthermore, their needs are often so relatively small that the cost of application review, credit checks, and processing makes extending loans prohibitively expensive for traditional banks.[138] Banks usually do not make loans for less than $25,000.[139] Several legal and illegal options rise to fill the credit vacuum, all of which offer credit at great cost.[140] This situation depresses the opportunities of the individual credit-seeker, the credit-seeker's family, and, in the aggregate, the credit-seeker's community.[141]

The lack of available credit is also poignantly felt among immigrants.[142] The situation has become increasingly difficult for legal immigrants, in particular, who face cuts in food stamps and restricted forms of social services and public services during the first five years of their residency in the United States.[143] For those immigrants wishing to start businesses but who are ineligible for microloans under the program offered by the Office of Refugee Resettlement of the Department of Health and Human Services, loansharks are often the only option.[144] An entrepreneur in Williamsburg, New York reported

---

136. Non-profit and government entities in the United States prefer such terms as "microfinance," "microenterprise," and "microentrepreneur" to the internationally used term "microcredit." *See id.* The difficulty of finding evidence to support this proposition directly is perhaps attributable to a semantic choice designed to remove the stigma of charity or entitlement from these programs. *See id.*

137. James P. Nehf, Secured Consumer Credit and the Fringe Banking Industry (manuscript, on file with author).

138. Id.

139. Leslie Eaton, *Minor Loans Giving Major Help, Microcredit Catches on with Entrepreneurs in Need*, N.Y. TIMES, July 11, 1998, at B1.

140. Nehf, *supra* note 136, at 2.

141. *See* Clinton, *supra* note 112.

142. *See Housing Counseling: Hearing Before the Subcomm. on Housing & Community Opportunity of the House Comm. on Financial Services*, 108th Cong. 120 (Mar. 18, 2004) (statement of Kenneth D. Wade, Executive Director, Neighborhood Reinvestment Corporation), *at* http://financialservices.house.gov/media/pdf/108-73.pdf. "Many minority families, particularly immigrants, lack the information and familiarity with mainstream financial institutions, which makes them vulnerable targets for high cost loans and predatory lending practices." *Id.*

143. JONES, *supra* note 1, at 44.

144. *See, e.g.*, Eaton, *supra* note 139, at B1; *see also* Laura Sydell, *Mexican Immigrants Use Money-Lending System Known as a* Tanda *to Start Small Business*, (Nat'l Pub. Radio Broadcast, Aug. 9, 2004) [hereinafter *Tanda*].

that loansharks there charged $200 per month on a $1,000 loan, an interest rate of 140% per annum.[145]

In addition to overtly coercive fraudulent money-lending operations, such as loansharks, there are subtler swindlers that either resemble traditional finance arrangements common in immigrant communities, or appear facially harmless. The most common frauds are the Ponzi scheme[146] and its derivative versions. Basically, investors are promised artificially high dividends when, in fact, new investors' contributions provide the dividends of earlier investors.[147] There is usually no actual capital production other than continually raising new funds.[148] A variation of the Ponzi scheme is the pyramid, or airplane,[149] scheme in which investors receive compensation for bringing in new investors.[150] Like the Ponzi scheme, pyramid schemes are illegal in most states.[151] Another version is the birthday club[152] in which new recruits make gifts of money to current members under the impression that future recruits will in turn make gifts of money to them.[153] Interestingly, many such clubs limit membership to women.[154]

Generally, Ponzi schemes do not represent as great a threat to microfinance operations, as they generally involve smaller amounts of money because, if the victims were required to put up large sums of money to participate, it is unlikely that they would need the services of a microlender.[155] There is room for a certain amount of confusion of Ponzi schemes with their legitimate cousin, the rotating savings and credit association (ROSCA). Essentially, a ROSCA is a group of individuals who come together to make regular contributions to a joint fund.[156] The joint fund is then distributed to one member of the group who then repays the loan in further monthly

145. Eaton, *supra* note 139, at B1.

146. "This scheme takes its name from Charles Ponzi, who in the late 1920s was convicted for fraudulent schemes he conducted in Boston." BLACK'S LAW DICTIONARY 1198 (8th ed. 2004).

147. *Id.*

148. *Id.*

149. An airplane scheme is simply a pyramid scheme with titles assigned to the investors such as pilot, co-pilot, navigator, stewardess, passenger, depending on how close the investor is to winning a pay-out. *See, e.g.*, New York v. Riccelli, 540 N.Y.S.2d 74 (1989).

150. Black's Law Dictionary 1272 (8th ed. 2004).

151. *Id. See, e.g.*, IND. CODE ANN. § 35-45-5-2 (2004); 815 ILL. COMP. STAT. ANN. 505/1 (2004); CAL. PENAL CODE § 327 (2006) (all three illustrating laws against illegal gambling and fraudulent investment schemes, none of which resemble the basic mode of Grameen microcredit).

152. Jennifer Coleman, *Sacramento Authorities Probe Pyramid Scheme*, ASSOCIATED PRESS, Oct. 23, 2002, *available at* Berkeley Daily Planet, http://www.berkeleydailyplanet.com/article.cfm?archiveDate=10-23-02&storyID=15584.

153. BLACK'S LAW DICTIONARY 710 (8th ed. 2004).

154. *Id.*

155. This, however, might not be the case in smaller-stake Ponzi or pyramid schemes. *See id.*

156. *Lending Models*, *supra* note 19.

contributions.[157] "Deciding who receives the lump sum is done by consensus, by lottery, by bidding or other agreed methods."[158] Such arrangements are common in Mexican immigrant communities, where they are known as *tandas*.[159] *Tandas* are often administered privately, as members may be undocumented.[160] This reluctance to turn to the authorities for help increases the risk that members of a *tanda* will fall victim to fraud, but such occurrences are apparently rare.[161] Professor Carlos Velez-Ibanez, a professor of anthropology at the University of California, Riverside, who studies *tandas*, describes a group cohesion similar to the peer pressure mechanism that drives repayment under Grameen microlending:

> If you bug out on somebody, all of the other relationships also vibrate. That is, your cousin's going to know about it, your aunt's going to know about it, the people that you go to school with are going to know about it and your reputation then goes down the tubes and you won't be invited to the wedding, to the baptism or to Aunty Maria's 50th golden anniversary.[162]

Other groups use ROSCAs similar to the *tanda* to start and maintain small businesses; Caribbean cultures call the arrangement *en susu* and the Vietnamese *hui*.[163] Korean and Ethiopian immigrants also have similar financial programs.[164] While these immigrant ROSCAs resemble Grameen microlending in form and function, it should be kept in mind that these groups are typically no larger than ten to fifteen persons,[165] and each group has no support beyond its membership.[166]

Proponents of microcredit urge that it is equally applicable in the United States as it is in rural South Asia.[167] Others do not believe the transition will be so smooth.[168] Two separate studies have shown impressive gains made by poor microentrepreneurs vis-à-vis control groups composed of non-poor microentrepreneurs and poor people who did not participate in microcredit

---

157. *Id.*
158. *Id.*
159. *Tanda*, *supra* note 144.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* *See, e.g.*, *ROSCAs: Whats in a Name?*, *available at* http://www.gdrc.org/icm/rosca/rosca-names.html (n.d.) (last visited Mar. 20, 2006) (listing common names for ROSCA arrangements by continent and country).
164. Eaton, *supra* note 139, at B1.
165. *Tanda*, *supra* note 144.
166. *See id.* (noting the low profile and self-sufficient nature of *tandas*.).
167. Clinton, *supra* note 112.
168. *Cf.* Eaton, *supra* note 139, at B1. Robin A.E. Ratcliffe, a vice-president of ACCIÓN International said, "Some people thought that you could take [the Grameen] model, go clunk and make it work here . . . but that is not our experience." *Id.*

programs.[169] Before examining those studies, this Note will address the general development of microfinance in the United States.

Microfinance is often defined in the United States as "a sole proprietorship, partnership or family business that has fewer employees, [without] access to the commercial banking sector, [utilizing] a loan of less than $25,000 to start or expand a business that usually grosses less than $250,000 per year."[170] In fact, "microenterprise development" covers a vast spectrum of programs that reflect the purposes and values of their designers and clients.[171] "Over 750 microenterprise programs and supporting programs now exist in all 50 states, the District of Columbia, the Mariana Islands and Puerto Rico. In 2000, the majority of these programs assisted 99,945 individuals, of which 9,800 were borrowers."[172] There are an estimated two million microentrepreneurs currently working in the United States.[173] Self-employment has grown in prominence due to layoffs and downsizing in the current U.S. economy.[174]

Microfinance in the United States resonates with the American psyche,[175] even though the benefits of microfinance manifest themselves in largely unpredictable ways.[176] Perhaps the most important side-effect of microfinance, especially where it allows a family to move out of poverty, is the ability to accumulate wealth. This, in turn, leads to, among other things, improved household stability, an increase in social and political participation and influence, and an enhancement of child welfare.[177] Furthermore, microcredit provides the means for some to break the cycle of economic dependency and poverty by providing both economic literacy and self-esteem.[178] This in turn leads to family and community development.[179]

Despite these optimistic possibilities, some observers have noted that it is irresponsible to expose poor people to the vagaries of market economics,[180] especially when moving from government assistance to self-employment may

---

169. *See generally* CLARK, *supra* note 109, at v; EDGCOMB, *supra* note 77, at 2; MCLENIGHAN, *supra* note 42, at 2-4.

170. Susan R. Jones, *Representing the Poor and Homeless: Innovations in Advocacy Tackling Homelessness Through Economic Self-Sufficiency*, 19 ST. LOUIS U. PUB. L. REV. 385, 389 (2000).

171. JONES, *supra* note 1, at 2.

172. *Id.*

173. CLARK, *supra* note 109, at 4.

174. Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 201 (1997).

175. CLARK, *supra* note 109, at iv.

176. *Id.* at 68.

177. *Id.* at 20 (quoting MICHAEL SHERRADEN, ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY 294-95 (1991)).

178. Jones, *Representing the Poor and Homeless*, *supra* note 170, at 394.

179. JONES, *supra* note 1, at ix.

180. *Cf.* Murdoch, *supra* note 43 (noting the perceived irresponsibility of exposing the world's poor to market forces rather than the U.S. poor).

mean a loss of medical coverage.[181] Proponents counter that microenterprise "represent[s] a responsible hybrid of business and social welfare institutions."[182]

Described as "the new public interest law,"[183] microfinance has a revitalizing potential that goes beyond mere banking. It is "not simply an economic issue; it is also a moral issue."[184] Microfinance involves the dignity of self-employment coupled with community empowerment.[185] While the original programs were marketed to women,[186] microfinance has expanded to serve women and men, who in turn work together to build stronger communities.[187] Furthermore, the training and technical assistance that microfinance programs provide, which are the most expensive components of the programs,[188] are also the most important, especially for low-income clients.[189] By addressing poverty through attacking the credit gap, these programs build people as well as businesses.[190] Among the disparate groups microfinance programs have assisted are immigrants and refugees,[191] domestic violence survivors,[192] physically disabled persons,[193] ex-offenders reentering society,[194] and homeless persons.[195]

One of the difficulties facing the domestic application of microfinance programs is the higher level of regulation and red tape in the United States than abroad.[196] At the federal level, microfinance programs must contend with IRS regulations,[197] the Community Block Grant Development Program,[198] as well as a litany of consumer laws.[199] The current administration's "faith-based initiatives" experiment provides a further level of complexity.[200] Most

---

181. *See, e.g.*, CLARK, *supra* note 109, at 25.
182. Taibi, *supra* note 16, at 1527.
183. Jones, *Small Business*, *supra* note 174, at 200.
184. JONES, *supra* note 1, at 3.
185. *Id.*
186. *But see The WSEP Strategy*, *at* http://www.wsep.net/About.htm (on file with author) (The Women's Self-Employment Project was founded to serve women and still maintains that mission).
187. Clinton, *supra* note 112.
188. MCLENIGHAN, *supra* note 42, at 10.
189. Jones, *supra* note 170, at 398.
190. MCLENIGHAN, *supra* note 42, at 10.
191. JONES, *supra* note 1, at 50-54.
192. *Id.*
193. *Id.* at 56.
194. *Id.* at 57-61.
195. *Id.* at 61.
196. MCLENIGHAN, *supra* note 42, at 9.
197. JONES, *supra* note 1, at 25-28.
198. *Id.* at 16.
199. *Id.* at 33.
200. *See id.* at 65. "[F]aith-based initiative has raised many legal and policy questions... [yet] faith-based microenterprise members are doing some of the best work in maintaining the focus on poverty alleviation as the most important impact of U.S. microenterprise efforts." *Id.* (internal quotation marks omitted).

microlending programs are organized as tax-exempt charitable or educational entities under section 501(c)(3) of the Internal Revenue Code.[201] In order to qualify for 501(c)(3) status, the program must be "organized and operated exclusively for . . . charitable . . . or educational purposes."[202] The word "charitable" comprises "relief of the poor and distressed or of the underprivileged, advancement of education, and promotion of social welfare through organizations formed to lessen neighborhood tensions, eliminate prejudice and discrimination, or combat deterioration or juvenile delinquency."[203]

The Community Block Grant Development Program, which involves grants of aid from the Department of Housing and Urban Development[204] to "carry out a wide range of community development activities directed toward revitalizing neighborhoods, economic development, and providing improved community facilities and services,"[205] now recognizes microfinance programs as eligible recipients.[206] However, some groups are reluctant to accept federal monies out of concern over the loss of local control.[207]

Other statutes that affect microenterprise programs deal with consumer law and credit-reporting practices.[208] The Truth in Lending Act (TILA)[209] concerns the computation of annual lending rates and how this information is communicated to the consumer.[210] The Equal Credit Opportunity Act (ECOA)[211] ensures that women are extended credit on the same terms as men, regardless of their marital status.[212] The Fair Credit Billing Act[213] outlines the procedures used in dealing with complaints about customer billing.[214] The Fair

---

201. *Id.* at 25.

202. *Id.* at 27.

203. *Id.* at 27-28.

204. *United States Department of Housing and Urban Development, at* http://en.wikipedia.org/wiki/United_States_Department_of_Housing_and_Urban_Development (last modified Mar. 1, 2006).

> The United States Department of Housing and Urban Development, often abbreviated HUD, is a Cabinet department of the United States government. It was founded in 1965 to develop and execute policy on housing and cities. It has largely scaled back its urban development function and now focuses primarily on housing.

Id.

205. *Community Development Block Grant Entitlement Communities Overview, at* http://www.hud.gov/offices/cpd/communitydevelopment/programs/entitlement/index.cfm (last updated Dec. 15, 2005).

206. JONES, *supra* note 1, at 16.

207. Telephone Interview with Jonathan Brereton, Chief Financial Officer, ACCIÓN Chicago (Oct. 14, 2004) [hereinafter Brereton Interview].

208. JONES, *supra* note 1, at 33.

209. 15 U.S.C. § 1601 (2005).

210. JONES, *supra* note 1, at 33.

211. 15 U.S.C. § 1691 (2005).

212. JONES, *supra* note 1, at 33.

213. 15 U.S.C. § 1666 (2005).

214. JONES, *supra* note 1, at 33.

Debt Collection Practices Act (FDCPA or FDCA)[215] outlines appropriate and inappropriate debt collection methods.[216] The Fair Credit Reporting Act (FCRA)[217] grants consumers access to their credit records and affords them opportunities to correct incorrect information.[218]

At the state level, microfinance programs must be aware of moneylender licensing and charitable solicitation licensing requirements, as well as usury laws.[219] While lender liability suits are rare, microfinance organizations often have to contend with various legal issues.[220] Aside from more mundane legal problems, such as breach of contract claims against distributors,[221] some programs have inquired as to their liability should the repayment peer pressure turn tortious.[222]

In *Hawthorne v. Olympia Fields*,[223] the Women's Self Employment Project entered as amicus curiae on behalf of a client who sought a zoning change to allow her to conduct a child daycare business. This case was critical because it not only affected microentrepreneurs' ability to work in one of the more popular spheres of microenterprise, but it also affected microentrepreneurs in need of child care. The "WSEP's interest in home-based child care stems from a desire to provide quality child care for low-income women, thereby helping welfare recipients become self sufficient, and from helping welfare recipients and other low-income women achieve a living wage through work as a home day care provider."[224]

In the case at bar, Sonya and Marcus Hawthorne purchased a house in Olympia Fields (the Village), intending to use it as a day care facility.[225] The Illinois Department of Children and Family Services approved their license, but the Village denied them a zoning permit.[226] The Village cited the fact that day-care facilities were outside the "home occupation" exception of businesses allowed in residential zones.[227] Businesses falling outside of the "home occupation" exception include "[o]ffices, clinics, doctors' offices, hospitals, barbershops, beauty parlors, dress shops, millinery shops, tearooms, restaurants, tourist homes, animal hospitals and kennels, among other things[.]"[228] Because

---

215. 15 U.S.C. § 1692 (2005).
216. JONES, *supra* note 1, at 33.
217. 15 U.S.C. § 1681 (2005).
218. JONES, *supra* note 1, at 33.
219. *Id.* at 29-33.
220. *Id.* at 32.
221. Brereton Interview, *supra* note 207.
222. JONES, *supra* note 1, at 32.
223. Hawthorne v. Olympia Fields, 765 N.E.2d 475 (Ill. App. Ct), *aff'd*, 790 N.E.2d 832 (Ill. 2003).
224. Brief of Amici Curiae Voices of Illinois Children et al., at 10, *Hawthorne v. Olympia Fields*, 765 N.E.2d 475 (Ill. App. Ct. 2002) (No. 1-01-447).
225. 790 N.E.2d at 835.
226. *Id.*
227. *Id.*
228. *Id.* This list would exclude a large number of microenterprises from the Village. *Id.*

this effectively meant that the Hawthornes could not open a state-licensed day-care facility anywhere within the limits of the Village, the zoning ordinance was "null and void" under Illinois law.[229] Other than the court mentioning WSEP specifically,[230] there is no indication that this case involves microcredit or women working their way out of poverty. *Hawthorne* underscores the problems microentrepreneurs may face in their transition from welfare to work beyond the typical concerns of funding and training.

A. *Findings of Studies of Microfinance in the United States*

The earliest study this Note considers organizes microlenders in one of two ways: either as a subsidiary of a larger agency or corporation, or as a tax-exempt nondepository community development financial institution.[231] Significantly, microlenders falling in the latter category were unregulated lenders, and investor funds were uninsured.[232] The majority of groups in the study used the Grameen peer-lending model with loans ranging between $8,000 and $20,000.[233] Among the study's findings were the importance of the peer-lending model, which was purported to lower operating costs,[234] as well as the need for microlenders to be acquainted with the needs of their clientele.[235] "With first-hand knowledge of the local economy, group members are quick to assess the market for, and feasibility of, a business idea and often have valuable insights, connections, and business assistance to offer."[236] That being said, the researchers repeat the mantra that has echoed through almost every account of microcredit, except for those written by Muhammad Yunus: Microcredit is not a panacea.[237] However, "targeted microenterprise development has tremendous potential for reaching deeply into disadvantaged populations."[238]

Five years later, the second study reaffirmed the basic values of microcredit: "[r]ather than emphasizing a person's deficiencies when they enter the program, such as their lack of training for a certain job, or low educational attainment levels, microenterprise programs being by recognizing a person's strengths—the skills, aptitudes, interests, and experience that they already have."[239] Most of the programs studied were funded primarily through

229. *Id.* at 837.
230. *Id.* at 838.
231. MCLENIGHAN, *supra* note 42, at 5.
232. *Id.*
233. *Id.* at 12.
234. *Id.* at 6.
235. *Id.* at 7.
236. *Id.*
237. *Id.*; *see also* Jones, *supra* note 170, at 392 (noting that criticism of microfinance includes the observation that there are "only a small percentage of possible microentrepreneurs in the U.S. population.").
238. MCLENIGHAN, *supra* note 42, at 7.
239. EDGCOMB, *supra* note 77, at 1.

private philanthropy.[240] The focus of the various programs remained poverty alleviation, but there was also a "strong emphasis on client self-selection and client choice."[241] Furthermore, a noticeable non-charity approach stressed client responsibility and reliance on market interest rates and repayment standards.[242]

The final study, the Self-Employment Learning Project (SELP), is a culmination of a five-year survey of microentrepreneurs from 1992 to 1996.[243] The key finding was that more than seventy-two percent of the poor microentrepreneurs "gained in household income during the five-year period, and more than one-half were able to move out of poverty."[244] A number of respondents were also able to discontinue government assistance.[245] Household assets rose by $13,623 on average, with the greatest increases among poor respondents ($15,909). One of the more surprising results of the study was the large fraction of households with assets in excess of $10,000.[246] "It is primarily the value of their real estate that accounts for the relatively high level of average assets for these respondents."[247] Also, despite their relative income levels, microentrepreneurs who participated in the survey achieved higher average levels of education than microentrepreneurs who were unable to participate, or members of the poor non-microentrepreneur control group.[248]

Beyond these statistics, there are numerous first-hand accounts of how well microcredit can work (even though it cannot work for everyone), including that of Gloria Davis from Chicago, Illinois:

> [M]y cousin was an underpaid secretary and I was a welfare mother sewing bridesmaids' dresses at home. All we needed was $3,000 to open the dress shop we've been dreaming about since we were kids. But we couldn't get a bank to even talk to us. Thanks to the Women's Self-Employment Project, we are now co-owners of the Neo Emporium. We have determination and a good business plan and with the grace of God, we're going to make it.[249]

240. *Id.* at 2.
241. *Id.*
242. *Id.*
243. CLARK, *supra* note 109, at v.
244. *Id.*
245. *See* Appendix, tables 2 & 4.
246. *See* Appendix, table 1.
247. CLARK, *supra* note 109, at 21.
248. *See* Appendix, table 3.
249. MCLENIGHAN, *supra* note 42, at 3.

And, more recently, a twenty-three year old microentrepreneur said:

> Through a local microenterprise program I learned about how I could start my own business . . . . I had experience cleaning houses for $25 a day so I thought, why not start my own business doing that. In my work with the literacy program my reading level increased from the third grade to the eighth grade. I haven't been on welfare in six years. I can read to my kids and we read the Bible everyday. I can now earn $200 a day. I make $48,000 a year and my goal is to make $60,000. I don't panic anymore. I feel great. I have confidence in myself.[250]

Microcredit programs have also reached out to people whose potential might not be as readily apparent as in the examples above. In this case, the success story belongs to a recovering alcoholic homeless veteran:

> He is now in the tenth week of Faith Ministry's program where he has learned about marketing, accounting, legal requirements, and business regulations. A volunteer lawyer has agreed to help him structure his business, assist him with getting the appropriate business licenses, and, along with the microenterprise program staff, help him apply for a $ 1000 loan for tools and equipment and business start-up expenses. The lawyer, also a Vietnam Veteran, has agreed to serve as Joe's personal mentor. . . . He attributes his current successes—sobriety, temporary housing, participating in a microenterprise program—to the possibility that he can start something on his own and try to reunite with his family.[251]

Finally, microcredit has also helped noncitizens to strengthen their families and communities:

> When Carlos Aldana came to the United States from Ibague, Columbia, 11 years ago, he worked at three jobs . . . His first $1,000 loan from Accion helped him buy a van to make deliveries; later, larger loans helped him by a tiny café . . . and to expand the production of corn cakes known as arepas. Today, Mr. Aldana employs 11 workers in his arepa factory . . .[252]

250. JONES, *supra* note 1, at 50.
251. Jones, *supra* note 170, at 388.
252. Eaton, *supra* note 139, at B1.

B. Microfinance and Welfare Reform

The SELP study is also the first completed in the wake of Welfare Reform and the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[253] Under the previous welfare regime, income caps militated against participation in microcredit programs.[254] Families receiving Aid to Families with Dependent Children (AFDC) lost their benefits if their assets exceeded $1,500.[255] No distinction was made between personal assets and money obtained through loans or the value of capital investment, nor could welfare recipients deduct principal repayments as business expenses.[256] Since loans were included under the heading of assets, a microloan of $2,000 could result in a loss of AFDC benefits.[257] "It [took] a giant leap of faith for an AFDC mother to forego the security of a monthly welfare check—not to mention Medicaid health coverage for her family."[258]

The PRWORA dramatically changed the way federal guarantees of assistance to the nation's poorest children had been delivered over the last six decades.[259] "Most notably, the law prohibits states from using federal block grant funds to assist a family for more than five years . . . and requires adults to be engaged in work within two years or receiving assistance, or sooner at the state's option."[260] On the bright side, PRWORA eliminated the federally-mandated income exclusions and asset caps that had caused problems under the old regime.[261] A further advantage of PRWORA and the implementation of state TANF programs are the provisions that grant states broad discretion over microenterprise programs.[262] Of course, this discretion can be used either advantageously or disadvantageously. For example, states face escalating participation rates in order to avoid TANF penalties.[263] Not all employment initiatives qualify; therefore, "a state may be hesitant to allow involvement in microenterprise activities unless the state is confident that allowing such activities will not put the state at risk of failing to meet the required participation rate."[264] Also, this does not account for those for whom microcredit programs are not a viable option: estimates place the number of

253. Pub. L. No. 104-193, 110 Stat. 2105 (1996).
254. YUNUS, *supra* note 18, at 185.
255. MCLENIGHAN, *supra* note 42, at 48.
256. JONES, *supra* note 1, at 45-46.
257. MCLENIGHAN, *supra* note 42, at 48.
258. *See id.* at 48 (1991) (noting the Women's Self-Employment Project's negotiation with the state of Illinois for an annual waiver of the income cap).
259. JONES, *supra* note 1, at 44.
260. *Id.*
261. *Id.* at 45.
262. Jones, *Representing the Poor and Homeless*, *supra* note 170, at 397.
263. JONES, *supra* note 1, at 47.
264. *Id.*

welfare recipients who are able to benefit from self-employment at only five to ten percent.[265]

The picture grows dimmer when one considers the non-entrepreneurial working poor in the aftermath of welfare reform. The focus is almost solely on getting people into jobs no matter what the wage or quality of work.[266] It was estimated that in order for the economy to absorb one million former welfare recipients, the bottom thirty percent of workers, those earning less than $7.19 per hour, would suffer an eleven percent wage drop or face displacement.[267] "The working poor will end up even poorer."[268] Microenterprise advocates have developed a number of recommendations to maximize the chances of microenterprise success.[269] The first calls for a minimum of six months job training and two years business development to be granted to people transitioning from welfare to work. Additionally, training programs should be developed to partner workers with microenterprises to supplement their incomes.[270] While these are valid recommendations, it has become increasingly important to find ways to extend the reach of successful microcredit programs to aid as many of the working poor as possible. Section III of this Note suggests a means of increasing revenues, counterintuitively, by adopting banking practices that will allow microlenders to lower their interest rates.

D. Microfinance: Costs and Problems

Much of the early literature on microcredit mentions the low default rates.[271] These low default rates and the corresponding claims of self-sufficiency on the part of microcredit programs[272] appear to be largely illusory. The average loss rate for microloans in the United States is above ten percent.[273] Microcredit advocates must come to terms with the fact that microcredit is costlier than other forms of credit.[274] The Edgcomb study reported that the average loan costs $1.47 per dollar lent to make and manage the loan, with costs ranging between $0.67 and $2.95.[275] A board member of a Los Angeles microenterprise program asked, when confronted with a similar

---

265. *Id.* at 46.
266. CLARK, *supra* note 109, at 40.
267. *Id.* at 41.
268. *Id.*
269. JONES, *supra* note 1, at 47.
270. *Id.* at 48-49.
271. *See, e.g.*, McKenna, *supra* note 21, at A26. "A loan repayment rate of 94 to 98 percent shows that people previously labeled as not credit-worthy are indeed bankable. They make up in industry and ingenuity what they lack in capital." *Id.*
272. *See, e.g.*, Eaton, *supra* note 139, at B1. "Because almost all the money gets repaid, it can be reused, making microcredit programs very cost-effective, proponents say. Some programs even make enough money from their lending to cover their costs." *Id.*
273. EDGCOMB, *supra* note 77, at 59.
274. MCLENIGHAN, *supra* note 42, at 9.
275. EDGCOMB, *supra* note 77, at 3.

cost-to-loan ratio: "Instead of investing so much effort and time into microenterprise programs, why don't we just hire a helicopter, fly over the target neighborhoods, and throw the money out of the window?"[276] Of course, as related above, there is more to microenterprise than merely banking, and the anecdote ends happily: "seeing firsthand the broad range of impact that the microenterprise program had on individuals, especially in developing 'human capital' (including self-esteem, confidence, and the drive to obtain financial self-sufficiency) this same board member became an enthusiastic convert . . . ."[277] A collateral effect of the high transactional costs involved in handling such loans is the difficulty in turning a profit without charging high interest rates.[278]

Despite this persistent enthusiasm, major challenges remain. Perhaps the three greatest challenges are the need for health care coverage for microentrepreneurs and their families, a financial cushion, and ongoing technical assistance.[279] The lack of health care is especially poignant, as the sickness of an entrepreneur or a close relative can destroy an otherwise successful microenterprise: "[m]y sister on the first floor, she didn't have anyone else to help her . . . she's in a wheelchair and is a dialysis patient. I just couldn't walk away from her."[280] Perhaps these problems can be remedied by variations of the Bangladeshi adaptations of Grameen II outlined previously. "Generally, all programs are urged to offer clients access to credit through innovative bank and other linkages . . . ."[281] The question becomes how much programs are willing to experiment and how much risk they are willing to assume. The next section explores concepts of Islamic banking law, the implementation of which can allow microlenders the opportunity to offer loans at lower interest rates and afford microentrepreneurs the ability to set aside the difference for health coverage or a rainy day fund.

III. MICROCREDIT AND EQUITY LENDING.

A. *Applications of Equity Lending Without Interest*[282]

The past twenty years have seen tremendous growth in Islamic

276. JONES, *supra* note 1, at 13.
277. *Id.*
278. Hurt, *supra* note 76, at 3-4.
279. CLARK, *supra* note 109, at viii.
280. *Id.* at 25.
281. JONES, *supra* note 1, at 8.
282. *See* MUHAMMAD UMER CHAPRA & RASHID RAHMAN, TOWARDS A JUST MONETARY SYSTEM 68 (1986) (noting that equity lending "not only distribute[s] equitably the return on total investment between the financier and the entrepreneur, but also transfer[s] a fair share of the risk of the risks of investment to the financier instead of putting the whole burden on the entrepreneur.").

banking.[283] Estimated worldwide deposits surpass $80 billion in more than forty-five countries.[284] By 1999, the annual turnover was estimated at $70 billion, and it was projected to surpass $100 billion by 2000.[285] Paradoxically to the Western mind, these results have been achieved in a system that prohibits the charging and payment of interest.[286] The Koran prohibits the practice of usury.[287] Whether this ban covers only the charging of exorbitant interest or the charging of any interest whatsoever is the subject of scholarly debate.[288] The rejection of interest centers on the perceived injustice of a borrower compelled to return more than he borrowed.[289] The use of paper money, credit cards, and checks is also considered to be a form of usury as it contributes to inflation.[290] Wealth is accumulated through investment and mutually agreed upon ventures.[291] Islamic law imposes two requirements on such enterprises: (1) each investor has an equal voice in decision-making, regardless of amount invested; and (2) the investment need not be monetary, but can come in the form of time, skill, or effort.[292]

These banking principles work best on a smaller scale. To date, no interest-free national economies have been established,[293] nor has anyone, "at the very least, opened a successful zero-interest investment fund in an [industrialized] country which could be taken as a model by believers and unbelievers alike."[294] Proponents claim that not only are such large-scale

---

283. Rahul Dhumale & Amela Sapcanin, *An Application of Islamic Banking Principles to Microfinance*, at 9, U.N. Doc. 23073 (Dec. 1999) [hereinafter *Islamic Banking*].

284. *Id.*

285. It is unclear what affect the events of September 11, 2001 and the invasions of Afghanistan and Iraq have had on international Islamic banking. *See* Hurt, *supra* note 76, at 3-4 (noting in passing that microfinance is "an idea that is taking on renewed popularity in the wake of Sept. 11, 2001, and the wars in Afghanistan and Iraq"). *Cf. Impact of Iraq War on Sovereign Credit Ratings in Arab Region*, GULF NEWS, (Jan. 28, 2006) *at* http://www.gulf-news.com/Articles/print.asp?ArticleID=111371 (reviewing changes in the Standard & Poor's rating for various nations in the Middle East in the wake of the Iraq War).

286. *Islamic Banking*, *supra* note 283, at 1.

287. *See* THE KORAN 270 (trans. J.M. Rodwell) (1994). "Whatever ye put out at usury to increase it with the substance of others shall have no increase from God: but whatever ye shall give in alms, as seeking the face of alms, shall be doubled to you." *Id.* "O believers! Fear God and abandon your remaining usury, if ye are indeed believers." *Id.* at 30. "O ye who believe! devour not usury, doubling it again and again and again! But fear God, that ye may prosper." *Id.*

288. Islamic Banking, supra note 283, at 1.

289. RICHARD DOUTHWAITE, SHORT CIRCUIT: STRENGTHENING LOCAL ECONOMIES FOR AN UNSTABLE WORLD, http://www.feasta.org/documents/shortcircuit/index.html?sc4/wsep.html (n.d.) (last visited Mar. 20, 2006) [hereinafter SHORT CIRCUIT].

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* (citing MAHMUD AHMAD, TOWARDS INTEREST-FREE BANKING (2000)). "[N]ot a single Muslim country . . . is running its financial institutions without resorting to interest. The fact is that no one knows how to do it and when political pressure mounts, they can only resort to some kind of subterfuge." *Id.*

294. *Id.*

ventures possible, but they would lead to greater economic stability. Under such a system, participants would technically be debt-free.[295] During periods of economic decline, profit shares would decline equally for everyone, and no one would be left with onerous interest payments.[296]

Rather than charging and paying interest, traditional Islamic banking systems are based either on the sharing of profit and loss or the charging of a pre-arranged fee.[297] Of the former group, the two most relevant for possible microcredit application are *mudaraba*, or trustee financing, and *musharaka*, or equity participation.[298] Of the latter group, *murabaha*, or cost plus markup, is the most relevant.[299] The main difference between the two categories is that for trustee financing and equity participation, the return is variable and is calculated at the end of the loan period, or for longer loans, at fixed periods.[300] In none of these situations may a contract be negotiated to provide a fixed rate of return.[301]

1. Mudaraba

Under *mudaraba*, or trustee financing, as it shall be called for the remainder of this Note, each partner agrees to a fixed share of the profits based on a contractual agreement.[302] Neither the gross nor the net returns may be predetermined.[303] Losses must be shared equally by all partners.[304] A modern application of trustee financing emends the traditional arrangement by allowing the ratio of return to be negotiated between the partners at the outset of the venture.[305] The risk of financial loss is assumed completely by the financial backer, usually a bank.[306] Borrower liability is limited to the entrepreneur's lost time and effort, unless the bank can show negligence or malfeasance on the part of the borrower.[307] Proponents of this system indicate that under such an

---

295. *Id.*

296. *Id.* In an American context, perhaps such lending practices might have led bankers during the Great Depression to commiserate with dustbowl farmers rather than foreclose their mortgages.

297. SHAIKH MAHMUD AHMAD, MAN AND MONEY: TOWARDS AN ALTERNATIVE BASIS OF CREDIT 432 (2002).

298. *Islamic Banking*, *supra* note 283, at 3.

299. *See, e.g.*, JONES, *supra* note 1, at 36 (noting that some U.S. microlenders protect themselves against borrower bankruptcy by retaining a security interest in borrowers' capital purchases).

300. *Islamic Banking*, *supra* note 283, at 5.

301. *Id.*

302. *Instruments of Islamic Investments: Mudaraba*, *available at* http://www.altawfeek.com/res1c11.htm (n.d.) (last visited Mar. 20, 2006) [hereinafter *Instruments*].

303. *Islamic Banking*, *supra* note 283, at 3.

304. *Id. See also Instruments*, *supra* note 302.

305. *Islamic Banking*, *supra* note 283, at 3.

306. *Instruments*, *supra* note 302.

307. *Islamic Banking*, *supra* note 283, at 8.

arrangement, with financial risk completely on the lender, banks would be more circumspect in their lending practices, thus eliminating the need to charge interest.[308]

This does not sound like the kind of argument that would win over many converts in the banking industry, but it is applicable to microlending. Unlike Islamic banking, where there is an outright ban on interest regardless of amount, microlenders could assume part of the loan risk through trustee financing. In exchange for part of the profit of the microentrepreneur's business, the microlender can reduce the interest it charges to the microentrepreneur. As the microentrepreneur returns for further loans, the interest rate can be raised or lowered according to the health of their repayment history. The lower the risk of default, the more burden of risk the lender should be able to shoulder.[309]

The trustee financing model is not without its disadvantages. Chief among them is the uncertainty of profit and the subsequent difficulty of calculating share returns.[310] Under this type of contract arrangement, the lender and borrower are partners. At first, the lender controls all the shares and is entitled to 100% of the profits.[311] As each loan installment is repaid, the borrower buys control of shares, simultaneously increasing his share and decreasing the lender's share of the profits.[312] This continues until the borrower controls 100% of the profits. At this point, the loan is paid in full.[313]

The repayment system is complex enough without taking market fluctuations into consideration. The situation is further complicated by the fact that, at least in a microcredit context, borrowers may not keep accurate and detailed records.[314] Dealing with profit share payment under trustee financing might also pose a problem for people with no exposure to Islamic banking practices. In fact, "the acceptability of [this] model depends rather heavily on whether such an agreement is in accordance with Islamic banking principles."[315] One might argue that, since an important component of microcredit is the training and support that accompanies it, borrowers can be trained to work effectively with bookkeeping for purposes of profit share calculation.[316] This, however, leads to the question of where the microlender case workers will get their training. "The margin for error is considerable given that a single loan officer often manages 100-200 borrowers."[317]

---

308. SHORT CIRCUIT, *supra* note 289.

309. *Cf. Grameen II*, *supra* note 72 (discussing the "flexible loan" repayment program whereby lowered risk of default allows rescheduling of debt).

310. *Islamic Banking*, *supra* note 283, at 8.

311. *See* Appendix, tables 5 & 6.

312. *Islamic Banking*, *supra* note 283, at 8.

313. *Id.*

314. *Id.* at 10.

315. *Id.*

316. CLARK, *supra* note 109, at 69-70.

317. *Islamic Banking*, *supra* note 283, at 10. Since the current clientele of U.S.

3. *Murabaha*

Under *murabaha*, or cost plus markup, the lender actually purchases the capital goods the borrower needs and would have otherwise borrowed money to purchase.[318] The borrower repays the lender the price of the goods plus an additional fee to cover administrative costs.[319] Cost plus markup is one of the most common forms of Islamic banking practice.[320] It is used to obtain machinery, raw materials, and finished goods.[321] Loan repayment under this system is easier to grasp and, subsequently, easier to predict. Something similar to cost plus markup is already practiced in the United States. As a means to protect against borrower bankruptcy, microlenders will sometimes take a security interest in goods purchased with the loan money.[322] While this approximates a *murabaha* arrangement, it is technically different because there is no corresponding markup on the capital goods.[323]

Cost plus markup seems more conducive to Grameen banking, as well. A Yemeni microfinance program started in 1997 grew within two years to an active membership of 1,000, with $150,000 in loans outstanding and a turnaround of one week.[324] The clients were "entrepreneurial poor in urban slum districts."[325] The program adopted the Grameen II innovations of loan insurance and increasingly larger loans.[326] Unlike the Bangladeshi model, only thirty percent of the Yemeni participants were women.[327]

Because the markup is predetermined, this type of loan contract typically costs the borrower less.[328] Of course, under a trustee financing arrangement, the borrower could stand to earn a greater absolute amount of money, but there is no guarantee. Also, some prefer the markup system because of its inherent transparency.[329] In fact, it is easier to enforce because the lender owns the goods until the final installment is paid,[330] in a sort of lending layaway. Trustee

---

microlenders is significantly lower than in places such as Bangladesh, this concern is not as great yet it remains valid. *Id.*

318. *Id.* at 10.

319. *Id.* at 11.

320. *Instruments of Islamic Investments: Murabaha Sale, available at* http://www.altawfeek.com/res1c1b.htm (n.d.) (last visited Mar. 20, 2006) [hereinafter *Islamic Investments*].

321. *Id.*

322. JONES, *supra* note 1, at 36.

323. *Id.* (not mentioning any surcharge made to the borrower for the lender's security interest). It would seem that, rather than turn a profit, a U.S. microlender would experience a loss in depreciation were it to claim its security share. *See id.* This loss could be aggravated by an inability to resell the item and subsequent storage charges, at which point such an arrangement may prove inefficient. *See id.*

324. *Islamic Banking*, *supra* note 283, at 11.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 12.

329. *Id.*

330. *Id.*

financing is more difficult to police. Due to its complexity and unpredictability, honest error, negligence, or malfeasance may go undetected.[331] However, it retains the advantage of all parties sharing in the profits, and in some respects, the losses, equally.[332] These tradeoffs are important to keep in mind. Although writing about Islamic banking in particular, Dhumale and Sapcanin make a point applicable to all forms of financing when they write that program must account "for the . . . risks of a particular methodology not only to the program but also to borrowers."[333]

A. *Application of Equity Lending in the United States*

To a very limited extent, equity microlending already exists in the United States.[334] One example is the Philadelphia Development Partnership, which offers zero-interest loans to Muslim microentrepreneurs based on tenets of Islamic banking.[335] It is important to keep in mind that even though hypothetical microloans can be disbursed using Islamic banking theory, loans to non-Muslims need not be zero-interest. In exchange for a limited share of the microentrepreneur's profits, the lender could offer a reduced interest rate that would both ease the burden of repayment and give the lender a more vested interest in the entrepreneur's success. Any lender profit realized from the transaction could be funneled into technical assistance generally, or into specific health or rainy-day accounts for the particular entrepreneur.[336]

B. *Challenges to Wider Adoption of Equity Microlending in the United States*

The three main challenges to the wider adoption of equity microlending in the United States are anti-Islamic sentiment,[337] the complexity of the equity microlending,[338] and, in a broader sense, the negative scrutiny placed on those who even this "softer" version of microenterprise cannot help.[339] The first obstacle seems hardly worth mentioning but, considering the current wars in Afghanistan and Iraq, the topic should be addressed, however briefly. Microlenders, one would hope, are socially conscious humanitarians who place the welfare of their clients above any prejudices they may harbor. As for the

---

331. *Id.* at 4.
332. *Id.* at 3.
333. *Id.*
334. JONES, *supra* note 1, at 66.
335. *Id.*
336. *See, e.g.*, Clark, *supra* note 109, at 69. The supposition that profits may be used for these collateral goals, of course, assumes that a microlender would have sufficient funding or successful borrowers to both offset the losses of failed microenterprises and to absorb the costs of a health care plan.
337. Ubaid, *supra* note 17.
338. *See generally Islamic Banking*, *supra* note 283.
339. *See, e.g.*, Jones, *supra* note 170.

microentrepreneurs, their main concern would most likely be successfully starting their businesses and rising from poverty.[340]

The second challenge, however, is much more daunting. As shown above, Islamic banking models are highly complex and counterintuitive to people who are accustomed to operating under interest-driven finance. In fact, the charts in the appendix depicting the distribution of borrower and lender profits are artificially simplified with a fixed periodic profit of $1,000 to demonstrate the basic mechanism of profit sharing.[341] However, it should be kept in mind that microcredit is much more complicated and labor intensive than conventional banking; "groups must think seriously about commitment and be prepared for the long haul because microenterprises are expensive to operate and involve a large time commitment for practitioners."[342] In her legal guide to microenterprise, Jones details a number of planning issues that practitioners have identified as important to consider.[343] One such recommendation is a call for greater transparency in reporting:

> If a bank services the microloans, it is important for the bank and the microenterprise program staff to maintain close communication. Negotiate with the bank for timely reports on borrowers' payments. These reports should be weekly or biweekly; monthly reports are insufficient because they allow for extended unsupervised periods of default. The microenterprise programs need to know immediately if borrowers are having trouble making loan payments. [344]

For the program experimenting with equity microlending, the suggestion to maintain transparency becomes paramount. Not only must borrowers be aware of non-standard financial arrangements, the financial institutions that back the loans must be even more aware. In this regard, equity microlending may be a viable option for only those microlenders who maintain complete control of their financial resources.[345]

Finally, if equity lending has the positive benefit of opening microenterprise possibilities for a wider array of poor entrepreneurs, it might also have the unintended effect of bringing increased negative scrutiny to those persons who are unable to participate in microenterprise projects. Numerous factors, such as environmental, social, and psychological, have a bearing on an individual's ability to rise from poverty.[346] "There are as many routes out of

340. *See*, e.g., *WSEP*, *supra* 186.

341. *See* Appendix, tables 5 & 6; *Islamic Banking*, *supra* note 283, at 9.

342. JONES, *supra* note 1, at 39-40.

343. *Id.* at 42.

344. *Id.*

345. *See, e.g.*, Eaton, *supra* note 139, at B1 ("Accion New York . . . has had the most trouble with its loans to taxi and livery drivers because they move around so much . . . .").

346. CLARK, *supra* note 109, at 15.

poverty as there are into poverty."[347] In her address before the microcredit summit, Hillary Clinton observed that "[i]t is the individual human being willing to work hard who will be given the opportunity if that person takes responsibility to seek and find a better life for themselves [sic]."[348] The language of choice and responsibility of this quotation suggests that a person unable to work hard might be viewed as unwilling to work hard, and a moral stigma attaches to those who cannot benefit from microcredit.[349] In considering adaptations and improvements to the application of microcredit in the United States, it is important to keep in mind the admonition that is often repeated in the international context: "The United States and other donor nations should not place unrealistic conditions on their support for those who work micromiracles. Nor should they use this program as a substitute for other more basic ways of helping the poorest of the poor."[350]

IV. CONCLUSION

Since its creation in the 1970s, microcredit has demonstrated both its simplicity and effectiveness. Banking on a person's potential rather than her credit or collateral has helped countless families worldwide to break free of poverty. Microcredit has also been successful in the United States; however, the transfer from the developing nation and agrarian village society to a highly regulated urban America has not been as smooth as microcredit proponents had originally envisaged. Still, the fundamental concepts of microcredit have proven highly adaptable in the new context. Central to microcredit's success in the United States is the desire of microlenders and microentrepreneurs to see the system succeed. It is a moral force that transcends simple banking.

The goal of this Note is to suggest a further adaptation of the Grameen microcredit model. By incorporating elements of Islamic banking, specifically, techniques which would allow microlender to move away from dependence on high interest rates, the lenders could either offer lower rates to microentrepreneurs to cushion their introduction to self-employment or they could funnel the money into accounts which could provide health insurance or emergency funds for their borrowers.

The problems associated with such a project might make it impractical on a wide scale. The largest obstacle is the complexity and alien nature of interest-free banking. It is an experiment for only the most dedicated and dauntless

347. *Id.* (quoting Robert E. Friedman, Microenterprise as an Asset Building Strategy Among the Poor, Presentation at a Ford Foundation Conference at New York University (December 10-12, 1998)).

348. Clinton, *supra* note 112.

349. For example, the popular title of Pub. L. No. 104-193, *i.e.*, Personal Responsibility & Work Opportunity Reconciliation Act of 1996, suggests the morally stigmatic dimension of individual welfare programs.

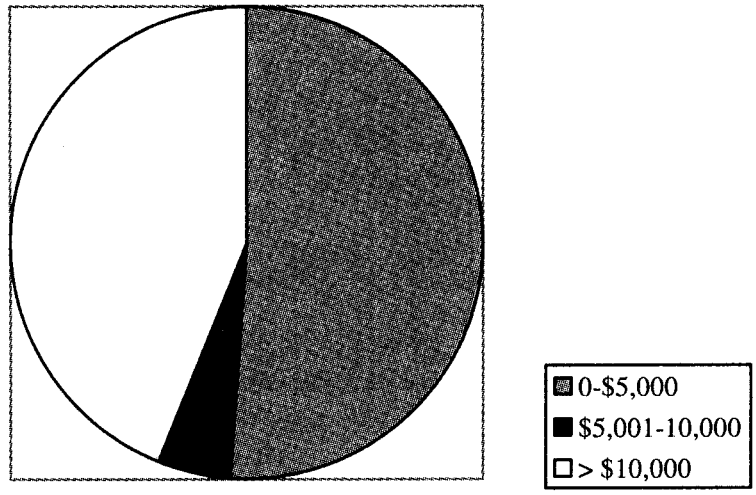
350. *Microcredit's Limits*, *supra* note 4, at 8.

microlenders to undertake. However, it does provide an opportunity for microlenders to expand and shore up their clientele in certain key areas.

Finally, it is important to bear in mind that for all its potential, microcredit is not a silver bullet to end poverty in the United States. That being said, it should also be remembered that microcredit is an option for only a fraction of the nation's poor people. Those who cannot be helped by microcredit must not be blamed for the limitations of the program.

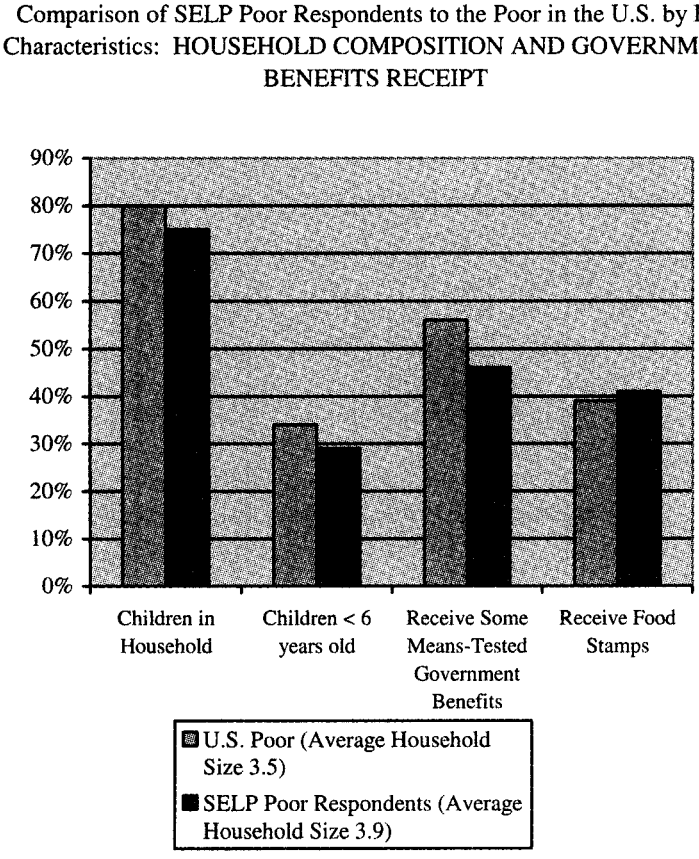
Appendix

Table 1. Household Assets of Low-Income Microentrepreneurs



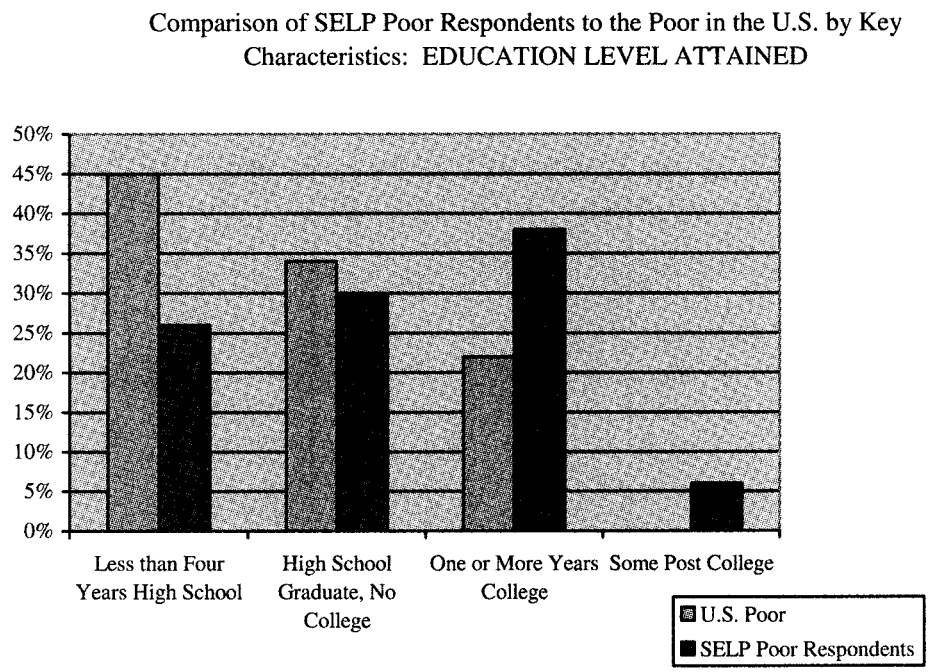
Source: PEGGY CLARK ET AL., MICROENTERPRISE AND THE POOR: FINDINGS FROM THE SELF-EMPLOYMENT LEARNING PROJECT, FIVE YEAR STUDY OF MICROENTREPRENEURS 21 (1999).

Table 2. Comparison of SELP Poor Respondents to the Poor in the U.S. by Key Characteristic: Household Composition and Government Benefits Receipt



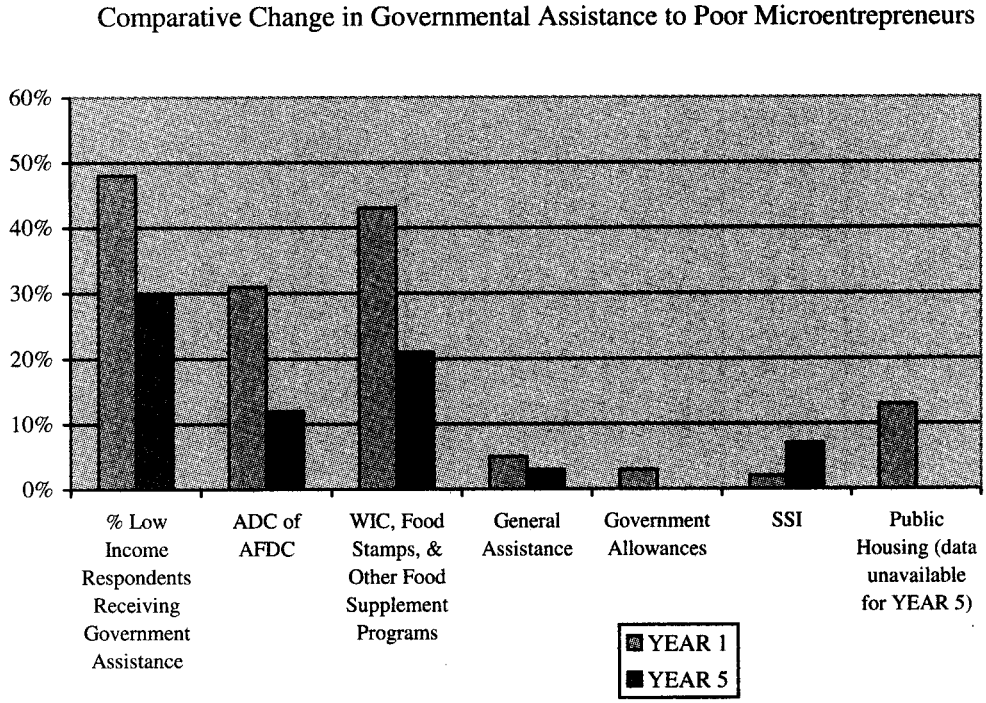
Source: PEGGY CLARK ET AL., MICROENTERPRISE AND THE POOR: FINDINGS FROM THE SELF-EMPLOYMENT LEARNING PROJECT, FIVE YEAR STUDY OF MICROENTREPRENEURS 14 (1999).

Table 3. Comparison of SELP Poor Respondents to the Poor in the U.S. by Key Characteristic: Education Level Attained



Source: PEGGY CLARK ET AL., MICROENTERPRISE AND THE POOR: FINDINGS FROM THE SELF-EMPLOYMENT LEARNING PROJECT, FIVE YEAR STUDY OF MICROENTREPRENEURS 14 (1999).

Table 4. Comparative Change in Governmental Assistance to Poor Microentrepreneurs



Source: Peggy Clark et al., Microenterprise and the Poor: Findings from the Self-Employment Learning Project, Five Year Study of Microentrepreneurs 37 (1999).

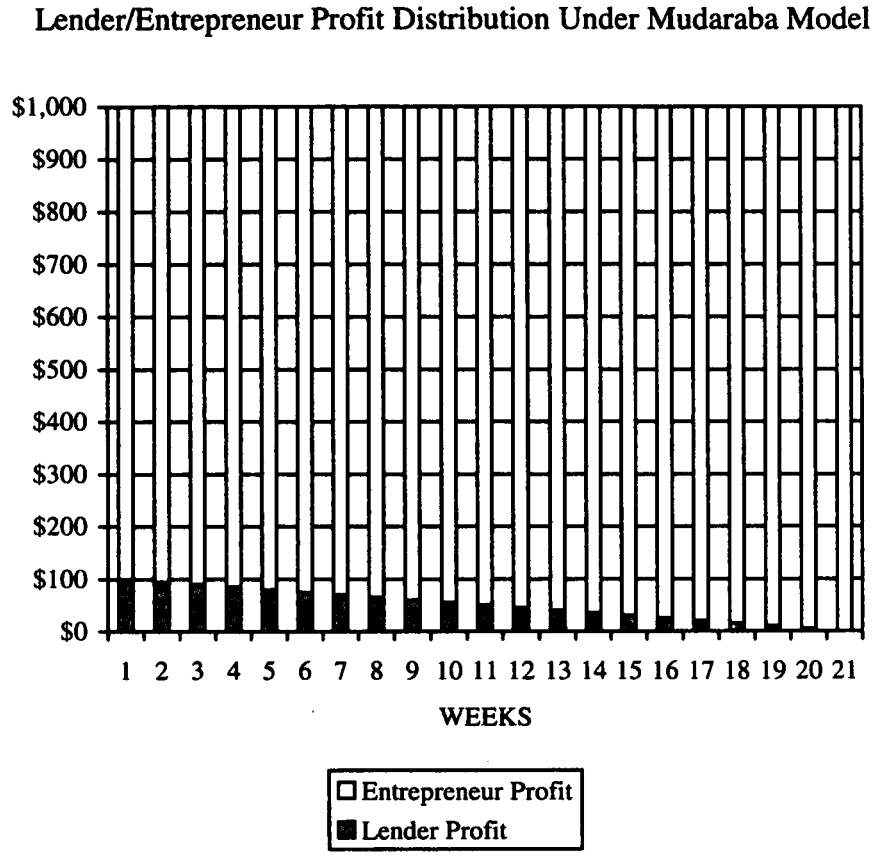
Table 5. Lender and Entrepreneur Profits under a Mudaraba Model

(Full profits go to entrepreneur at the twenty-first week).
(Profit artificially fixed at $1,000 per week for sake of example).

Week	*Profit to be shared*	*Lender Income*	*Entrepreneur Income*
1	20/20 × $1,000	$1,000 × 10% = $100	$1,000 × 90% = $900
2	19/20 × $1,000	$950 × 10% = $95	$1,000 × 90% = $905
3	18/20 × $1,000	$900 × 10% = $90	$1,000 × 90% = $910
4	17/20 × $1,000	$850 × 10% = $85	$1,000 × 90% = $915
5	16/20 × $1,000	$800 × 10% = $80	$1,000 × 90% = $920
6	15/20 × $1,000	$750 × 10% = $75	$1,000 × 90% = $925
7	14/20 × $1,000	$700 × 10% = $70	$1,000 × 90% = $930
8	13/20 × $1,000	$650 × 10% = $65	$1,000 × 90% = $935
9	12/20 × $1,000	$600 × 10% = $60	$1,000 × 90% = $940
10	11/20 × $1,000	$550 × 10% = $55	$1,000 × 90% = $945
11	10/20 × $1,000	$500 × 10% = $50	$1,000 × 90% = $950
12	9/20 × $1,000	$450 × 10% = $45	$1,000 × 90% = $955
13	8/20 × $1,000	$400 × 10% = $40	$1,000 × 90% = $960
14	7/20 × $1,000	$350 × 10% = $35	$1,000 × 90% = $965
15	6/20 × $1,000	$300 × 10% = $30	$1,000 × 90% = $970
16	5/20 × $1,000	$250 × 10% = $25	$1,000 × 90% = $975
17	4/20 × $1,000	$200 × 10% = $20	$1,000 × 90% = $980
18	3/20 × $1,000	$150 × 10% = $15	$1,000 × 90% = $985
19	2/20 × $1,000	$100 × 10% = $10	$1,000 × 90% = $990
20	1/20 × $1,000	$50 × 10% = $5	$1,000 × 90% = $995
Total		$1,050	$18,950

Source: Rahul Dhumale & Amela Sapcanin, An Application of Islamic Banking Principles to Microfinance at 9, U.N. Doc. 23073 (Dec. 1999).

Table 6. Lender and Entrepreneur Profit Distribution under a Mudaraba Model



Source: Data taken from Table 5.