

THE INTRODUCTION OF JURY TRIALS AND ADVERSARIAL ELEMENTS INTO THE FORMER SOVIET UNION AND OTHER INQUISITORIAL COUNTRIES

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I. INTRODUCTION

Several years ago when I was teaching a course on Comparative Criminal Procedure in our summer program at the University of Geneva,² a Swiss professor remarked about America's interest in exporting her criminal justice system. Although unspoken, it was apparent that the professor had great confidence in, and a preference for, the inquisitorial system as it exists in the Canton of Geneva and most of Europe.³ I thought of his words often when, a year later, I was sent by our Department of Justice and the American Bar Association on a three-month mission to Ukraine and Russia to work with their governments on criminal justice reform.

It is difficult to overstate the importance of the work being done by the American Bar Association's Central and East European Law Initiative and the United States Department of Justice. These organizations are making an invaluable contribution to the establishment of the rule of law in Russia and the other newly independent states of Eastern Europe.⁴ I was privileged to have had the opportunity to participate in this endeavor and hope that I was able to, in some small way, contribute to its success. During this time I was continually impressed by the sensitivity of those involved in the project to the history, culture, and legal traditions of the countries of the former Soviet Union and their knowledge and understanding of the inquisitorial system of criminal justice.

The establishment of the rule of law is of paramount importance to the process of democratization. The acceptance of the precept that there is an independent body of law, and no one is above the law, is essential to the establishment of a government of and by the people. Only when presidents, kings, queens, and other rulers are subject to a higher law, can communism, fascism, and other dictatorships be eliminated and democracy prosper. If democracy is to be established in the countries of the former

2. *See id.*

3. As is evident from the discussion in Part II of this article, the inquisitorial system is quite different in theory and practice from our adversarial system of criminal justice. For purposes of contrasting the two systems in this article, the author will use the terms "inquisitorial system" and "adversarial system." While the latter is also occasionally referred to as the "accusatorial system," see, e.g., Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1213 (1989), it would appear that, as the words are defined, the terms "inquisitorial" and "adversarial" more accurately reflect the differences between the two systems.

4. These countries are hereinafter referred to as the "Newly Independent States" or "NIS countries."

Soviet Union and if those countries are to succeed economically, there must be a commitment to the rule of law.

It must then be determined what procedures will be put in place to establish the rule of law. This is particularly important in the area of criminal procedure. As was noted by the Swiss professor, the inquisitorial system is a fine system of criminal justice that has served well in democracies throughout the world, including nations such as France, Germany, and Switzerland. Although it is much different from our system, the inquisitorial system has won the respect and confidence of the citizens of these countries. We here in the United States, for good reason, tend to favor our adversarial system of criminal justice and, as the Swiss professor also noted, would like to see it adopted in other parts of the world. Although Russia did have some experience with jury trials at the end of the imperial rule of the czars, the criminal procedures of the countries of the former Soviet Union are generally similar to the procedures of other European countries and are inquisitorial in nature.⁵ With the exception of some

5. The recent developments in the former Soviet Union, including the reintroduction of jury trials, have led to a large number of books, articles, and news reports about the criminal justice system in that area. See, e.g., STEPHEN HANDELMAN, *COMRADE CRIMINAL* (1995); ROBERT RAND, *COMRADE LAWYER* (1991); Girish N. Bhat, *The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era*, 15 L. & HIST. REV. 77 (1997); Scott P. Boylan, *Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution*, 4 U.C. DAVIS J. INT'L L. & POL'Y 103 (1998) [hereinafter Boylan I]; Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999 (1996); Scott P. Boylan, *The Status of Judicial Reform in Russia*, 13 AM. U. INT'L L. REV. 1327 (1998) [hereinafter Boylan II]; Scott P. Boylan & Catherine L. Newcombe, *Parliamentary Immunity: A Comparison Between Established Democracies and Russia A Crisis of Democratic Legitimacy for Russia*, 3 J. INT'L LEGAL STUD. 205 (1997); Gary S. Gildin, *Trial by Jury in the New Russia: A Travelogue*, 15 DICK. J. INT'L L. 151 (1996); Sergei Pashin, *New Opportunities for Development of Russia's Judicial System*, CONSTITUTIONAL LAW: EASTERN EUROPEAN REVIEW, no. 2 (19) (1997); Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1 (1996); Steven R. Plotkin, *The Jury Trial in Russia*, 2 TUL. J. INT'L & COMP. L. 1 (1994); *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1 (2000) [hereinafter *Symposium*]; Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995); Vasily A. Vlasihin, *Towards a Bill of Rights for Russia: Progress and Roadblocks*, 17 NOVA L. REV. 1201 (1993); Richard T. Andrias, *Jury Trials, Russian Style*, 11 CRIM. JUST. 14 (1996); Justin Burke, *An Independent Judiciary and Jury Trials Are Needed*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 1992, at 13 [hereinafter Burke I]; Justin Burke, *Crumbling Courtrooms Add to System Woes*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 1992, at 12 [hereinafter Burke II]; Justin Burke, *In Russia, Jury Still Out on Trial by Jury*, CHRISTIAN SCIENCE MONITOR, Jun. 14, 1993, at 12 [hereinafter Burke III]; Carey Goldberg, *Mock Trial Gives Russia a Taste of the Jury System*, L.A. TIMES, Apr. 30, 1992, at A6; Marshall Ingwerson, *Russia's Juries Give Police an O.J.-style Rap*, CHRISTIAN SCIENCE MONITOR, Apr. 23, 1996, at 1, 7; Joseph M. Jones, "Too Rough to Go Slow," *Criminal Law Reform in Eastern Europe and the Former Soviet Union*, 9 CRIM. JUST. 26 (1994); Valeriy Rudnev,

Communist hardliners, everyone is in agreement that the criminal procedures of the Soviet era must be changed. The question for these countries then becomes whether it would be best to adhere to the inquisitorial system, change to the adversarial system, or develop a hybrid procedure.

Developments of the past few years have made it clear that Russia and the Newly Independent States will not be adopting, *in toto*, the adversarial system found in the United States. Consistent with their history and legal traditions, these countries will continue to base their criminal justice system on the inquisitorial model. However, on their own initiative, and at the suggestion of representatives from common law countries, the countries of the former Soviet Union are adopting and incorporating elements found in the criminal justice systems of adversarial countries such as the United States. This grafting of adversarial elements onto an inquisitorial system raises interesting questions and issues.

Some might argue that, in order to be effective, the adversarial system must be adopted as a whole. They could suggest that the adversarial model and trial by jury can only function properly where rules of evidence, direct and cross-examination by counsel, the possibility of a mistrial, finality of acquittal, and all of the other procedural rules and safeguards of the adversarial system are put into effect. Others will take the position that even though the basic inquisitorial structure is retained, elements of the adversarial system can be introduced into the criminal justice systems of Russia, the Newly Independent States, and other inquisitorial countries throughout the world. They would, no doubt, point to the apparent success of jury trials in Russia from 1864 to 1917 and the Russian jury trials that have been taking place since 1993.

The fact remains that adversarial elements are being introduced into the criminal justice systems of the former Soviet Union. In addition to advancing progress toward the rule of law, these developments constitute a fascinating experiment as to

Trial by Jury is Returning to Russia, IZVESTIYA, Nov. 26, 1992, at 3; *Soviet of Nationalities Rejects Draft Law on Nationwide Trial by Jury*, BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS, May 15, 1993, LEXIS, Nexis Library, BBC File (original source - ITAR-TASS NEWS AGENCY, Moscow) [hereinafter BBC]; Deborah Stead, *The Jury is Back*, L.A. TIMES MAGAZINE, Apr. 24, 1994, at 24; Alexander S. Vesselinovitch, *Criminal Trial, Russian Style: An American in Moscow*, 10 CRIM. JUST. 13 (1995).

whether a hybrid system can succeed and, if so, what adversarial elements can be accommodated in an inquisitorial system.⁶

The success or failure of these experiments in the former Soviet Union and elsewhere will depend on a number of factors, some of which are not directly related to the criminal justice system. We can evaluate the probability of successfully incorporating adversarial elements into a particular inquisitorial system only if we fully comprehend and consider these factors. In doing so we can also avoid the appearance of being ethnocentric and myopic, traits too often attributed to Americans operating in foreign cultures. The purpose of this article is to identify and explore some of these factors that will influence the success or failure of these experiments. Developments in the countries of the former Soviet Union provide excellent examples and will serve as the primary basis for this discussion. However, our intent is to explore issues and problems arising from the introduction of adversarial elements into an inquisitorial system, not only in the former Soviet Union, but in other countries as well.

II. THE INQUISITORIAL SYSTEM

A. Generally

Although it is one of the major, if not the major, criminal justice systems in the world, few Americans are acquainted with the inquisitorial system. All of our history and experience deals with the adversarial system, and we are, by virtue of our Constitution, history, and culture, inextricably wedded to those procedures. Nevertheless, at least some familiarity with the inquisitorial system is necessary to understand the issues that arise when adversarial elements are introduced into the inquisitorial process.⁷ One must be cautious in generalizing about

6. Russia's present system, although incorporating jury trials and other adversarial elements, remains primarily inquisitorial in nature. Boylan I, *supra* note 5, at 109-10; Boylan II, *supra* note 5, at 1331-32. The procedures in effect during the period of jury trials at the end of the rule of the czars were also a mixed system. Bhat, *supra* note 5, at 93-94. Historically, jury trials have also existed in France and Germany. *Id.* at 83; Thaman, *supra* note 5, at 65 n.19. Today other countries, in and out of Eastern Europe, are experimenting with systems that incorporate components of both inquisitorial and adversarial systems. Boylan I, *supra* note 5, at 109-10.

7. A number of excellent books and articles have been written about the inquisitorial system and its criminal justice process. *See, e.g.*, CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* (2d ed. 1996); RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (3d ed. 1985); *THE FRENCH CODE OF CRIMINAL PROCEDURE* (Gerald L. Kock & Richard S. Frase trans., rev. Fred B. Rothman & Co. 1988) (1964); BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE* (1987); JOHN H.

the inquisitorial system. Just as adversarial systems vary from country to country, there are also substantial differences among inquisitorial countries.⁸ There has even been some suggestion that the two systems are moving closer together.⁹ However, the inquisitorial system and the adversarial system remain two very different systems, both in theory and in practice.

The inquisitorial system, as the name implies, is in the nature of an inquiry, while the adversarial system is essentially a contest.¹⁰ In our system each party is represented by an attorney and, in accordance with established procedures, these attorneys engage in a battle before an impartial arbiter, the judge or the jury.¹¹ It is the attorneys who control and conduct most of the trial. The judge is, for the most part, passive and usually becomes involved only to instruct the jury or to rule on evidentiary matters, motions, or other legal issues. The jury, once selected, is totally passive. As with other contests, such as football games, cricket matches, or even pool, a large number of procedural rules are necessary to ensure that the contest will be well-run and fair to all sides.¹² As with other contests, fairness can be achieved only if the lawyers representing the respective parties are of equal ability and have equal resources. The inquiry in the inquisitorial system is, in virtually all respects, controlled and conducted by an impartial judge. The judge is quite active, and it is the lawyers who have a more passive role. Witnesses are called by the court, and the judges determine the order of trial and conduct most of the examinations.¹³ If experts are needed, it is the judge who designates and initially examines the expert.¹⁴ The proceedings

LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* (Christine Van den Wyngaert et al. eds., 1993) [hereinafter *CRIMINAL PROCEDURE SYSTEMS*]; *THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY* (Edward M. Wise ed. & Joseph J. Darby trans., Fred B. Rothman & Co. 1987); Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990) [hereinafter Frase]; Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995) [hereinafter Frase & Weigend].

8. See generally *CRIMINAL PROCEDURE SYSTEMS*, *supra* note 7.

9. See generally INGRAHAM, *supra* note 7, at 30-32; Bradley, *supra* note 7, at 219-20.

10. LANGBEIN, *supra* note 7, at 58.

11. *Id.* (noting that one author has contrasted the "fight theory" of the adversarial system with the "truth theory" of the non-adversarial systems).

12. INGRAHAM, *supra* note 7, at 26.

13. *Id.* at 27-30. LANGBEIN, *supra* note 7, at 13-32, 38; Frase & Weigend, *supra* note 7, at 342-44.

14. LANGBEIN, *supra* note 7, at 75-76.

are conducted in a fact-finding, less formal, and less confrontational manner. This form of dispute resolution requires fewer rules and is much less dependent on the establishment of procedural guidelines.

The theoretical history of the two systems is revealing. The historical basis of the adversarial system has been traced to ancient situations where the head of the clan was called upon to resolve the differences among its members. The parties would come before the impartial chieftain who would remain passive during the proceedings. One party would then accuse the other of wrongdoing and they would engage in a dispute before the arbiter, making arguments and possibly calling witnesses. At the conclusion of the proceedings, the chieftain would issue the decision.¹⁵ The origins of the inquisitorial system have been attributed to inquiries conducted by clerics into alleged wrongdoing, proceedings in which the arbiters initiated the investigation and remained in control of the trial. In these proceedings, the clerics called witnesses, conducted the questioning, and ultimately decided the issue.¹⁶ The name “inquisitorial system” conjures up images of the inquisition; but in its present form, it is an excellent system viewed by some American scholars and others as being superior to the adversarial system.¹⁷ One author, noting the coaching of favorable witnesses, intimidation of others on cross-examination, and similar practices prevalent in the adversarial system, has articulated as procedural models the “fight theory” of the adversarial system versus the “truth theory” of the inquisitorial system.¹⁸ The debate as to the relative merits of the two systems will be left to others. However, it is immediately apparent that the adversarial system and the inquisitorial system are much different systems that are, at least in some ways, polar opposites. The inquisitorial process continues to be a fact-finding endeavor in the form of an inquiry that, by its nature, requires few procedural rules. The emphasis is on substance rather than procedure.¹⁹ The adversarial system, on the other hand, remains a contest requiring strict compliance

15. INGRAHAM, *supra* note 7, at 25-27.

16. *See id.* at 27-30.

17. LANGBEIN, *supra* note 7, at 58, 147-51 and authorities cited therein. *Contra* Boylan II, *supra* note 5, at 1331 n.29 and accompanying text.

18. LANGBEIN, *supra* note 7, at 58 (quoting JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949)).

19. INGRAHAM, *supra* note 7, at 29.

with a large body of evidentiary and procedural rules, rules that are necessary to ensure the fairness of the proceedings.²⁰

B. Specific Aspects of the Inquisitorial System

Inquisitorial systems vary from country to country, and it is difficult to generalize about their procedures. Nonetheless, most, if not all, embody the following elements that are quite different from those encountered in adversarial jurisdictions:

1. Reliance on Code Provisions Rather than Case Precedent

Unlike common law systems that rely on case law, inquisitorial systems were historically generally code-based. We, in our common law adversarial system, frequently refer to prior cases and case precedents are of great importance. Our libraries and databases are filled with cases from all over the United States that we research and cite to with regularity. In the code countries of the inquisitorial system, decisions were made on a case-by-case basis solely by reference to and interpretation of the applicable code provisions or similar legislative materials.²¹ Court decisions generally did not create precedent.²² The next court that faced a similar issue would again refer only to the legislative materials and reach an independent judgment without direct reference to the courts' decisions in prior cases.²³ It has been noted that, in the past, a judicial official in a code country needed only a copy of the code and a very modest library in order to draft decisions at home.²⁴ Legislatures were viewed as having the prerogative to create law by the enactment of codes and statutes, and it was the judge's function to interpret those provisions and apply them to the case before the court.²⁵ The court's decision had no precedential value. This may seem strange or even inconceivable to common law lawyers who have been trained under the case method, have spent their careers

20. *See id.* at 26.

21. *See, e.g.,* DADOMO & FARRAN, *supra* note 7, at 24-28, 41-43; Bradley, *supra* note 7, at 175, 219.

22. For example, Article 5 of the French Civil Code expressly prohibits the establishment of precedent by judges. DADOMO & FARRAN, *supra* note 7, at 41. *See also* INGRAHAM, *supra* note 7, at 7.

23. DAVID & BRIERLEY, *supra* note 7, at 136-37; Bradley, *supra* note 7, at 175, 219. It should be noted, however, that judges could, in their research, refer to doctrinal works that refer to cases or other compilations of cases. DAVID & BRIERLEY, *supra* note 7, at 133-34.

24. LANGBEIN, *supra* note 7, at 60.

25. DADOMO & FARRAN, *supra* note 7, at 41-42; DAVID & BRIERLEY, *supra* note 7, at 136-37.

researching cases, and are in constant pursuit of “controlling precedent.” By the same token, code country lawyers and judges found it extraordinary that we fill up libraries with volumes and volumes of cases and spend hours researching precedents when we could merely resort to the applicable code provision and use logic to extrapolate the appropriate decision for the particular case at issue. They even viewed the judicial creation of law by the establishment of court precedent to be, at least to some extent, an improper usurpation of a power reserved solely to the legislature.²⁶

The fact that inquisitorial countries were, for the most part, code-based jurisdictions had a number of significant effects. The legal education of lawyers and judges was and continues to be more theoretical than the case method generally employed in the United States.²⁷ As noted above, historically in many countries there was no citation to prior cases. In recent years, in many inquisitorial countries, changes have taken place and there is now, at least to some extent, resort to precedent and citation to prior cases.²⁸ However, it is important to understand and remember this code-based tradition when considering inquisitorial systems, a tradition that, in some situations, continues to the present day. Courts of general jurisdiction still may have no power to declare an act of the legislature, or other actions, unconstitutional. Constitutional issues may be required to be referred to a special constitutional court, and even that court may be limited as to actions it can take and the precedential value of its decisions.²⁹ This is obviously quite different from the common law adversarial system.

2. *Exclusionary Rules*

Consistent with their code system training and experience, inquisitorial judges are not inclined to create broad exclusionary

26. DADOMO & FARRAN, *supra* note 7, at 41-42; DAVID & BRIERLEY, *supra* note 7, at 136-37.

27. See DADOMO & FARRAN, *supra* note 7, at 117-19; THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 7, at xiv (Editor’s Preface); Frase, *supra* note 7, at 561-62 n.90. It should also be noted that judgeships are lifetime careers, and candidates are usually selected to become judges immediately after completing their legal education. DADAMO & FARRAN, *supra* note 7, at 143; DAVID & BRIERLEY, *supra* note 7, at 139-40; LANGBEIN, *supra* note 7, at 59; Frase, *supra* note 7, at 564-67; Frase & Weigend, *supra* note 7, at 320.

28. See, e.g., Bradley, *supra* note 7.

29. DADOMO & FARRAN, *supra* note 7, at 112-13.

rules like those found in the United States.³⁰ In our country, the courts have found it appropriate to exclude evidence from trials based on a wide variety of violations of federal and state constitutional protections and code provisions.³¹ The effect of the exclusionary rule has been further expanded by the “fruit of the poisonous tree” doctrine.³² Exclusion has been deemed to be mandated even in cases where the protection is found in the interpretations of constitutional provisions rather than in the specific language of the Constitution itself.³³

Some inquisitorial countries are more inclined than others to develop exclusionary rules. Where they have been implemented, the rules of exclusion are generally more limited and somewhat different than those found in the United States.³⁴ Suppression of evidence is usually based on a finding that the authorities violated a specific rule set out in a code or constitution, and even then the evidence may not be excluded.³⁵ The granting or denial of exclusion may depend upon a balancing of individual privacy rights against the societal interest in presenting all of the evidence,³⁶ and the “poisonous tree” principle is generally not recognized.³⁷ Perhaps most important, since the cases resulting in suppression may have no precedential value, the decisions may be made on a case by case basis, with the result that there is no development of a coherent doctrine of exclusion.³⁸ While it has been suggested that there has been some movement towards the exclusionary rule in inquisitorial countries,³⁹ the concept, to the

30. LANGBEIN, *supra* note 7, at 68-70; Bradley, *supra* note 7, at 175, 219; Frase, *supra* note 7, at 586-87.

31. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 226-43 (1996).

32. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

33. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (holding that the prophylactic *Miranda* warnings are not rights protected by the Constitution). *But see Dickerson v. United States*, 530 U.S. 428, 440 (2000) (making it clear that the requirement of *Miranda* warnings is a constitutional rule).

34. LANGBEIN, *supra* note 7, at 68-70; Frase, *supra* note 7, at 386-87. See generally Bradley, *supra* note 7, at 203-19. It should be pointed out, however, that in certain cases, exclusionary rules imposed in inquisitorial countries can be broader than the analogous rule in the United States, especially when a remedy is provided to protect privacy guaranteed by a specific constitutional provision. See Bradley, *supra* note 7, at 211-16; Frase & Weigend, *supra* note 7, at 334-35.

35. Bradley, *supra* note 7, at 145; Frase, *supra* note 7, at 586 n.254.

36. Bradley, *supra* note 7, at 211; Frase, *supra* note 7, at 586 n.254; Frase & Weigend, *supra* note 7, at 335-36.

37. Frase, *supra* note 7, at 586 n.254; Frase & Weigend, *supra* note 7, at 337 n.134.

38. DADOMO & FARRAN, *supra* note 7, at 41-43.

39. Bradley, *supra* note 7, at 219-20.

extent that it exists, is much different than ours, and it has not been universally accepted.

3. *Investigatory and Pretrial Procedures*

The investigatory and pretrial procedures in inquisitorial countries vary greatly. As in the United States, the investigation is usually accomplished by the police working in conjunction with the prosecutor's office.⁴⁰ In some countries, the prosecutor is deemed to be, at least in theory, less of an advocate and more of an impartial participant in the investigation and trial.⁴¹ In more serious cases, the investigation of the matter may be referred by the prosecutor to an investigating magistrate. This is a judicial officer who conducts the investigation, interviews witnesses, seeks and obtains other evidence, and ultimately decides whether charges should be brought against the suspect.⁴² During the investigatory process an extensive file or dossier is prepared that contains witness statements, accounts of investigatory actions, and other records pertaining to the case. The suspects are questioned,⁴³ and lawyers and defendants in inquisitorial countries are generally more inclined to cooperate with the investigation and give statements.⁴⁴ There is liberal discovery, and the defense attorney is given access to the documents in the dossier.⁴⁵ Depending on the country and the seriousness of the conduct, the charges may be brought by the prosecutor or a body of judges who serve a function similar to our grand jury.⁴⁶

4. *Absence of Pleas of Guilty and Plea Bargaining*

Traditionally, pleas of guilty and plea bargaining were unknown in inquisitorial countries.⁴⁷ All cases went to trial,

40. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 108-11; Frase & Weigend, *supra* note 7, at 322-23.

41. LANGBEIN, *supra* note 7, at 90-92.

42. In France, for example, this investigating magistrate is known as the *juge d'instruction* and has broad investigative powers. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 110, 125-26; DADOMO & FARRAN, *supra* note 7, at 203-09.

43. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 128-29.

44. See INGRAHAM, *supra* note 7, at 80 (noting, in the context of a discussion regarding the privilege against self-incrimination, that lawyers reared in the civil law tradition are more inclined to participate in the pretrial investigation and provide exculpatory information).

45. Frase, *supra* note 7, at 672; Frase & Weigend, *supra* note 7, at 355.

46. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 126; DADOMO & FARRAN, *supra* note 7, at 210-11; INGRAHAM, *supra* note 7, at 50.

47. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 157 (under German principles of instruction and legality there is no room for plea bargaining in the strict sense); INGRAHAM, *supra* note 7, at 50-51 (the guilty plea as we know it does not exist in the

during which the evidence against the defendant was presented to the court. The judge then reached a verdict and, in the event of conviction, imposed a sentence. Inquisitorial scholars rejected the concept of guilty pleas and were particularly critical of the American practice of taking pleas of guilty to lesser offenses or granting leniency in order to avoid the trouble and expense of a trial.⁴⁸ In recent years there has been a tendency to move to short trials or the reduction of charges that bear similarities to guilty pleas. There is even an acknowledgment that, in complex cases, some defendants may be getting consideration in exchange for shortening the proceedings.⁴⁹ Nonetheless, the aversion to pleas of guilty and plea bargaining continues in inquisitorial countries.⁵⁰

5. *Trials*

The trial of the criminal case in inquisitorial jurisdictions is much different than the trial in adversarial countries, in both theory and practice. As noted above, it is more in the nature of an inquiry than a contest. The trial is conducted by the judge or judges, who may sit alone or with jurors, also known as lay judges.⁵¹ There is no independent jury, and the lay judges sit and deliberate with the professional judges.⁵² This situation creates a

inquisitorial system and all cases must go to trial); Frase, *supra* note 7, at 627 (at least some American scholars take the position that continental countries have effectively avoided the overt form of plea bargaining).

48. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 157 (scholars in Germany are strenuously opposed to strategies that are eroding the prohibition against plea bargaining).

49. *Id.* (informal agreements have developed in Germany to the effect that the client will confess to certain elements and the court will not give a sentence in excess of a certain term); Frase, *supra* note 7, at 626-39 (at least some plea bargain analogues exist in France); *Symposium*, *supra* note 5, at 8-14 (discussing the abbreviated proceedings and other plea bargaining analogies used in Germany, Italy, and France). *But see* INGRAHAM, *supra* note 7, at 51-52 (noting that at least one author argues convincingly that plea bargaining does not underlie the French prosecutors' practice of reducing felonies to misdemeanors); LANGBEIN, *supra* note 7, at 97-98 (taking the position that the German use of the penal order does not constitute plea bargaining); Frase & Weigend, *supra* note 7, at 344-46, 354 (some forms of agreements tantamount to plea bargaining are now being introduced into the German system, but also noting that they are not as significant or abusive as the practices in the United States).

50. *See supra* notes 47-48 and accompanying text.

51. In some courts the professional judge may sit alone, while in others there may be a panel of judges. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 113-14 (France), 142 (Germany), 227-28 (Italy); DADOMO & FARRAN, *supra* note 7, at 73-74 (France); LANGBEIN, *supra* note 7, at 62-63 (Germany); Frase & Weigend, *supra* note 7, at 321-22, 344 (Germany).

52. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 113-14, 126-27 (France), 142 (Germany), 228 (Italy); DADOMO & FARRAN, *supra* note 7, at 73-74 (France); LANGBEIN, *supra* note 7, at 63 (Germany); Frase & Weigend, *supra* note 7, at 321-22, 344 (Germany).

much different dynamic and may give the professional judges more control over the outcome.⁵³

It is the professional judges, not the attorneys, who control the proceedings. The judge determines which witnesses will be called and the order of proof, and it is usually the judge who conducts the initial questioning of the witness.⁵⁴ After the judge has concluded his or her examination, the other parties may examine the witnesses, but the questioning is generally less confrontational and there is no formal direct and cross-examination.⁵⁵ It is also the presiding judge, not the lawyers, who decides whether experts will be necessary and designates the experts who will be called.⁵⁶ Since there is no independent jury and the judge controls the questioning, there are few rules of evidence. Determinations as to whether particular items of evidence will be admitted are generally entrusted to the discretion of the judge.⁵⁷ There is no separate sentencing procedure, and, for the most part, evidence regarding the defendant's work history, family situation, and similar matters is admitted at the trial.⁵⁸ There is also less of a tendency to require live testimony, and witness statements from the dossier and other hearsay evidence may, in some instances, be considered.⁵⁹ Although defendants are not required to testify, in most cases

53. LANGBEIN, *supra* note 7, at 119-41 (discussion of the influence of lay judges in German criminal trials, including studies by other scholars); Frase & Weigend, *supra* note 7, at 344 (noting the influence that the professional judges have on the lay judges in Germany).

54. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 126-27 (France); DADOMO & FARRAN, *supra* note 7, at 212-13 (France); LANGBEIN, *supra* note 7, at 62 (Germany).

55. DADOMO & FARRAN, *supra* note 7, at 212-13 (France); INGRAHAM, *supra* note 7, at 87 (the court examines first and vigorous cross-examination, if there is any, is more likely to be conducted by the court than by the lawyers); LANGBEIN, *supra* note 7, at 13-32 (the account of a German murder trial), 64.

56. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 127 (France), 250-51 (Italy); LANGBEIN, *supra* note 7, at 75-76 (Germany) (but noting that the government may have some influence in this regard).

57. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 147 (in Germany there are, in principle, no rules of evidence); Frase, *supra* note 7, at 677-78 (in France the trial procedures and the evidentiary rules are more relaxed than in the United States).

58. LANGBEIN, *supra* note 7, at 38, 70 (since Continental courts decide sentencing issues simultaneously with issues of guilt, the scope of relevancy is quite broader); *id.* at 13-32 (the account of the German trial); Frase, *supra* note 7, at 680-81 (noting the significance of the absence of a separate sentencing proceeding in French defendants' decision to testify).

59. INGRAHAM, *supra* note 7, at 87 (in the French courts, other than the assize court, judges may rely on evidence in the dossier); Frase, *supra* note 7, at 677 n.704 (in French courts there are few formal rules governing the admissibility of evidence, hearsay and documents are frequently admitted) (citing George W. Pugh, *The Administration of Criminal Justice in France, An Introductory Analysis*, 23 LA. L. REV. 1, 22-24, 26 (1962) (arguing that the court may consider all properly acquired material within the dossier)).

they do. There appears to be more of a tradition of defendants testifying at trial, and, since they have usually given an admissible pre-trial statement, they feel somewhat compelled to explain their position in open court.⁶⁰ Judges may, and frequently do, call the defendant to testify first.⁶¹ Unlike other witnesses, the defendant's statements are not given under oath,⁶² but the fact that the defendant is called upon to give his or her version first may affect the nature of the trial and the strategies of both the defense and the prosecution.⁶³

The victim may be, and often is, represented by an attorney who participates in the proceedings and questions witnesses.⁶⁴ This practice can, in effect, add another prosecutor to the proceedings. If a civil action is brought on behalf of the victim, it may be joined with the criminal case and both cases will be litigated at the same trial.⁶⁵

At the conclusion of the trial, the attorneys present final arguments, and the defendant has the last word.⁶⁶ The professional judges, along with any lay judges, deliberate and render a verdict, and, in the event of a guilty verdict, they pass sentence on the defendant.⁶⁷ If civil action has been joined to the

60. LANGBEIN, *supra* note 7, at 72-74 (Germany); Frase, *supra* note 7, at 677-80 (France); *id.* at 680 n.729 (citing Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973) (claiming that "almost all continental defendants choose to testify")); Frase & Weigend, *supra* note 7, at 343 (noting that most German defendants waive their right to remain silent).

61. DADOMO & FARRAN, *supra* note 7, at 212-13 (France); INGRAHAM, *supra* note 7, at 87 (France); LANGBEIN, *supra* note 7, at 38 (Germany); Frase, *supra* note 7, at 679 (France).

62. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 154 (Germany); Frase, *supra* note 7, at 679-80 (France).

63. Frase, *supra* note 7, at 679-80 (noting that in France the defendant is called as the first witness in every trial, the defendant must answer or stand mute while asked about his or her guilt, and French law does not forbid an adverse inference from the defendant's silence; and also noting the possible strategic disadvantages that the defendant may suffer by being required to testify first).

64. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 115 (France), 232 (Italy); DADOMO & FARRAN, *supra* note 7, at 213 (France); LANGBEIN, *supra* note 7, at 65 (Germany); Frase, *supra* note 7, at 669-71 (France); Frase & Weigend, *supra* note 7, at 350 (Germany).

65. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 233 (Italy); DADOMO & FARRAN, *supra* note 7, at 201-03, 213 (France); LANGBEIN, *supra* note 7, at 111-15 (discussing the availability of the procedure in France and Germany and further noting that it is seldom used in the latter); Frase & Weigend, *supra* note 7, at 351 (noting that although Germany grants victims the right to file a claim for civil damages in the criminal process, the procedure is rarely used); Frase, *supra* note 7, at 669-71 (France).

66. DADOMO & FARRAN, *supra* note 7, at 213 (France).

67. *Id.* at 213-14 (France); LANGBEIN, *supra* note 7, at 80-81 (Germany).

case, the professional judges will also render a decision on those issues.⁶⁸

6. *Appellate Procedures*

The appellate procedures in inquisitorial countries take many forms.⁶⁹ On some levels in some countries, there is the possibility of a trial de novo.⁷⁰ Perhaps most significant is the fact that either the defendant or the prosecution can take an appeal,⁷¹ and in certain situations the victim may also seek appellate review.⁷² In the United States, although the prosecutor can generally appeal pre-trial rulings excluding evidence,⁷³ the prosecutor is barred on double jeopardy grounds from taking an appeal from an acquittal on the merits.⁷⁴ This constitutes a major difference between the inquisitorial system and the adversarial system.

III. HISTORY, CULTURE, AND POLITICAL TRADITIONS

A. *Generally*

As lawyers and scholars considering issues relating to comparative criminal procedure, we have a tendency to focus solely on the criminal justice system and sometimes fail to adequately take into account factors that may be even more important, such as the history, culture, and political traditions of

68. INGRAHAM, *supra* note 7, at 87 (noting that in France the civil action is decided by the professional judges alone).

69. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 134-35 (France), 160-61 (Germany), 256-58 (Italy); DADOMO & FARRAN, *supra* note 7, at 219-21 (France); INGRAHAM, *supra* note 7, at 111-12 (France); LANGBEIN, *supra* note 7, at 82-85 (Germany); Frase, *supra* note 7, at 682-83 (France); Frase & Weigend, *supra* note 7, at 344, 348-49, 356 (Germany).

70. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 160 (Germany); LANGBEIN, *supra* note 7, at 82-83 (Germany); Frase, *supra* note 7, at 682 (France); Frase & Weigend, *supra* note 7, at 348-49, 356 (Germany).

71. DADOMO & FARRAN, *supra* note 7, at 219-20 (France); LANGBEIN, *supra* note 7, at 84-85 (Germany); Frase, *supra* note 7, at 682-83 (France); Frase & Weigend, *supra* note 7, at 344, 348-49, 356 (Germany).

72. DADOMO & FARRAN, *supra* note 7, at 219-20 (France).

73. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1147-51 (2d ed. 1992).

74. *Kepner v. United States*, 195 U.S. 100 (1904). As a matter of historical interest, this could have well been decided differently in the *Kepner* case. As Professors LaFave and Israel note in their treatise, in his dissent Justice Holmes formulated a concept of "continuing jeopardy" that would have established the principle that jeopardy continues through the proceedings. This would have permitted the government to appeal from an acquittal of the defendant. LAFAVE & ISRAEL, *supra* note 73, at 1062-63; LANGBEIN, *supra* note 7, at 85-86.

the country. Legal systems do not develop or function in a vacuum, and these elements can have a much greater impact on whether a legal system will succeed than the nature of the trial procedures or the parties' rights to appeal. We in the United States have a history and tradition of democracy and free enterprise that dates back hundreds of years. We have developed, and we have ingrained in us, a culture that expects the government to be elected by, and be responsive to, the people. We also expect our government officials to be honest, and we abhor and seek to extirpate corruption. The separation of powers among the legislative, executive, and judicial branches of government is a given in our political system and has been for centuries. Our common law adversarial system is uniquely suited to an environment where the courts are independent of the other branches of government, corruption is not tolerated, citizens are accustomed to making decisions that affect their community, individual rights are respected and protected, the people have confidence in their government, and democracy is firmly rooted. This is certainly not true of all nations.

B. *The Russian Experience*

One need only consider the history, culture, and political traditions of Russia to understand the differences that one can encounter in other parts of the world. For over a thousand years Russia has been under autocratic rule, and its citizens have had little or no experience with democracy, elected government, or the rule of law. For a millennium they have been subject to the control of foreign rulers, kings, czars, and most recently, Communist dictators such as Lenin and Stalin.⁷⁵ Even during the "enlightened period" of Peter the Great purges and torture were common, corruption was rampant, and anyone who had the temerity to question the authority of the czar was dealt with severely.⁷⁶ Stalin's purges remind us that strict autocratic rule continued well into the twentieth century,⁷⁷ and the corruption that has existed since the time of Peter the Great continues to be a fact of life.⁷⁸

75. DAVID & BRIERLEY, *supra* note 7, at 160-63 (noting that early in Russian history "[t]he sentiment took root that those who governed, and whose whim was law, were all-powerful.").

76. *See generally* ROBERT K. MASSIE, *PETER THE GREAT* (Ballantine Books ed. 1981).

77. DAVID & BRIERLEY, *supra* note 7, at 193.

78. *See generally* HANDELMAN, *supra* note 5.

For most of the twentieth century Russia was under communism,⁷⁹ a political system that is not well understood by many Americans. However, an understanding of this form of government is necessary to comprehend the thinking and psyche of the Russian people today. It must be remembered that only a few years ago only members of the Communist Party could be judges, lawyers, legislators, or hold other positions of power.⁸⁰ For generations the Russian people have been inculcated with Marxist-Leninist dogma and even today a majority of the politicians are Communists or “former Communists.”⁸¹ Since the recent political changes in Russia did not involve a violent revolution, those members of the Communist Party who were the judges, prosecutors, lawyers, and legislators under the old system, remain in those positions today.

Communist theory is primarily an economic theory that seeks to eliminate class struggle by eliminating the exploitation of the working class.⁸² It is thought that if this can be accomplished, it will ultimately result in a classless society in which individuals will live in harmony and voluntarily observe societal values. This will, according to Marxist-Leninist theory, lead to the day when law, courts, and even government will be unnecessary. However, the state must first pass through a period of socialism.⁸³ During this period the state will be charged with the responsibility of ensuring that the economic situation is progressing satisfactorily and there is total conformity with Communist ideology and Communist principles.⁸⁴ In the economic area this requires a planned economy, the elimination of free enterprise, collectivization of the means of production, and government control of industrial output.⁸⁵ Private individuals may not carry

79. According to Marxist-Leninist theory this was really socialism: the scientific socialism that will ultimately lead to communism. DAVID & BRIERLEY, *supra* note 7, at 170, 175-76.

80. It was up to this elite group, which constituted a rather small percentage of the population, to convert a disciplined social organization into a society that conformed to societal standards as a matter of conscience rather than on the basis of outside coercion. *Id.* at 193.

81. Boylan II, *supra* note 5, at 1343.

82. DAVID & BRIERLEY, *supra* note 7, at 172-75. It is a point often missed that communism considers morality to be subordinate to economics while the opposite is true in our political system. *Id.* at 180, 191-92.

83. *Id.* at 155, 170-76, 188. It is interesting to note that shortly after the October Revolution of 1917, there was a period when there appeared to be an attempt to immediately move to a Communist state, skipping the socialist period forecast by Marx. However, this proved to be unrealistic. *Id.* at 184-85. Under Communist theory, in the international area non-socialist states represent a threat to humanity. *Id.* at 177-78.

84. *Id.* at 176-78.

85. *Id.* at 186-87, 191-92, 233-34.

on any business. To do so would constitute the crime of speculation.⁸⁶

Although communism involves primarily economic theory, it has great political implications. In fact, many Americans view it as primarily a political doctrine. From the Communist perspective, the totalitarian regime was not a cause for embarrassment or shame. To the contrary, this was an essential and important step in the evolution of society towards the ultimate goal – the establishment of the Communist state. For the Communist, the requirement of total state control was self-evident and non-debatable. The power must be reposed in one central authority. The socialist government must reign supreme and unchallenged, and concepts such as separation of powers and rule of law are antithetical to Marxist-Leninist principles. Governmental power cannot be dispersed or separated and nothing, including rule of law, can be permitted to rival the authority of the state. Authoritarian control is essential to ensure that the country is progressing satisfactorily on the road to communism.⁸⁷

It is clear that the culture and thousand-year history of autocratic rule in Russia did not create a hospitable environment for democracy and rule of law. This is in sharp contrast to our culture and the political history of other democracies of the former Soviet Union that have made great strides toward the development of democratic rule.⁸⁸ This is not to suggest that the goal of democratization cannot be accomplished or that we should be pessimistic about its prospects. However, the cultural and political history are factors that must be considered.

C. The Effect of Cultural, Historical, and Political Traditions on the Introduction of Adversarial Elements into the Inquisitorial Systems of Other Countries

Although Russia and the former Soviet Union have been discussed at length, they serve only as an example of the importance of considering the cultural, historical, and political traditions of the particular area. These will vary from continent to continent and from country to country. It has been noted, for example, that due to political history and culture, some countries of the former Soviet Union are progressing much more rapidly

86. *Id.* at 187.

87. DAVID & BRIERLEY, *supra* note 7, at 155, 226-27, 282-83; INGRAHAM *supra* note 7, at 4.

88. Boylan II, *supra* note 5, at 1331.

than others on the road to democracy and the rule of law.⁸⁹ Based solely on cultural and political traditions, a criminal justice system that is well suited to an Asian country may not succeed in Switzerland or a system that functions well in Switzerland may be a failure in Uganda. To ignore these considerations is tantamount to ignoring the climate and the soil in which a tree is to be planted.

IV. THE LEGAL TRADITION

A. Generally

Equally important are the legal traditions of the country. Criminal justice systems vary as to their theories of law, objectives, and procedures. We have a tradition in the English common law adversarial system that dates back over three hundred years in this country alone, and it existed in England long before that. Along with it we inherited our treasured legacy of individual rights, due process, and trial by jury. The democracy that we enjoy has provided fertile ground for the criminal justice system that has served us so well.

Other countries have inherited a legal tradition quite different from ours. In the United States, Continental Europe, and England, law is viewed to be a natural complement to morality,⁹⁰ while in other countries there is a deeply rooted tradition that those who govern are all powerful and “the law” is subject to their whim and caprice.⁹¹ We, in our free market democracy, seek to protect, preserve, and defend the rule of law, while it is the objective of other political systems to arrive at a point where law no longer exists.⁹² Many nations, including some in the former Soviet Union have a strong legal tradition,⁹³ while in others the

89. *Id.* (noting that the Czech Republic, which had a history and culture of democratic institutions, is at the forefront of democratic reforms); *see also* DAVID & BRIERLEY, *supra* note 7, at 201 (noting that even during the Communist period in Poland some free enterprise existed, the land was not nationalized, and the greater part of the agricultural production was carried out by individuals); *id.* at 283 (discussing the fact that in Czechoslovakia the tradition of criticism of government continued at least until the 1968 crack down by the Communist Party).

90. DAVID & BRIERLEY, *supra* note 7, at 165.

91. *Id.* at 162, 165-66.

92. *Id.* at 155, 173-74, 188 (referring to Marxist-Leninist doctrine).

93. *Id.* at 167 (Hungary, Poland, Czechoslovakia, Slovenia, and Croatia have a strong legal tradition consistent with that in Germany, Austria, and France).

attachment to legal principles is extremely weak.⁹⁴ Criminal procedures will also vary. They may be adversarial in nature, inquisitorial, or mixed,⁹⁵ and may or may not include an independent jury. Some countries are moving toward the adoption of the jury as an independent trier of fact,⁹⁶ while other countries, such as Germany and France, have implemented the system and then abolished it.⁹⁷ Even England, which has a long tradition of trial by jury, may soon remove serious fraud trials from the jury's competence.⁹⁸

B. *The Russian Experience*

In considering the history and culture of Russia, it is difficult to imagine a legal tradition more different from our own. We view law to be a natural complement of morality, while, with their autocratic history, Russians have viewed the law to be merely the instrument and whim of the ruler in power.⁹⁹ We have treasured and protected the rule of law, while for the past millennium in Russia, the rule of law has been seen as antithetical to the ineluctable rule of the state.¹⁰⁰ We have a very strong legal tradition, while the Russians have had a weak attachment to legal principles.¹⁰¹ Our criminal justice system is adversarial, while the Russian system is primarily inquisitorial in nature.¹⁰² We have a history of independent juries going back hundreds of years, while, with the exception of approximately forty years at the end of imperial rule, the use of the jury as an independent trier of fact has been unknown in Russia.¹⁰³

Throughout virtually the entire history of the Russian people, the primary purpose of the criminal justice system has been to serve the ends of the totalitarian regime. In the words of a

94. *Id.* at 165, 167 (noting that the legal tradition and idea of law are extremely weak in Russia, but the legal traditions in Albania, Bulgaria, Rumania, and Serbia are even weaker than in Russia).

95. *See supra* notes 7-20 and accompanying text.

96. *See infra* notes 111-17, 170-91 and accompanying text.

97. Thaman, *supra* note 5, at 65 n.19 and accompanying text.

98. *Id.* at n.20 and accompanying text.

99. DAVID & BRIERLEY, *supra* note 7, at 161-62, 165-66, 181; Vlasihin, *supra* note 5, at 1206 (a modern Russian scholar notes that in the public consciousness of Russia "the law is like the shaft of a wagon, it goes wherever you turn it").

100. DAVID & BRIERLEY, *supra* note 7, at 161-62, 165-66, 212-14.

101. *Id.* at 165-66.

102. *Id.* at 164; Boylan I, *supra* note 5, at 109-10; Boylan II, *supra* note 5, at 1330.

103. *See infra* notes 111-17, 171 and accompanying text.

prominent Russian judge and scholar: “Our courts have always been part of a repressive system.”¹⁰⁴

Russian legal history actually begins in Kiev, Ukraine, when a tribe known as the Varangians established domination over the Russia of Kiev in 892. Perhaps the most important historical event of the time occurred when the tribe was converted to Christianity in 989 during the reign of St. Vladimir. In the West, the Church observed Roman law, but Byzantine law had an important place in the Russia of Kiev. The Mongol domination by the Golden Horde from 1236 until 1480 kept Russia isolated, and it was separated from its western neighbors by its adherence to the Orthodox faith. After 1480 Russia endured the despotic rule of the czars, serfdom was established, and the sentiment that obedience to law involved submission to the will of the despot took root.¹⁰⁵ In 1722, Peter the Great created the *Prokuratura* to serve as “the eyes of the monarch” to ensure that the acts of administrators were in conformity with the law and the orders of the czar.¹⁰⁶ Bribery and corruption were rampant. Prior to Peter the Great the judicial system ran on the principle of “feedings” under which judges’ compensation came from litigants.¹⁰⁷ Even after this practice was abolished, bribery was pervasive. Many examples exist, including an account that, in the middle of the nineteenth century, a Minister of Justice bribed a subordinate to facilitate the delivery of a deed.¹⁰⁸ A Russian author described the Russian court system before 1864 as being corrupted by excessive bribery in every judicial district, having staff members of low morals and intellect, using social class as the basis for the system of justice, and being slavishly dependant on the administration.¹⁰⁹ Due to a number of factors, the corruption of the officials went unexposed.¹¹⁰

The Russian criminal justice system has been, and continues to be, an inquisitorial system.¹¹¹ However, a mixed system that included jury trials was introduced in 1866 under judicial reforms

104. Ingwerson, *supra* note 5, at 1 (quoting Moscow judge and legal scholar Sergei Pashin).

105. DAVID & BRIERLEY, *supra* note 7, at 160-63.

106. *Id.* at 216-17.

107. Plank, *supra* note 5, at 42 and authorities cited therein at nn.141-43.

108. *Id.* at n.143 and accompanying text.

109. *Id.* at 40-41 (citing V.N. Bochkarev, *Doreformennyi Sud [The Pre-Reform Court]*, in 1 SUDEBNAYA REFORMA [THE JUDICIAL REFORM] 205 (N.V. Davydov & N.N. Polyanski eds., 1915) (the criticisms listed above comprise only a partial list of the those enumerated in the text)).

110. *Id.* at 43.

111. DAVID & BRIERLEY, *supra* note 7, at 155-56.

implemented by Czar Alexander II.¹¹² All of these reforms, including the right to jury trial, were abolished when the Bolsheviks came to power in 1917.¹¹³ This period of approximately fifty years provides interesting insights into the possibility of effectively introducing an independent jury into an inquisitorial system, and specifically the Russian system. It must be kept in mind that the czars were still in power and continued the autocracy, and the effect of the reforms should not be exaggerated. It does appear that the reforms generally, and the jury trials in particular, were at least to some extent successful, and examples are cited of cases where juries made decisions that went against the obvious wishes of the czar.¹¹⁴ The procedures and evidentiary rules were rather liberal,¹¹⁵ there were able defense attorneys, and juries were permitted to make moral judgments that included a form of jury nullification.¹¹⁶ However, decrees could be reversed or quashed by the Senate.¹¹⁷

All of this changed dramatically when the Communists overthrew the Czar and seized control of the government during the October Revolution of 1917.¹¹⁸ Along with the revolution came new theories about the law that had a monumental effect, not only upon the legal system, but also on the country as a whole. Under Communist theory, if the classless economic system could be established, there would no longer be any need for law.¹¹⁹ In order to arrive at that point, the government would have to exercise total control to guide the country from socialism to the Communist state.¹²⁰ Unlike Western nations, law would not be linked to morality, but instead would serve only to facilitate the

112. These were enacted under the Judicial Reform Act of 1864, and the first jury trial was held in 1866. Bhat, *supra* note 5, at 77, 93-94; Gilden, *supra* note 5, at 151; Plank, *supra* note 5, at 45-46; Plotkin, *supra* note 5, at 1-2; Thaman *supra* note 5, at 64; Stead, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13. As a matter of interest, the Judicial Reforms introduced into the system an examining magistrate similar to the French *juge d'instruction*. See *supra* note 42 and accompanying text; Plank, *supra* note 5, at 49.

113. Gilden, *supra* note 5, at 151; Plotkin, *supra* note 5, at 1; Jones, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13.

114. See, e.g., Bhat, *supra* note 5, at 94-113. Particularly noteworthy is the acquittal of the revolutionary Vera Zasulich who was found not guilty on charges involving the attempted murder of the municipal governor of St. Petersburg. *Id.* at 110-12.

115. *Id.* at 93-94, 97.

116. *Id.* at 87; 94-113; Boylan II, *supra* note 5, at 1339.

117. Plank, *supra* note 5, at 49.

118. See Gilden, *supra* note 5, at 151; Plotkin, *supra* note 5, at 1; Jones, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13.

119. DAVID & BRIERLEY, *supra* note 7, at 173-74, 214-15.

120. *Id.* at 188.

economic changes necessary to arrive at the goal.¹²¹ This would, of necessity, include ensuring that the will of the Communist regime was carried out. Such was the nature and *raison d'être* of “socialist legality.”¹²² There was a constitution guaranteeing Soviet citizens a multitude of rights, but it was little more than a piece of paper.¹²³ The need for law, and law itself, would eventually disappear. In the interim, law would serve only to maintain control and ensure that the final objective was achieved.¹²⁴

The fact that the law and the court systems were merely the instruments of the government was not viewed by the Communists as a source of embarrassment. To the contrary, it was both consistent with and required by Marxist-Leninist doctrine.¹²⁵ Lenin himself reinstated the *Prokuratura* as the guardian of socialist legality in all areas of Soviet life, including the court.¹²⁶ In the criminal area, the procurator functioned as the prosecutor and much more. If, in the view of the procurator, the court was taking a position contrary to socialist legality, he or she could file a protest that would suspend the proceedings until the court changed its ruling or the procurator appealed to a higher court. The procuracy seldom, if ever, lost these appeals.¹²⁷ Individuals could be detained by the procurator and held for months without being charged.¹²⁸ Under communism, the criminal court and the criminal law were viewed to have a pedagogical function to ensure that perpetrators were educated and guided towards behavior consistent with their obligations as a citizen of a socialist country.¹²⁹

Everyone in the judicial process, like everyone else in a position of responsibility, was a member of the Communist Party.¹³⁰ Judges and lawyers were poorly paid and held in low esteem.¹³¹ The judiciary was subject to the direct supervision of

121. *Id.* at 176-77, 188, 191-92, 214-15.

122. *Id.* at 209.

123. Boylan II, *supra* note 5, at 1339; Thaman, *supra* note 5, at 66.

124. DAVID & BRIERLEY, *supra* note 7, at 176-77, 188.

125. *Id.* at 212.

126. *Id.* at 216-18.

127. *Id.* at 217-20; INGRAHAM, *supra* note 7, at 39.

128. Burke I, *supra* note 5, at 13; Thaman, *supra* note 5, at 66.

129. DAVID & BRIERLEY, *supra* note 7, at 194-95.

130. *See id.* at 193.

131. Boylan II, *supra* note 5, at 1327-28 (the judiciary was the least respected branch of the legal profession); Gilden, *supra* note 5, at 156-57 (within the legal system the procurator stood at the pinnacle, followed by investigators, criminal defense attorneys, and at the nadir, judges); Thaman, *supra* note 5, at 66 (judges were poorly paid and often

the *Prokuratura*, and Communist Party leaders would routinely call judges on the telephone and advise them how to rule in particular cases. This practice became known as “telephone justice.”¹³² Defense lawyers were available to represent criminal clients, but all attorneys were first and foremost servants of socialist legality.¹³³

While the theory and objectives of the Soviet criminal justice system were obviously much different than those found in Western Europe,¹³⁴ the procedure was inquisitorial in nature. Primary reliance was placed upon the codes and cases had no precedential value.¹³⁵ Defense attorneys and defendants were, as they are in other inquisitorial countries, encouraged to and inclined to provide statements and cooperate with the investigation.¹³⁶ At trial, the cases were decided by professional judges sitting alone or with lay judges.¹³⁷ However, the lay judges were clearly under the control of the professional judges and became known as “noddors,” either because of their constant agreement with the professional judges or their membership in the Communist Party.¹³⁸ The victim or the victim’s representative was permitted to actively participate in the trial.¹³⁹

The trial procedures were similar to those in inquisitorial countries. The professional judge controlled the proceedings and would customarily call upon the defendant to testify first.¹⁴⁰ There was one significant difference. Western inquisitorial systems require that once the proceedings are started, the trial must proceed uninterrupted to a conclusion.¹⁴¹ However, in the Soviet system, if the court determined that there was a need for more evidence, the trial could be terminated at that point, and the matter be referred back to the procurator and the police for further investigation. The case could later be rebrought on the

under-educated); Andrias, *supra* note 5, at 18 (the judge was seen as an extension of the prosecutor and the government bureaucracy).

132. Boylan II, *supra* note 5, at 1327-28; Plank, *supra* note 5, at 4 n.6; Thaman, *supra* note 5, at 66; Andrias, *supra* note 5, at 18; Burke II, *supra* note 5, at 12; Burke III, *supra* note 5, at 12.

133. DAVID & BRIERLEY, *supra* note 7, at 222-23.

134. *Id.* at 281.

135. *Id.* at 225, 244, 261-63; INGRAHAM, *supra* note 7, at 5.

136. INGRAHAM, *supra* note 7, at 80.

137. *Id.* at 88; DAVID & BRIERLEY, *supra* note 7, at 245.

138. DAVID & BRIERLEY, *supra* note 7, at 247-48; Boylan II, *supra* note 5, at 1339; Thaman, *supra* note 5, at 67; Andrias, *supra* note 5, at 18; Jones, *supra* note 5, at 27.

139. Boylan I, *supra* note 5, at 105.

140. INGRAHAM, *supra* note 7, at 88; Plotkin, *supra* note 5, at 4-5.

141. See THE FRENCH CODE OF CRIMINAL PROCEDURE, *supra* note 7, at 25 (noting that in France, once the trial is commenced, it “must continue without interruption to judgment and may only be recessed to allow the court to eat and sleep”).

basis of newly discovered evidence.¹⁴² As a result, acquittals were extremely rare. Virtually all trials resulted in conviction of some offense or, infrequently, the matter was referred back for further investigation.¹⁴³ Not surprisingly, the prosecutor could appeal from court decisions and acquittals, and could also seek what was called “supervisory review” by an appellate panel.¹⁴⁴

Thus, for most of the last century, Russia endured a criminal justice system that was established to make certain that the wishes and objectives of the Communist Party were carried out. Separation of powers,¹⁴⁵ an attorney’s duty to zealously represent his or her client,¹⁴⁶ and an independent judiciary were out of the question.¹⁴⁷ The criminal justice system, along with the economy and the entire nation, was under the firm control of the regime.¹⁴⁸ This was, in the purest sense, the rule of the state rather than the rule of law.¹⁴⁹ It was the procurator, not the judges or lawyers, who possessed the power and were held in high esteem.¹⁵⁰ From our perspective, this was an inquisitorial system that was debased and corrupted to serve the ends of the party in power. However, to the Communists the system was legitimate, and a very effective instrument in achieving the final goal.

As difficult as it may be for us to comprehend these principles, and as repugnant as they may be to our ideals, we must understand the theory in order to understand the situation with which we are dealing when we attempt to affect events in the former Soviet Union. Virtually everyone in the former Soviet Union was educated and indoctrinated in these principles. Only

142. Thaman, *supra* note 5, at 67; Andrias, *supra* note 5, at 18.

143. Thaman, *supra* note 5, at 67; Burke I, *supra* note 5, at 13 (noting that conviction rates ran about 99%).

144. INGRAHAM, *supra* note 7, at 112.

145. DAVID & BRIERLEY, *supra* note 7, at 226-28.

146. *Id.* at 222-23; INGRAHAM, *supra* note 7, at 5-6.

147. It is rather interesting that the 1936 Constitution of the former Soviet Socialist Republics stated that “Judges shall be independent and subordinate to law” when in fact the Communist Party regularly dictated the results to judicial officials. Plank, *supra* note 5, at 4 (citing U.S.S.R. CONST. art. 112 (1936) (replaced 1977), *quoted in and translated by* ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 154 (1982)). *See also* INGRAHAM, *supra* note 7, at 5 (noting that an independent judiciary is antithetical to the Soviet system).

148. DAVID & BRIERLEY, *supra* note 7, at 288 (noting that activities having an adverse effect upon government control of the economy such as purchases for resale, failure to accomplish the minimum amount of work due to the *kolhoz*, and failure to perform a contract in the collectivized sector carried penal sanctions).

149. *Id.* at 212; Boylan II, *supra* note 5, at 1339.

150. Gildin, *supra* note 5, at 156-57 (“within the legal system, the procurator stood at the pinnacle, followed by investigators, criminal defense attorneys, and at the nadir, judges.”); Thaman, *supra* note 5, at 66 (the procurator was the most powerful figure in the Soviet justice system); Jones, *supra* note 5, at 26.

those who accepted communism, or at least claimed to accept it, could gain an education and become a respected member of society. Only members of the Communist Party became judges, lawyers, or politicians. Even today, many, if not most, of the judges, lawyers, and politicians in Russia are Communists or former Communists. They have spent their entire lives in a society that, as a matter of political principle, rejected the independence of the courts, free enterprise, the right to dissent, and other individual rights that we may sometimes take for granted. Corruption in the court system and elsewhere continued to be, as it has been for centuries, if not accepted, at least a fact of life.

*C. The Effect of Legal Tradition on the Introduction of
Adversarial Elements into the Inquisitorial Systems of Other
Countries*

Law is, to a great extent, based on custom.¹⁵¹ Custom develops over a long period of time and is ingrained in the society. It has been recognized that it borders on folly to attempt to import the entire criminal justice system of one nation into another that has a totally different legal culture and history.¹⁵² Just as a human body will reject foreign organs or tissue from another body that is incompatible with its physiology, a society will not be receptive to a foreign legal system that is inconsonant with its customs and traditions. The Russian legal culture provides an excellent example of a firmly rooted legal tradition that, not surprisingly, is consistent with its autocratic political history. However, the example has universal significance. In order to evaluate whether adversarial elements will be accepted or rejected in any inquisitorial system, we must be well acquainted with the society's legal culture and traditions. This is not only true of Russia, it is true of any nation in the world.

151. See generally MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 46-47 (2d ed. 1994); DAVID & BRIERLEY, *supra* note 7, at 274.

152. Bhat, *supra* note 5, at 80 (referring to the importation of European judicial practices into Russia in the 1860s).

V. DEVELOPMENTS IN POST-SOVIET RUSSIA

A. Background

In the years since the collapse of the Soviet Union, there has been a commendable effort on the part of the Central and East European Law Initiative and others to assist Russia and other NIS countries to move toward democracy and establish the rule of law. Perhaps the largest obstacles to progress have been the historical and cultural factors discussed above. The alteration of the autocratic tradition, history, and culture that has been developed over the past millennium will not be an easy task for the citizens of Russia and the Newly Independent States. Real and permanent change may come slowly. The problem was perhaps best expressed by the Russian Head of U.S. Legal Studies of the U.S. & Canadian Studies of the Russian Academy of Sciences, Vasily Vlasihin, who noted in an article:

I would like to quote from an American authority, with whom I wholeheartedly concur. After his visit to the Union of Soviet Socialist Republic in 1990, the United States Attorney General Dick Thornburgh, delivering remarks in Philadelphia, said:

What is really missing [in the Soviet Union] is what might be called a "legal culture." Time and again, we found a naive belief that all that was needed was to pass the correct statutes to get the right laws on the books to create a "rule of law."

It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process - due process of law - even over substantive rights, as the true safeguard of the people's liberties. Again they asked us often, and in much confusion, about separation of powers. The idea of deliberately building in a tension between separate branches of government - our concept of checks and balances -

was extremely puzzling to them and, to some, incomprehensible.

All too many people in Russia think that once you get the right statutes on the books, you automatically qualify to enter the realm of the Rule of Law. But, Russians still do not trust the law itself. It is a great pity that the old Russian saying, “the law is like the shaft of a wagon, it goes wherever you turn it,” maintains a firm grasp on public consciousness, reflecting the failure of the legal system to provide ultimate protections to the people against abuses of government. . . .

Many things related to the Rule of Law that are widely accepted and known in the West from time immemorial are just incomprehensible for Russians. The minds of the people brought up in the spirit of “the-rule-of-the-state-law” are not capable of absorbing to the fullest extent the ideas of limited government, decentralized government, checks and balances within the mechanism of the separation of powers, the judicial supremacy, and the priority of individual rights and liberties over interests of the state. It is quite a task to implant ideas of judicial review when a criminal justice official seriously stated in a newspaper that when the judiciary assumes the duty of interpreting statutes and the Constitution, this is the first obvious sign of a totalitarian regime.¹⁵³

While this was written in 1993 and progress has been made, Professor Vlasihin’s comments provide the Russian perspective and make it clear that overcoming a thousand years of history will be a challenge. More important, however, are his observations that superficial changes will not be successful and that real change must be effected from the ground up by first establishing a respect for the law and a legal culture that comprehends and embraces the rule of law. That certainly has been, and continues to be, a primary objective of the Central and East European Law Initiative.

153. Vlasihin, *supra* note 5, at 1205-06 (footnotes omitted). The author had the privilege of meeting and working with Professor Vlasihin at a seminar in Moscow in the fall of 1997.

B. The Introduction of Adversarial Elements into the Russian Criminal Justice System

1. Generally

The success or failure on the part of Russians and others to introduce adversarial elements, including the right to jury trial, into the Russian criminal justice system will have profound implications for the Russian people and the entire world. However, it also provides an interesting experiment as to whether a mixed system can succeed in the Russian environment. The Russian criminal justice system continues to be primarily an inquisitorial system.¹⁵⁴ Present day Russians have inherited an autocratic tradition and a history of over seventy years of Communist domination.¹⁵⁵ For more than one thousand years there has been a weak legal culture, and courts have existed solely to carry out the wishes of the party in power.¹⁵⁶ Corruption has always been rampant, and is so today.¹⁵⁷ Judges and lawyers continue to be held in low esteem, and the courts are suffering from an acute lack of resources.¹⁵⁸ Many, if not most, of the judges, lawyers, and politicians are Communists, former Communists, or re-labeled Communists.¹⁵⁹ There is substantial resistance to the introduction of adversarial elements and to change generally.¹⁶⁰ On the other hand, many Russians favor these measures, and the transition is going forward.¹⁶¹ A number of characteristics of that system deserve consideration when implementing these reforms.

Russia continues to be a code country in the inquisitorial tradition. Judges, in reaching decisions rely primarily on the code or other legislative materials, and court decisions have no precedential value.¹⁶² Following the tradition of the Communist

154. Boylan I, *supra* note 5, at 110; Boylan II, *supra* note 5, at 1330-32.

155. See *supra* notes 75-78, 118-50 and accompanying text.

156. See *supra* notes 75-78, 99-150 and accompanying text.

157. See generally HANDELMAN, *supra*, note 5.

158. Vlasihin, *supra* note 5, at 1207 (providing a revealing comparison of the responses of American and Russian school children regarding their views of lawyers); Andrias, *supra* note 5, at 23 (in Russia the executive branch has the dominant role, the legislative branch is struggling to be heard and the judicial branch ranks a far distant third).

159. Boylan II, *supra* note 5, at 1333, 1343.

160. Andrias, *supra* note 5, at 20 (noting the staunch resistance of a surprisingly large number of judges to the introduction of jury trials or change generally).

161. *Id.* (noting that many judges are also vigorous proponents of change).

162. Boylan II, *supra* note 5, at 1341-42; Vlasihin, *supra* note 5, at 1210 (Russian courts are not empowered to exercise judicial review of legislative or executive

period, constitutional provisions and other legislative acts are often not implemented or simply ignored.¹⁶³ While illegally obtained evidence may be suppressed on the basis of constitutional or code provisions, exclusion is based on the provisions themselves rather than prior case law. The implementation of the exclusionary rule is in the developmental stage, and the wide-open nature of the trial makes it difficult to prevent the illegally seized evidence from ultimately coming to the attention of the judge or the jury.¹⁶⁴ Bail is unheard of, and the release of the defendant before trial is very rare.¹⁶⁵ During the preliminary investigation the Russian suspect usually must provide an interview or statement.¹⁶⁶ At the time that the preliminary investigation is concluded, the defendant does have

enactments); Andrias, *supra* note 5, at 22 (cases do not have precedential value and, while attorneys refer to the Code of Criminal Procedure, they rarely refer to a case); *id.* at 23 (since there are no precedents evidentiary issues are determined on a case by case basis). The Russian Constitution provides for a Constitutional Court. Upon motion of an interested governmental organization, the Constitutional Court may give its interpretation of a constitutional provision or hold a statute or executive regulation unconstitutional. Whenever an issue regarding the constitutionality of an act arises in a case before a court of general jurisdiction, those proceedings are suspended and the issue is referred to the Constitutional Court for a decision. Memorandum from Vasily A. Vlasihin on the Introduction to the Legal System of Russia (July 1997) (on file with author). *But see* Boylan II, *supra* note 5, at 1340-42 (discussing the fact that Russian trial courts are now, at least in some instances, applying the Constitution to their cases, but also noting that these cases have no precedential value).

163. Boylan II, *supra* note 5, at 1331 (in contravention of the Russian Constitution which provides that the prosecutor and the defense attorney should be on equal footing, the prosecutor frequently does not attend the trial and the judge acts as both prosecutor and judge); *id.* at 1339 (noting that although the Constitution of the Soviet era provided for a multitude of rights, the rights were never enforced); *id.* at 1344 (although the Constitution provides for the right to jury trial throughout Russia the Russian parliament has not been willing to enact enabling legislation). *See also* Plank, *supra* note 5, at 4 (although the 1936 Constitution of the former Soviet Union provided that judges were to be independent and subordinate to law, party officials regularly interfered in judicial decisions); Thaman, *supra* note 5, at 66 (the Soviet regime routinely violated the rights of the accused in contravention of the laws and the Soviet Constitution); *id.* at 78 (in 1994, President Yeltsin violated his own Constitution by promulgating a decree allowing for the detention of certain individuals for up to thirty days without judicial approval). While in Russia, Professor Thaman criticized the practice of returning the case for supplementary investigation as violative of the Russian Constitution. *Id.* at 66.

164. Gildin, *supra* note 5, at 154-55; Thaman, *supra* note 5, at 90, 106. Since the government can take an appeal from an acquittal, defense lawyers have usually forgone the right to ask the judge to exclude the evidence and argued the validity of the evidence in front of the jury. This decision arises out of a concern that the judge may dismiss the case and return it to the procurator to be re-brought later. It may also be prompted by a concern that the appellate court may reverse a not guilty verdict because of the improper suppression of the evidence. *Id.* at 92 n.198 and accompanying text.

165. Boylan II, *supra* note 5, at 1342-43 (the accused can be held for months or even years while awaiting trial); *see also* Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191 (2000).

166. Vesselinovitch, *supra* note 5, at 52.

the right to counsel, and if the defendant cannot afford an attorney, one is provided by the state. Appointed counsel represent defendants in the overwhelming majority of cases and these attorneys are generally inexperienced, poorly paid, and sometimes assume representation only a few days before trial.¹⁶⁷ Defense attorneys have no knowledge as to how to investigate a case and are prohibited from doing so. In the past, defense attorneys who interviewed witnesses have even been arrested for witness tampering.¹⁶⁸ Consistent with the inquisitorial tradition, there is no plea bargaining, and all cases go to trial.¹⁶⁹

2. *Jury Trials*

a. *Generally*

The recent reinstatement of jury trials in the Russian criminal justice system has attracted a great deal of attention and comment.¹⁷⁰ As noted above, Russia had some experience with independent juries from 1866 until 1917 when the Bolsheviks seized power and abolished the jury system.¹⁷¹ The right to jury trial is now guaranteed by the Russian Constitution;¹⁷² the Russian Supreme Soviet passed enabling legislation on July 16, 1993,¹⁷³ and on December 15, 1993, the first Russian jury trial in modern times was convened in the Saratov region.¹⁷⁴

While this event is significant, the jury system is still inchoate. The concept almost died aborning. Procurators, Communists, and conservatives were staunchly opposed to the use of juries, and initial attempts to pass enabling legislation went down in defeat.¹⁷⁵ When the measure did pass in 1993, jury trials were authorized in only nine of Russia's eighty-nine regions or oblasts,¹⁷⁶ and even in those regions only defendants charged

167. Thaman, *supra* note 5, at 87.

168. It is the exclusive right of the procurator to investigate the case. Boylan II, *supra* note 5, at 1332; Stead, *supra* note 5, at 25.

169. Boylan II, *supra* note 5, at 1343; Gildin, *supra* note 5, at 168; Thaman, *supra* note 5, at 104 (there is a procedure for an abbreviated trial if the defendant admits his or her guilt, but the procedure is not used).

170. *See generally* sources cited *supra* note 5.

171. Bhat, *supra* note 5, at 77; Gildin, *supra* note 5, at 151; Plotkin, *supra* note 5, at 1.

172. Boylan II, *supra* note 5, at 1343-44.

173. Gildin, *supra* note 5, at 151; Thaman, *supra* note 5, at 80.

174. Thaman, *supra* note 5, at 62.

175. Burke III, *supra* note 5, at 12; BBC, *supra* note 5.

176. Boylan II, *supra* note 5, at 1337; Gildin, *supra* note 5, at 151; Thaman, *supra* note 5, at 80.

with very serious offenses have the right to a jury trial.¹⁷⁷ As a result, the vast majority of cases are still tried before professional judges, or a judge sitting with people's deputies.¹⁷⁸ At those trials the procurator receives a great deal of assistance from the judge. In over half of the cases the procurator does not even appear, and the judge acts as both judge and prosecutor.¹⁷⁹ The judge will have the dossier of the investigation well before the trial begins and may be inclined to view the procurator's reports as the facts of the case.¹⁸⁰ Not surprisingly, most non-jury trials result in conviction.¹⁸¹ During the proceedings in both jury trials and non-jury trials the defendant is confined in a cage that is located in the courtroom.¹⁸²

Resistance to the concept of jury trials continues among legislators, judges, and even defense attorneys.¹⁸³ Even though the right to trial by jury is guaranteed by the Russian Constitution, implementing legislation to expand the system to twelve additional oblasts has been stalled in the Russian Duma.¹⁸⁴ Critics contend that the system is too expensive for the overtaxed budget.¹⁸⁵ In spite of predominately favorable results for the defense in the first cases to come before the courts,¹⁸⁶ defendants have not been inclined to exercise their right to jury

177. Thaman, *supra* note 5, at 70 (in the oblasts where the procedure has been implemented, jury trials are available only in cases where the crimes are punishable by death or deprivation of liberty in excess of ten years). In the United States the broad right to jury trial and the inability of the system to provide a jury trial to all defendants has led to plea bargaining, and it is interesting to note that most Russian reformers want to avoid that situation. *Id.* at 85 n.150.

178. Boylan II, *supra* note 5, at 1339 (a panel of three judges may decide criminal cases and a defendant can be convicted on the vote of two of the three); *Symposium, supra* note 5, at 74-75 (noting that the trial may be decided by a panel of one judge and two lay assessors called people's deputies who are also referred to as "nodding people").

179. Boylan I, *supra* note 5, at 111 n.56 and accompanying text.

180. *Id.* at 110-11.

181. Andrias, *supra* note 5, at 18 (the overall acquittal rate in Russia is .0046%); *id.* at 26 (due to the extensive pretrial investigation and the confessions obtained during that period, most defendants do not deny committing the offense, and the only issues at trial involve matters pertaining to mitigation).

182. *Id.* at 15, 24-25; Boylan I, *supra* note 5, at 112; Gildin, *supra* note 5, at 157.

183. Andrias, *supra* note 5, at 21. During the author's meetings with older lawyers and members of the judiciary they were almost hostile to the concept of jury trials. One judge stated that he and his colleagues were convinced that juries would return unlawful verdicts and, in his view, Russians were not ready for jury trials. The judge asserted that he would not preside over a jury trial. *Id.*

184. Boylan II, *supra* note 5, at 1338, 1344.

185. *Id.* at 1338.

186. Thaman, *supra* note 5, at 90; Andrias, *supra* note 5, at 18 (the overall acquittal rate in Russia is .0046%, while in jury trials the rate is 21% and 30% in some regions).

trial,¹⁸⁷ and defense attorneys have been reluctant to recommend the procedure. This may be due, at least in part, to anxiety about the new procedure and the very low fee paid to court-appointed counsel.¹⁸⁸ Courts have not received adequate funding,¹⁸⁹ and it appears that the Duma is, at least for the present, disinclined to pass the legislation necessary to extend the right to other regions.¹⁹⁰ On occasion even jurors have expressed misgivings about the system.¹⁹¹ In spite of the best efforts of Russian reformers and others, the future of the right to jury trial for all Russians is not yet assured.

b. Procedures

While the independent jury trial now exists in Russia, the procedures and general nature of the trial are quite different from those in the United States. This is due in part to the inquisitorial nature of the proceedings, and in part to aspects that are unique to the Russian system. The procedure continues to be primarily inquisitorial.¹⁹² The judge determines the order of trial and conducts the initial examination of each witness.¹⁹³ The attorneys, and particularly the defense attorneys, remain more passive than those in the United States.¹⁹⁴ Rather than observing our formal procedure of direct and cross-examination by non-leading and leading questions, lawyers generally engage in general questioning, and witnesses respond in a narrative

187. Thaman, *supra* note 5, at 87 (noting that between January 1 and September 1, 1994, defendants elected a jury trial in only 254 of the 1465 cases filed in the nine regional and territorial courts).

188. *Id.* at 87-88, 90 (noting that it has been suggested that investigators may be discouraging defendants from demanding jury trials before they meet with their attorneys).

189. Pashin, *supra*, note 5, at 10 (jury trials are not getting enough financial support and judges have been known to pay jurors out of their own pockets).

190. Boylan II, *supra* note 5, at 1343-44; Pashin, *supra*, note 5, at 10.

191. Stead, *supra* note 5, at 44 (relating that after a trial one juror was put off by the defense attorneys' desire to acquit their clients "because one can't start declaring the murderer to be fully innocent," and another juror's statement that "[i]t's not time to start jury trial in Russia."); see also Duncan DeVille, *Essay: Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 GEO. WASH. J. INT'L L. & ECON. 73, 94-101 (1999) (discussing Russian concerns about the re-introduction of jury trials, particularly in organized crime cases).

192. Boylan I, *supra* note 5, at 110.

193. Boylan I, *supra* note 5, at 112; Gildin, *supra* note 5, at 163; Plotkin, *supra* note 5, at 4-5; Thaman, *supra* note 5, at 103, 105-06 (the judge in consultation with the parties decides the order of trial). On occasion another party may conduct the initial examination. Vesselinovitch, *supra* note 5, at 40 (the prosecutor conducted the initial examination of the defendants).

194. Andrias, *supra* note 5, at 26 (noting that at the trial the lawyers were very passive).

fashion.¹⁹⁵ Jurors may submit questions for the witness to the judge, who then decides whether they are appropriate.¹⁹⁶ The trial usually begins with the court calling upon the defendant to give his or her version of the events.¹⁹⁷ The victim is permitted to have a representative present and, unlike Western Europe, the representative is usually not an attorney. Frequently the representative of the victim is a relative untrained in the law.¹⁹⁸ Like the inquisitorial systems in the West, the rules of evidence, to the extent that they exist at all, are extremely lax.¹⁹⁹ Charges that are unrelated may be charged together and joined for trial.²⁰⁰ The courts retain the uniquely Russian practice of halting the trial and referring the case back to the procurator for further investigation, with the prospect that the case may be brought again at a later time.²⁰¹ At the conclusion of the trial the jury is called upon to render a verdict on four issues: 1) Whether a crime was committed; 2) Whether the defendant committed the acts charged in the indictment; 3) Whether the defendant is guilty of the crime; and 4) Whether the defendant merits lenience.²⁰² The twelve jurors first attempt to reach unanimity, but if after three hours of deliberation they are unable to do so, a majority vote on each of the four issues will be sufficient to return a verdict.²⁰³ As

195. Gildin, *supra* note 5, at 163-64; Plotkin, *supra* note 5, at 12-14; Andrias, *supra* note 5, at 23.

196. Plotkin, *supra* note 5, at 12-14; Thaman, *supra* note 5, at 105-06.

197. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 106.

198. Boylan I, *supra* note 5, at 112, 114-15; Thaman, *supra* note 5, at 95 n.212 (as in Western Europe, the court may attach a civil suit to the criminal case); *id.* at 107-08 (relating that, in a case where the aggrieved did hire an attorney, the attorney appeared to assist the defendant); Andrias, *supra* note 5, at 15-16 (the victim and the victim's representative, her sister, participated in a rape trial); *id.* at 22 (also noting that issues relating to civil damages may be tried in the criminal case); *id.* at 24 (the homicide victim's aunt was designated as legal representative when the widow could not be present).

199. Gildin, *supra* note 5, at 155; Plotkin, *supra* note 5, at 14 (stating that other than evidence suppressed because it was illegally obtained, all evidence is admissible except evidence relating to privileged information and the defendant's criminal record); Thaman, *supra* note 5, at 106-08.

200. Thaman, *supra* note 5, at 111; Andrias, *supra* note 5, at 24.

201. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 92, 99; Andrias, *supra* note 5, at 27 (relating that in 1995 approximately nine percent of all criminal cases were referred back for additional investigation).

202. Gildin, *supra* note 5, at 167-68; Plotkin, *supra* note 5, at 15; Thaman, *supra* note 5, at 108, 114.

203. Thaman, *supra* note 5, at 125 (relating that ties inure to the defendant's benefit); *id.* at 126 (noting that after a verdict of guilty the court may, on sufficient grounds, order a new trial or grant a motion for acquittal); *id.* at 127 (stating that if a civil suit has been joined to the criminal case, the judge rules on that case and determines damages).

in other inquisitorial jurisdictions, the prosecutor can appeal an acquittal.²⁰⁴

Although this may appear to be similar to the procedure in the United States, the dynamics and the process are much different. The tenor of the trial changes dramatically when it is the judge, and not the lawyers, who controls the proceedings and begins the questioning of each witness.²⁰⁵ This difference is enhanced by the narrative testimony and the absence of cross-examination by leading questions.²⁰⁶ It is difficult to overstate the importance of the order of trial, and specifically the stage at which the defendant is called upon to testify. If, as in the Russian system, the defendant is called first and gives his or her version, there will usually be few issues left to determine.²⁰⁷ If, however, the government is required to prove its case beyond a reasonable doubt and withstand a motion for judgment of acquittal before the defendant decides whether to testify, the result is much different.²⁰⁸ In our country this situation has led to issues of constitutional proportion that have ultimately been decided by the United States Supreme Court.²⁰⁹ The presence of the victim and/or a victim's representative who is not legally trained leads to outbursts, improper comments, and other incidents that unfairly prejudice the defendant.²¹⁰ The laxity of the evidentiary rules opens the door to incidents where the jury is exposed to inadmissible evidence, including the defendant's criminal record or evidence that has been suppressed by the court.²¹¹ It also appears that the prosecutors join unrelated charges for trial

204. *Id.* at 91, 127-28 (noting that the victim or the victim's representative may appeal); Plotkin, *supra* note 5, at 20-21; Andrias, *supra* note 5, at 22.

205. Boylan I, *supra* note 5, at 112; Gildin, *supra* note 5, at 163.

206. Gildin, *supra* note 5, at 163.

207. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 106.

208. *See* Frase, *supra* note 7, at 80.

209. *See* Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant cannot be made to testify first in the defense case).

210. Boylan I, *supra* note 5, at 115-16; Thaman, *supra* note 5, at 107-08 (in his closing argument the aggrieved brother of the decedent illegally revealed the defendant's criminal record); Andrias, *supra* note 5, at 22, 24-25 (noting that both the victim's aunt and his widow shouted out during the proceedings); Vesselinovitch, *supra* note 5, at 52 (noting the emotional impact of a next-of-kin confronting a defendant or crying at a murder trial).

211. Gildin, *supra* note 5, at 155 (relating an incident where the admissibility of certain statement was debated in front of the jury); Thaman, *supra* note 5, at 106-08 (noting that illegally gathered evidence and defendant's criminal record have come before the jury); *id.* at 107-08 (relating that witnesses relate hearsay, transcripts from the preliminary hearing are read, and friends in the audience have helped witnesses remember events); *id.* at 112 (stating that the aggrieved brother of the deceased illegally revealed the criminal record of the defendant in his closing argument); Andrias, *supra* note 5, at 23, 26 (at a trial there were no side bar conferences and evidentiary issues were argued).

merely to get prejudicial information before the jury.²¹² These problems are exacerbated by the fact that there are no mistrials and, even in the most egregious situations, the trial will continue.²¹³ The practice of referring the case back for further investigation is reminiscent of the Soviet era and undoubtedly deprives defendants of a final favorable decision in cases where an acquittal is merited.²¹⁴

The nature of the verdict is quite different from ours and appears to permit, if not invite, jury nullification.²¹⁵ It is interesting, and a source of criticism, that the jurors address the issue of leniency without knowledge of the defendant's criminal record or other information generally viewed as important to a determination of the sentence.²¹⁶ The prospect that a verdict can be returned by only a majority of the twelve jurors affects both the defense and the prosecution and effectively eliminates the defense strategy of attempting to create a hung jury.

Although theoretically sound,²¹⁷ permitting the prosecutor to appeal has important ramifications, including some that are not obvious.²¹⁸ For example, it has been noted that Russian defense attorneys will intentionally forgo meritorious pretrial motions to suppress evidence in order to eliminate the prospect that an acquittal may be later overturned by an appellate court's ruling that suppression was improperly granted.²¹⁹ While each of these factors independently has great significance, when taken together

212. Thaman, *supra* note 5, at 111 (in one case procurators joined a 1988 knife assault that had previously been dismissed with 1993 shooting and a 1991 hooliganism incident).

213. *Id.* at 112 (even though the revelation of the defendant's record was extremely prejudicial and was likely to affect the verdict, the trial continued after a cautionary instruction); Vesselinovitch, *supra* note 5, at 52 (mistrial motions do not exist in Russia and all trials continue to conclusion).

214. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 92 (defendants frequently forgo meritorious pretrial motions to suppress because of a concern that, if granted, the judge may merely refer the case back to the procurator for further investigation); *id.* at 99-101 (the power to return cases for supplementary investigation may compromise the presumption of innocence and the equality of the defense and prosecution).

215. Thaman, *supra* note 5, at 114 (allowing the jury to find a defendant not guilty despite a determination that the defendant committed the charged conduct is tantamount to jury nullification).

216. Andrias, *supra* note 5, at 26.

217. See *supra* note 74 and authorities cited therein.

218. Thaman, *supra* note 5, at 91 (the reversal of the acquittal cast doubt on the vitality of an exclusionary rule); *id.* at 120 (reversal of acquittal included holding that questions of self-defense and excessive force were questions of law for the judge not the jury).

219. *Id.* at 92 n.198.

it becomes very clear that the Russian jury system is much different than our own.²²⁰

3. *The Future of the Russian Criminal Justice System*

We are all hopeful that democracy, free enterprise, and the rule of law will succeed in Russia. With regard to the criminal justice system, it will be very interesting to see whether adversarial elements and independent juries will be universally accepted into the system and whether they will be successful.²²¹ It will not be enough to merely introduce new procedures. Consideration must also be given to the history, culture, custom, and legal traditions of the country. Real and lasting change will come only when a culture and tradition exists that is receptive to the elements of reform and welcomes them into the system. The words of Learned Hand, quoted by the Russian scholar Professor Vlasihin, are significant in this regard:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²²²

220. At the time this article was completed, Scott P. Boylan, Esquire, Regional Director of the Office of Overseas Prosecutorial Development Assistance and Training of the Criminal Division of the United States Department of Justice advised the author that there is presently legislation pending before the Russian Duma that would make significant changes in Russian criminal procedure. Although it would affect a number of areas, there are three key elements in this legislation. First, search and arrest warrants would require judicial approval; second, the right to jury trial in serious offenses would be provided in all regions of Russia; and finally, a plea bargaining procedure would be instituted in cases involving offenses punishable by three years in prison or less. If enacted, elements of this legislation will go into effect early in 2002.

221. With regard to jury trials, it is encouraging that for a period of approximately forty years, independent juries did exist, and were apparently successful, in Russia. See *supra* text accompanying notes 111-17. Also, juries may be seen as a moral force helpful in addressing the skepticism that developed during years of oppression. Boylan II, *supra* note 5, at 1339.

222. Vlasihin, *supra* note 5, at 1210 (quoting Learned Hand, Address at the "I am American Day" ceremony (May 21, 1944), in *SPIRIT OF LIBERTY* 189-90 (Irving Dillard ed. 1960)) (citation omitted).

These words are even more significant when one considers that they were quoted by a distinguished Russian scholar regarding the situation in his native land. We must, to the maximum extent possible, continue to assist the Russian people to create the institutions and attitudes necessary to establish permanent changes in the system, institutions and attitudes that will, over time, lead to a tradition of democracy and rule of law.

VI. CONCLUSION

The legal system, and particularly the criminal procedure, of any country is derived from, and rooted in, the customs, history, and legal and political traditions of its people. A criminal justice system can be effective and legitimate only if it reflects the country's culture and traditions. These considerations are of paramount importance whenever an attempt is made to alter the criminal procedure of a nation or introduce a new element. The changes that are now taking place in the former Soviet Union provide an excellent example. The introduction of adversarial elements into the inquisitorial systems of those countries will succeed only if the new elements are compatible with the country's values, customs, and background. For this reason, it is important that those who are attempting to assist the citizens of any nation in the process of democratization and criminal justice reform acquaint themselves with that country's legal and historical traditions. The failure to do so will lead to perceptions of insensitivity, misunderstandings, and ultimate failure. If, however, we are sensitive to the legal, political, and social culture, we can provide invaluable assistance that will be welcomed by our friends in those countries and lead to positive and permanent change that will be of great benefit to all of us in the years to come.

**WILL RETROCESSION TO A COMMUNIST
SOVEREIGN HAVE A DETRIMENTAL EFFECT
ON THE EMPHASIS AND ENFORCEMENT OF
LAWS PROTECTING HONG KONG'S
ENVIRONMENT?**

**THE CZECH EXPERIENCE AS
CONTRAPOSITION**

J. CAMERON THURBER*

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I. INTRODUCTION

On July 1, 1997, the governance of Hong Kong was transferred from British rule to the People's Republic of China. This transition had, and continues to have, major impacts in many areas of the law for the Hong Kong Special Administrative Region (HKSAR), China, and the international community. Although much of the focus of these legal changes has centered on economic, political, international and human rights laws, the

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retrocession promises to have a significant impact on HKSAR environmental law, as well. In particular, conventional wisdom holds that the transition to a Communist state will have a negative effect on the emphasis and enforcement of laws protecting Hong Kong's environment.¹

The change in Hong Kong sovereignty from a democratic, capitalist nation to an authoritarian Communist country contrasts with the trend of the past decade. Many countries, particularly in Central and Eastern Europe, have repudiated Communism in favor of democratic governments and free market economies. In the newly formed Czech Republic, the past decade of democracy has resulted in positive changes for laws protecting the environment.²

This article will examine the question of whether the transfer of Hong Kong's sovereignty to a Communist government will have the reverse effect on environmental law when compared with the Czech experience in shedding its Communist system. Although Hong Kong has been granted at least semi-autonomous rule as a Special Administrative Region, China still has ultimate authority over the Region and exerts great political and legal influence over it.³ The thrust of this article, therefore, will be on the impact of national policies on both the national and regional emphasis and enforcement of laws protecting the environment, especially where the administration and enforcement of national policies has been locally delegated. The emphasis will generally be on political policies and their implications rather than on economic policies and implications, except where political decisions are made for economic reasons or are inextricably linked with economic policies. A brief overview of the current HKSAR political and legal structure, and how it interacts with that of mainland China, will be presented in Part V.

For the purposes of this article, the term "Communism" will primarily refer to a Marxist-Leninist, totalitarian and authoritarian form of government as once existed in Eastern Europe and currently exists in China.⁴ References to democracy

1. Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L.J. 231, 242 (1998).

2. Professors Eva Kruzikova & Vaclav Mezricky (Charles University Law Faculty, Czech Rep.), Address to The Florida State University College of Law on legal changes in the Czech Rep. since 1989 (Oct. 26, 1999).

3. Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 297-302, 304-05 (1999).

4. Jaques deLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters - and Doesn't Matter - in Hong Kong's Return to China*, 18 U. PA. J. INT'L ECON. L. 69, 79-80 (1997).

will generally imply the "liberal-democratic" political and governmental structures of countries of Western Europe and North America, and particularly the United Kingdom.⁵

The Czech Republic is well-suited for comparison with Hong Kong for three major reasons. As already mentioned, the diametrically opposed recent history in terms of change in the form and political ideology of national governance of the Czech Republic and Hong Kong provides the initial basis for comparison. Second, both Hong Kong and the Czech Republic have extensive environmental problems, particularly with pollution. Hong Kong is one of the most heavily polluted regions in the Pacific Rim,⁶ and the Czech Republic is one of the most environmentally damaged countries of the former Soviet Bloc.⁷ Finally, both Hong Kong⁸ and the Czech Republic⁹ have a political dilemma involving strong economic development interests at odds with the need for protection of the environment.

II. THE CZECH EXPERIENCE IN ENVIRONMENTAL LAW

A. Under Communist Rule

Following the end of World War II and a brief attempt at a democratic government in Czechoslovakia, in 1948 the Czechoslovak Social Democratic Party attained power and soon began the transition to a Communist state and Soviet satellite country.¹⁰ The Communist government remained in power until the "Velvet Revolution" in late 1989, which resulted in democratic elections and reforms in early 1990.¹¹ During Communist/socialist rule, the government considered

5. *Id.*

6. Liebman, *supra* note 1, at 239.

7. David E. Madeo, *Environmental Contamination and World Trade Integration: The Case of the Czech Republic*, 26 LAW & POL'Y INT'L BUS. 945, 953 (1995).

8. Julie Bloch, *Conservation in a Concrete Jungle: Political, Legal and Societal Obstacles to Environmental Protection in Hong Kong*, 6 GEO. INT'L ENVTL. L. REV. 593, 593 (1994).

9. Elizabeth F. Brown, *In Defense of Environmental Rights in East European Countries*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 197-201 (1993).

10. LIBRARY OF CONGRESS FED. RESEARCH DIV., CZECHOSLOVAKIA: A COUNTRY STUDY, reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 1-36 (Ihor Gawdiak ed.).

11. Radio Prague, *History Online: The Velvet Revolution*, available at <http://www.radio.cz/history/>, reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 37-41 [hereinafter Radio Prague].

environmental problems a political threat.¹² According to Communist doctrine at the time, a polluted environment could not exist in a socialist country, as Communism and socialism were considered to be of "the most progressive order."¹³ Basically, one reason the Communist government ignored pollution was because to admit to the problem would mean admitting Communism was not perfect.¹⁴

Additionally, the Communists placed much value in economic development and production while placing almost no value in environmental protection.¹⁵ State-owned heavy industries in the centrally planned economies like Czechoslovakia wasted raw materials and energy and were only concerned about meeting production quotas.¹⁶ There were, however, four major environmental laws and over 350 regulations on the books by the late 1970s, but these laws were widely ignored, as they were not enforced and financial sanctions served no deterrent effects.¹⁷

The result of forty years of the Communist Czechoslovakian government's absence of any real policy towards the environment (besides the unrestricted exploitation of natural resources and the environment) was environmental devastation on a grand scale.¹⁸ The Czech Republic was one of the most heavily polluted and environmentally damaged countries in Europe by 1989, and was the worst in terms of air pollution.¹⁹ More than sixty percent of Czechoslovakia's forests were (and still are) damaged from acid rain, a result of inefficient power plants that burned brown coal.²⁰ Fifty-seven percent of the country's drinking water was so polluted it was unhealthy.²¹

12. Vaclav Mezricky, *State of the Environment in the Czech Republic*, FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 138-139.

13. MINISTRY OF ENV'T OF THE CZECH REP. & CZECHOSLOVAK ACADEMY OF SCIENCES, ENVIRONMENT OF THE CZECH REPUBLIC 18-19 (1990), *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 1-18 [hereinafter MINISTRY].

14. Margaret Bowman & David Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921, 926 (1992).

15. MINISTRY, *supra* note 13, at 11-12.

16. Mark Mininberg et al., *Promoting Economic Growth and Environmental Protection: The Institute for Sustainable Development*, 9 CONN. J. INT'L L. 69, 71 (1993).

17. Bowman & Hunter, *supra* note 14, at 938.

18. Madeo, *supra* note 7, at 942.

19. *Id.* at 953; Mezricky, *supra* note 12, at 140.

20. Mezricky, *supra* note 12, at 140-41.

21. *Id.* at 140.

B. After the "Velvet Revolution"

The Velvet Revolution, or as the Czechs prefer, Listopadové události (November events), was a six-week period between November 17 and December 29, 1989, in which the ruling Communist government in Czechoslovakia was driven out of power.²² Democratic government and reforms replaced the old regime, and the country began a fast-paced transition to a market-based, capitalist economy.²³ Due in large part to the speed with which these reforms were taking place, in 1992 the Slovak people voted to split from Czechoslovakia and form the Slovak Republic with Bratislava as its capital.²⁴ Hence, the Czech Republic was born.

The new government, eager to join Western democratic capitalist countries as a trading partner, made environmental regulation and protection a priority during its early years in order to break down the international trade barriers the country's high level of pollution had erected.²⁵ Premier Vaclav Klaus and other pro-economic development and property rights factions resisted efforts to pass and strengthen laws to protect the environment, fearing such protections would slow economic growth, raise the unemployment rate, and interfere with property rights.²⁶ The Czech Constitution and the Charter of Fundamental Rights and Freedoms, which were written during this time, reflected a compromise between both the pro-environmental protection and pro-economic development sides. The environmentalists, who had a friend in former President Vaclav Havel, garnered an edge on environmental issues.²⁷

Article 7 of the Czech Constitution states, "The state shall take care that the natural resources [of the Czech Republic] are exploited economically and that Nature's wealth is duly protected."²⁸ The Czech Constitution, ratified on December 16, 1992, incorporates the Charter of Fundamental Rights and Freedoms in Article 3.²⁹ This Charter, passed in 1991, prohibits using privately owned property in a way that damages nature or

22. Radio Prague, *supra* note 11, at 37.

23. *Id.* at 39-41.

24. *Id.* at 39.

25. Madeo, *supra* note 7, at 955-56.

26. Brown, *supra* note 9, at 197-201.

27. *Id.* at 200-01.

28. ÚSTAVA ČR [Constitution of the Czech Rep.] art. 7, *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 54-73.

29. *Id.* art. 3.

the environment beyond statutory limits³⁰ and prohibits anyone from exercising their rights to the extent it endangers or damages natural resources or the environment.³¹ The Charter also guarantees the right to live in a "favourable living environment" and the entitlement to "timely and complete information [regarding] the state of the living environment and natural resources."³² The Charter gives the citizens standing to enforce these rights through the Constitutional Court.³³

Most Czech environmental protection laws were passed between 1990 and 1992 when the zeal to reform was still strong.³⁴ The General Environmental Protection Law, the Clean Air Act and the Act on the State Administration of Waste Management were passed in 1991; the Regulation on Waste Management Programs was also adopted by the government that year.³⁵ In 1992, a weak, Communist-era 1973 Water Act was amended and strengthened.³⁶ These new Czech environmental laws contained provisions for administrative fines and sanctions and a duty for polluters to clean up their environmental damage and restore the ecosystem to its natural state.³⁷ A 1990 amendment to the criminal code made endangering the environment a criminal offense, and a 1992 law made every Czech citizen responsible for preventing environmental pollution.³⁸

After 1992, Premier Klaus began choosing weak environmental ministers.³⁹ Environmental problems faded as a political priority, displaced by a political emphasis on the economy and market reforms.⁴⁰ Public support for environmental protection measures waned with the political support for

30. Constitutional Act of January 9, 1991, instituting the Charter Of Fundamental Rights And Freedoms as a Constitutional Act of the Federal Assembly of the Czech and Slovak Federal Rep., art. 11, sec. 3, *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 74-82.

31. *Id.* art. 35 §3.

32. *Id.* art. 35 §1-2.

33. Bowman & Hunter, *supra* note 14, at 940.

34. Kruzikova & Mezricky, *supra* note 2; *see also* MINISTRY OF ENV'T OF THE CZECH REP., STATE ENVIRONMENTAL POLICY, Aug. 23, 1995, *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 66-99.

35. Bowman & Hunter, *supra* note 14, at 940-43.

36. Madeo, *supra* note 7, at 956.

37. *Id.* at 957-58.

38. *Id.*

39. *Id.*

40. John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227, 252-53.

economic reasons as well.⁴¹ Laws making owners of private property liable for inherited environmental damage on their lands and requiring environmental audits had a negative effect on the privatization process where formerly state-owned companies were sold off to Czech citizens through a lottery, which in some cases also involved foreign investors.⁴² Many industrial sites were heavily polluted from the Communist era.⁴³ Even though the state of the environment did improve somewhat during the mid-1990s and the overall level of pollution dropped between 1992 and 1994, this was primarily due to reduced economic output from decreased operations of heavily polluting factories rather than better environmental management.⁴⁴

After 1996, political support began to improve again for environmental protection laws.⁴⁵ One of the main goals of the Czech government is to be admitted into the European Union (EU) early in the 21st Century. Political officials realize they will have to meet strict EU pollution limits and have environmental laws which reflect those of the EU through the approximation process.⁴⁶ Additionally, estimates that environmental degradation was causing the Czech Republic to lose five to seven percent of its gross national product each year emphasized the economic benefits of environmental protection.⁴⁷

The environmental ministers have been "getting better" since 1996, which, when combined with the government's interest in obtaining admission to the EU, has resulted in a renewed political emphasis on environmental laws.⁴⁸ The current government, though, is still not quite environmentally friendly, as more than ten years after the fall of the Berlin Wall many government ministers are still members of the Communist Party.⁴⁹ The current environmental minister, Milos Kuzvart, while of an environmental protection mindset, is young and not yet politically

41. Brown, *supra* note 9, at 198-99.

42. Madeo, *supra* note 7, at 959-60. However, the Czech government promised to reimburse property owners for the costs of environmental clean-up under some limited circumstances.

43. *Id.* at 955.

44. Casalino, *supra* note 40, at 249.

45. Kruzikova & Mezricky, *supra* note 2.

46. *Id.*; see also Jennifer A. Vinson, Article Review, 11 GEO. INT'L ENVTL. L. REV. 812 (1999) (reviewing Andrej Hronec, *The Approximation of EU Environmental Legislation in the Czech Republic*, 8 EUR. ENVTL. L. REV. 17 (1999)).

47. Madeo, *supra* note 7, at 958-59.

48. Kruzikova & Mezricky, *supra* note 2.

49. *Id.* According to lectures by professors at Charles University Law Faculty attended by the author, Prague, Czech Rep., on May 25, 1999, the Communist Party still secures about 16% of the votes in Czech elections.

strong enough to stand up to the old ministers.⁵⁰ However, things are definitely looking better for the Czech environment following this renewed emphasis on enforcing laws that protect the environment.

Recently, a report by the Organization for Economic Cooperation and Development (OECD) praised government efforts to clean up pollution and protect the environment since 1990.⁵¹ "Thanks to the importance attached to the environment . . . the expenditures on environmental protection rose to three percent of GDP [gross domestic product] in 1996, which is comparable to other OECD countries."⁵² Air pollution has decreased fifty percent in the past ten years, but twenty-three percent of Czechs still breathe heavily polluted air.⁵³ The decrease in air pollution, a remnant of the Communist era, is primarily due to enforcement of the 1991 Clean Air Act, which resulted in massive investment to install pollution filters in factories.⁵⁴ The OECD report suggested even tighter enforcement of environmental laws through increasing fines and drawing up a new environmental policy for the Czech Republic, which outlines specific goals and deadlines for meeting EU environmental requirements.⁵⁵

The transition from a Communist to a democratic government and free market economy has benefited the Czech environment through an increased emphasis on and enforcement of environmental protection laws, although much remains to be done. While the Czech Republic needs new laws on water protection, waste management and assessments on the impact of new construction on the environment, factories today produce ninety percent less sulfur emissions than ten years ago.⁵⁶ Environment Minister Kuzvart is hopeful these tough new laws will be enacted soon.⁵⁷ The Ministry of the Environment is principally responsible for the enforcement of environmental protection laws through the Czech Environmental Inspection

50. *Id.*; *EU Too Hard in Assessing Environment*, CZECH NEWS AGENCY, Oct. 27, 1999.

51. *Czech Environment Better, but Problems Persist*, CZECH NEWS AGENCY, Apr. 14, 1999 [hereinafter *Czech Environment*].

52. *Id.*

53. Katka Fronk, *Air Pollution Drops Dramatically*, THE PRAGUE POST, Apr. 28, 1999, available at 1999 WL 8731909.

54. *Id.* This statistic accounted for non-enforcement and economic factors in its determination.

55. *Czech Environment*, *supra* note 51.

56. *EU Too Hard in Assessing Environment*, *supra* note 50.

57. *Id.*

Agency, which also delegates this responsibility to nine regional offices.⁵⁸

III. HONG KONG ENVIRONMENTAL LAW UNDER BRITISH RULE

Hong Kong (which actually comprises the island of Hong Kong, Kowloon, Stonecutter's Island, and the New Territories) was acquired by Great Britain between 1842 and 1898 through treaties and a subsequent lease after the Opium Wars.⁵⁹ Throughout most of the tenure of Hong Kong as a British colony, environmental protection was largely ignored by the legal and political processes.⁶⁰ The first laws related to sanitation were Good and Cleanliness Ordinances enacted by the local legislature in 1844 and 1845.⁶¹ Other laws enacted by the British colonial government during the 18th century and into the early 19th Century dealt primarily with public health, hygiene, and land use rather than directly with environmental protection.⁶² Interestingly, many public health laws were resisted by both the government and populace as an unnecessary intervention in an individual's behavior.⁶³

In the early and mid-twentieth century, most environmentally-related legislation dealt primarily with land use and zoning.⁶⁴ Only in the fifteen or so years before the end of British rule did Hong Kong begin to tackle environmental problems directly.⁶⁵ Hong Kong's regional government did not have an agency charged with environmental protection until 1986, when it established the Environmental Protection Department (EPD).⁶⁶ Hong Kong's first white paper on environmental problems was not published until 1991.⁶⁷ Due to these developments, as well as the "passage of many significant environmental laws over the past two decades,"⁶⁸ it appeared

58. VACLAV MEZRICKY, STATE ADMINISTRATION OF ENVIRONMENTAL PROTECTION, FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 143-47.

59. Peter Wesley-Smith, *The Future of Hong Kong: Not What It Used To Be*, 30 VAND. J. TRANSNAT'L L. 421, 423 (1997); see also Bloch, *supra* note 8, at 593.

60. Bloch, *supra* note 8, at 593.

61. Bryan Bachner, *Conserving a Legal Heritage in Hong Kong: Environmental Regulation After 1997*, 19 LOY. L.A. INT'L & COMP. L. REV. 363, 365 (1997).

62. *Id.* at 365-66.

63. *Id.*

64. *Id.* at 366-67.

65. *Id.* at 367-70.

66. Liebman, *supra* note 1, at 238.

67. *Id.* at 231.

68. Bachner, *supra* note 61, at 369.

Hong Kong was finally getting serious about environmental protection.

However, despite the number of environmental laws on the books in the 1990s, enforcement was a problem.⁶⁹ A survey by the Hong Kong Environmental Law Association found that in 1993, the judiciary generally imposed only nominal fines on polluters (if they were caught in the first place), making it more financially beneficial for the offenders to pay the fines rather than stop polluting.⁷⁰ The two main reasons for this enforcement void were Hong Kong's emphasis on the economy over all else⁷¹ and a lack of citizen concern or involvement in environmental policies.⁷²

As with the Czech Communists and later political officials after the formation of the Czech Republic, many in Hong Kong viewed economic development and environmental protection as inconsistent goals,⁷³ despite the growing idea of sustainable development.⁷⁴ Industry and government always had a close relationship under British rule,⁷⁵ as Hong Kong's economic prosperity was Britain's most important interest in the colony.⁷⁶ Hong Kong regional government policies reflected the British government's interest.⁷⁷ Environmental groups gave Chris Patten's government failing marks in protecting the environment and controlling pollution in the mid-1990s,⁷⁸ and had similar concerns at that time about Tung Chee-hwa's future leadership which was to follow the retrocession.⁷⁹

Citizen apathy and the inability of public interest groups to gain enough power to influence local or British national politics are closely related to the government's choice of economy over

69. Patricia Young, *Patten Fails Green Test*, S. CHINA MORNING POST, Sept. 25, 1995, at 6; see also Bloch, *supra* note 8, at 628-29; Liebman, *supra* note 1, at 238-39.

70. Kathy Griffin, *Survey Shock Over Low Pollution Fines*, S. CHINA MORNING POST, June 9, 1994, at 4; see also Liebman, *supra* note 1, at 240.

71. Liebman, *supra* note 1, at 240; see also Bloch, *supra* note 8, at 600, 629; Davis, *supra* note 3, at 297.

72. Liebman, *supra* note 1, at 239-40.

73. Brown, *supra* note 9, at 127-201; Bloch, *supra* note 8, at 629.

74. Edward D. McCutcheon, *Think Globally, (En)act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395, 409 (1998) (citing THE WORLD BANK, WORLD DEVELOPMENT REPORT 1994 – INFRASTRUCTURE FOR DEVELOPMENT 1 (1994)). Sustainable development seeks to balance economic progress and development with environmental concerns.

75. Bloch, *supra* note 8, at 629; see also Bachner, *supra* note 61, at 372.

76. Liebman, *supra* note 1, at 240.

77. Bloch, *supra* note 8, at 600-01.

78. Young, *supra* note 69, at 6; see generally Patricia Young, *Rare Court Victories in Japan Spur HK Action*, S. CHINA MORNING POST, July 17, 1995, at 5.

79. Fiona Holland, *Green Warning to Candidate*, S. CHINA MORNING POST, Dec. 5, 1996, at 4.

environmentalism. A 1996 study by a Hong Kong environmental group revealed the region was dead last among 39 other countries and territories in ranking public support for environmental issues.⁸⁰ Unlike the United States, there were only a handful of pro-environmental organizations existing in Hong Kong prior to the transition in governance, and public interest groups had little influence in the territory's politics.⁸¹ This lack of public participation is partially due to domination of the legislature by business and industry advocates.⁸²

On its home turf, the British government was much more progressive in terms of environmental protection. Some of the first environmental acts date back to the mid-19th Century, and an 1868 case opinion by the House of Lords imposed strict liability for polluting another's land in certain instances.⁸³ Although they have not always been consistently enforced, British law provides for strict administrative and criminal penalties and civil remedies for harm resulting from environmental damage.⁸⁴ The Environmental Agency (for England and Wales) and the Scottish Environmental Protection Agency were formed in 1996, consolidating the previous duties of several forerunner agencies and coordinating local authorities.⁸⁵ The United Kingdom has also been a signatory to many international environmental law treaties and agreements, and applied most of these to Hong Kong.⁸⁶

In relating British environmental policies in the Hong Kong territory to those in the British Isles, the United Kingdom placed more emphasis on and more strictly enforced environmental protection laws at home than in Hong Kong. Except for applying international treaties of which it was a signatory, the British government took a laissez-faire attitude toward Hong Kong and left the development and enforcement of environmental protection laws to the local colonial government.⁸⁷ In contrast, the British government put great emphasis on the economic development of the region to the detriment of the environment.⁸⁸

80. Liebman, *supra* note 1, at 239-40.

81. Bloch, *supra* note 8, at 607.

82. Bachner, *supra* note 61, at 372.

83. Valerie M. Fogleman, *English Law - Damage to the Environment*, 72 TUL. L. REV. 571, 573-75 (1997).

84. *Id.*

85. *Id.* at 576; Stephen Tromans, *Developments in the European Community and United Kingdom*, 8 NAT. RESOURCES & ENV'T 43, 44 (Spring 1994).

86. Liebman, *supra* note 1, at 261-63; see generally Bloch, *supra* note 8, at 609.

87. Bachner, *supra* note 61, at 370.

88. Bloch, *supra* note 8, at 601.

Arguably, a firm legal foundation for protecting Hong Kong's environment was established late under British rule,⁸⁹ but overriding political concerns, as well as public and government apathy, generally led to non-enforcement of these laws and regulations.⁹⁰ As a result, Hong Kong has been called "[a] first world economy with a third world environment"⁹¹ and Victoria Harbour "a vast sewage and waste pit."⁹² The government of the United Kingdom, a first world democracy, has shown that "democracy may not always result in pro-environmental decisions . . ."⁹³ through its governance of the Hong Kong territory.

IV. OVERVIEW OF CHINESE ENVIRONMENTAL LAW

A. History

China is a relative latecomer in the area of environmental protection law compared to the United Kingdom and other Western democracies, but, like the Czech Republic and Hong Kong, has increasingly done more in this area over the past twenty years. Traditionally, China has relied more on community morals and customs to resolve disputes and check behavior than a structured legal system.⁹⁴ Informal mediation has long been favored over formal means for dispute resolution.⁹⁵ Under the danwei system, similar to the tithings and frankpledge of medieval England,⁹⁶ each citizen belongs to a self-policing unit that monitors each person's behavior within the unit.⁹⁷

Following the Communists' rise to power in 1949, limited environmental laws were passed in 1956, 1957, and 1962.⁹⁸ However, the Great Leap Forward and the resulting emphasis on development and productivity led to massive ecological

89. Bachner, *supra* note 61, at 363; see also Bloch, *supra* note 8, at 594.

90. Bachner, *supra* note 61, at 370; Griffin, *supra* note 70, at 4.

91. Liebman, *supra* note 1, at 239 (citing Mei Ng & Lisa Hopkinson, *A Little Green Dragon?*, 5 ASIAN J. ENV'T MGMT. 75, 75 (1997)).

92. *Id.* (citing *Reclamation of the Harbour - Fate or Folly?*, URB. PLAN. & ENVTL. R., Dec. 1995, at 1).

93. Bloch, *supra* note 8, at 607-08.

94. William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 125 (1997).

95. Michael Palmer, *Environmental Regulation in the People's Republic of China: The Face of Domestic Law*, CHINA Q., Dec. 1, 1998, at 788, available at 1998 WL 31507442.

96. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 8 (1990).

97. Alford & Shen, *supra* note 94, at 133.

98. Palmer, *supra* note 95.

destruction and pollution.⁹⁹ The importance and enforcement of environmental laws was virtually nil until the early 1970s.¹⁰⁰ This neglect, occasionally interspersed with the passage of impotent environmental legislation, corresponds with the Czech experience under Communism.

A second phase of Chinese environmental law and policy began following its attendance at the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden.¹⁰¹ In 1973, China's first national conference on environmental protection resulted in the first somewhat comprehensive law in this area.¹⁰² A more comprehensive environmental protection law was passed in 1979, and "[t]he general drift towards safeguarding environmental welfare" led to mention of environmental protection and pollution control in Article 11 of the 1978 Constitution and Article 26 of the 1982 Constitution.¹⁰³

The Chinese government accelerated its emphasis on protecting the environment through legislation by passing comprehensive environmental protection laws in 1979 and 1989 and an air pollution law in 1987.¹⁰⁴ A slew of civil and criminal environmental laws and regulations have been passed by the National People's Congress (NPC) in the past decade,¹⁰⁵ and in some cases serious offenders may now face capital punishment for environmental crimes such as dumping toxic wastes.¹⁰⁶ A number of administrative and enforcement agencies have also been established at the national and local levels of government.¹⁰⁷ The State Environmental Protection Administration (SEPA) is the main national agency, and provincial and local governments have local Environmental Protection Bureaus (EPB's) to implement national laws and policies.¹⁰⁸

In 1993, Qu Geping, head of the National Environmental Protection Agency (NEPA; the forerunner of SEPA) predicted that because of the government's emphasis on environmental

99. *Id.*

100. *Id.*

101. *Id.*; Paul J. Smith, *Free Trade and the Environment: Will Free Trade Save China's Environment?*, 1 *BUFF. J. INT'L L.* 27, 29 (1994).

102. Palmer, *supra* note 95.

103. *Id.*; see also Alford & Shen, *supra* note 94, at 129.

104. Palmer, *supra* note 95; Alford & Shen, *supra* note 94, at 129-31, 133.

105. Palmer, *supra* note 95; Alford & Shen, *supra* note 94, at 129-31; Zhang Hongjun & Richard J. Ferris, Jr., *The Environmental Regulatory Regime of the People's Republic of China: A Primer Addressing Practical Concerns of Foreign Investors*, 27 *ENVTL. L. REP.* 10228 (1997).

106. Hongjun & Ferris, *supra* note 105.

107. Palmer, *supra* note 95.

108. *Id.*

protection through the China Action Programme, "pollution [would] be under control, that cities [would] be cleaner and that China's ecology greatly improved [by the end of the 20th Century]."¹⁰⁹ Instead, China was the world's third leading carbon dioxide emitter in 1993 and may be first by 2025.¹¹⁰ Twenty percent of deaths in China's urban areas were caused by environmental hazards in 1994, and respiratory disease from pollution was the second leading cause of death in China in 1996.¹¹¹ China's water pollution problem is at a critical level.¹¹² These statistics beg the question: Why have China's environmental problems worsened over the past twenty years in spite of the proliferation of environmental protection laws?

The answer to this question is primarily threefold, although these main reasons are inter-related. First, like in Hong Kong, environmental issues in China have taken a back seat to economic and production concerns due to political policies favoring development of the economy.¹¹³ Central planning in the past largely ignored environmental concerns.¹¹⁴ During the reign of Deng Xiao Ping, China sought to quadruple its gross national product during the last twenty years of this century, and China's gross domestic product hovered around ten percent during the 1980s and early 1990s.¹¹⁵ Mou Guangfeng, Deputy Director of the Policy and Legal Department of SEPA, claimed, "China's high-speed economic growth has put enormous pressure on its environment."¹¹⁶ Xie Zhenhua, Beijing's EPB director, said, "China's environment [has] been sacrificed" in order to have more economic development.¹¹⁷

Additionally, in 1994 it was estimated that it would cost the PRC \$300 billion to control pollution and clean up the environment, an expense China said it could not afford.¹¹⁸ Free trade advocates argue poor, developing countries can not afford to protect the environment until they reach a point where they can

109. Zhu Baoxia, *Ecological Protection the State's Top Task*, CHINA DAILY, Feb. 3, 1993, at 11, available at 1993 WL 10862926.

110. Alford & Shen, *supra* note 94, at 126-27.

111. Smith, *supra* note 101, at 28-29; Alford & Shen, *supra* note 94, at 126.

112. Michael A. Gheleta, *Sustaining the Dragon: Rational Use and Protection of China's Water Resources in the Twenty-First Century*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 221, 224 (1998).

113. *Id.*; Chan Wai-Fong, *Economic Growth Leaves a Dirty Trail*, S. CHINA MORNING POST, Nov. 29, 1994, at 11; see also Smith, *supra* note 101, at 40-41.

114. Smith, *supra* note 101, at 28.

115. Gheleta, *supra* note 112, at 223.

116. Wai-Fong, *supra* note 113, at 11.

117. *Id.*

118. *Id.*

feed their people, at which time they then become willing to pay for environmental protections.¹¹⁹ China's political policies on this issue were summed up when Premier Li Peng stated China will only be able to participate more in global environmental protection after it has improved economically, become more developed, and eliminated poverty.¹²⁰

To encourage economic development, China had made it easier for foreign industry to locate polluting factories in China.¹²¹ These foreign companies were often lured by China's comparatively lax environmental laws, inter alia, and this led a NEPA official to characterize China as a "dumping ground" for businesses that cannot meet their own countries' environmental laws.¹²² This proliferation of foreign-owned factories in China, while providing for much-needed employment and economic development, has severely worsened China's environmental problems.¹²³

Second, a period of decentralization over the past twenty years has also affected the national government's ability to emphasize enforcement of environmental and pollution laws.¹²⁴ Responsibility for environmental quality now generally rests with local governments,¹²⁵ but local EPB's have limited power to enforce national laws; for example, under a 1987 air pollution law, they could issue warnings and fines to polluters but could not shut the offending company down without national approval.¹²⁶ Regional governments are also generally slow to obey commands from the central government.¹²⁷

Economic priorities of regional and local governments also have taken priority over national, regional and local environmental policies and laws. Local "EPB's are often compromised by government policies of economic growth and local pressures to ignore environmental standards."¹²⁸ Local governments, which often have a financial interest in local enterprises or foreign industry located in the area, will often

119. Smith, *supra* note 101, at 36.

120. *Id.* at 41.

121. Tom Korski, *Lax Laws Allow Foreign Pollution to Relocate*, S. CHINA MORNING POST, Mar. 4, 1997, at 12.

122. *Id.*

123. Smith, *supra* note 101, at 31.

124. Bacher, *supra* note 61, at 383-84.

125. Alford & Shen, *supra* note 94, at 131.

126. *Id.*

127. *Id.* at 134; Liebman, *supra* note 1, at 279.

128. Palmer, *supra* note 95.

tolerate polluting factories.¹²⁹ Furthermore, local EPB's must rely on locally-raised revenues, which frequently come from local industries.¹³⁰

Lack of meaningful fines and corruption at the local level further creates problems.¹³¹ Polluters figure it is often more cost-effective to pay fines than correct their behavior when they compare the expense of modifying their operations, or a reduction in profits from such modifications, to the amount of any fines to which they may be subject.¹³² Corruption also leads to regulatory confusion and inconsistent enforcement,¹³³ as the degree of corruption may vary greatly between the regulators and officials with whom a polluter must do business.

Third, environmental protection laws themselves are somewhat to blame. They are often viewed more as policy statements than "real" primary laws.¹³⁴ The environmental protection laws on the books are frequently vague and sometimes contradictory.¹³⁵ An emphasis on social harmony rather than formal legal codes has pervaded Chinese history, making law less important than in other countries, particularly those in Europe and the West.¹³⁶ Lawyers play a relatively unimportant role in the enforcement of Chinese environmental laws, which remains principally an administrative rather than legal area.¹³⁷ There is also a dearth of judicial decisions interpreting environmental laws, and this can lead to inconsistencies in enforcement.¹³⁸ In addition, Chinese law itself can be an impediment to the enforcement of environmental laws, as, for example, a citizen must be directly affected by another's action to have standing in a Chinese court.¹³⁹

129. Wai-Fong, *supra* note 113, at 11.

130. Alford & Shen, *supra* note 94, at 142.

131. Smith, *supra* note 101, at 40.

132. *Id.*; Palmer *supra* note 95.

133. Hongjun & Ferris, *supra* note 105; see generally deLisle, *supra* note 4, at 84.

134. Palmer, *supra* note 95.

135. Hongjun & Ferris, *supra* note 105; *China Must Map Out Strategy on Resources*, CHINA DAILY, Nov. 6, 1997, available at 1997 WL 13647816 [hereinafter *China Must Map Out*].

136. John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 N.Y.U. ENVTL. L.J. 517, 523-24 (1996).

137. Palmer, *supra* note 95.

138. Nagle, *supra* note 136, at 517-18; Palmer, *supra* note 95.

139. Palmer, *supra* note 95.

B. Recent Developments

Very recently, though, there have been some encouraging developments evidencing that the national emphasis on environmental policy may be starting to pay off and trickle down to regional and local governments. In 1998, China spent \$10 billion, or one percent of its gross domestic product, on environmental protection.¹⁴⁰ While China reportedly now needs at least \$54 billion for a new environmental protection project, it already plans to have spent \$22.5 billion by the beginning of the 21st Century on the Trans-Century Green Project.¹⁴¹ These expenditures will finance 1600 new environmental projects.¹⁴²

Qu Geping admitted in 1998 that the patchwork of environmental laws was not working properly and needed revision.¹⁴³ Contradictions in these laws were pointed out at a 1997 conference, and the research director for the NPC Environmental and Resource Protection Committee (ERPC) called for a "mother law" to coordinate the myriad environmental protection laws.¹⁴⁴ At the ERPC forum held November 4-7, 1999, it was announced the NPC Standing Committee had recently promulgated six environmental laws and thirteen environmentally-related resource protection laws.¹⁴⁵ ERPC Vice Chairman Zou Jiuhua emphasized that enforcement of the laws was as important as the laws themselves.¹⁴⁶

The environment, and especially the enforcement of environmental protection laws, seems to be gaining ground as a priority not only on the national level, but on the local level as well.¹⁴⁷ As of February 1998, China had shut down approximately 60,000 severe polluters out of 70,759 deserving of enforcement attention,¹⁴⁸ and almost one thousand factories had been closed down along one highly polluted river alone.¹⁴⁹ Zou Jiuhua called for local governments to strengthen their own environmental

140. *Foreign Firms in China Adjust to New Environmental Standards*, CHINAONLINE, July 29, 1999, available at 1999 WL 20785588 [hereinafter *Foreign Firms*].

141. *A Profile of China's Environmental Protection Industry*, ASIA PULSE, Feb. 19, 1998, available at 1998 WL 2949375 [hereinafter *A Profile*].

142. *Id.*

143. *NPC to Revise Environmental Laws*, CHINA BUS. INFO. NETWORK, May 28, 1998.

144. *China Must Map Out*, *supra* note 135.

145. Wang Chi & Yang Junjiang, *NPC Forum on Environmental Protection Held in Guiyang*, WORLD NEWS CONNECTION, Nov. 7, 1999, available at 1999 WL 26460445.

146. *Id.*

147. *Foreign Firms*, *supra* note 140.

148. *A Profile*, *supra* note 141.

149. Liebman, *supra* note 1, at 242.

protection regulations and to more strictly enforce these laws,¹⁵⁰ and it appears local governments are getting more strict with polluters.¹⁵¹ There is a rising tide of complaints about pollution by the public.¹⁵² Surprisingly, even though the Chinese government has traditionally been wary of grassroots public involvement in policy issues,¹⁵³ the central government appears to have finally realized the importance of involving the public in preventing further pollution and destruction of the environment.¹⁵⁴ Zou Jiuhua stated, "sustainable development depends on the support and participation of the masses," and called for public education and more environmental obligations on the part of the citizenry.¹⁵⁵

Most importantly in terms of long term political policy, the Chinese government now seems to realize, as the Czech government did in the mid-1990s, that environmental problems affect the "sustained and coordinated development of the entire national economy."¹⁵⁶ Pollution is an obstacle to economic development,¹⁵⁷ as the World Bank estimated that pollution costs the Chinese economy eight percent of its annual gross domestic product per year.¹⁵⁸ Premier Li Peng said, "[E]nvironmental protection is a basic state policy which is directly related to China's long-range development."¹⁵⁹ It would be easy to characterize these recent reports as merely being the same lip service that has been paid to environmental protection previously. However, in 1999, Eastman Kodak closed one of its plants in Wuxi because new environmental laws would not have made continued operations cost-effective.¹⁶⁰ Perhaps even more telling of China's renewed emphasis on the environment is a report that the New Zealand forestry industry, which has been suffering from severe financial problems, is pleased China's new, tough laws halting timber production will result in more business for them.¹⁶¹

150. Chi & Junjiang, *supra* note 145.

151. *Foreign Firms*, *supra* note 140 (citing attorney Richard Ferris of the International Practice Group of Beveridge & Diamond, Washington, D.C.).

152. *Id.*

153. See generally deLisle, *supra* note 4, at 82-83.

154. Chi & Junjiang, *supra* note 145.

155. *Id.*

156. *Id.*; see also MINISTRY, *supra* note 13, at 68-70.

157. *A Profile*, *supra* note 141.

158. Chi & Junjiang, *supra* note 145.

159. *Top Legislator Stresses Need to Preserve Environment*, XINHUA ENGLISH NEWswire, Aug. 6, 1998, available at 1998 WL 12175575 [hereinafter *Top Legislator*].

160. *Foreign Firms*, *supra* note 140.

161. *Chinese Move Offer Forestry Fresh Hope*, N.Z. HERALD, July 8, 1998, available at 1998 WL 9239318.

These are signals that China is beginning to focus more on rational allocation of resources instead of "predatory exploitation of nature."¹⁶²

V. OVERVIEW OF HONG KONG ENVIRONMENTAL LAW SINCE THE RETROCESSION

A. Overview of the Hong Kong Special Administrative Region's Political and Legal Structure Relating to Environmental Law

The Basic Law, Hong Kong's current constitutional document, is the product of the 1984 Sino-British Joint Declaration regarding the impending transition of power.¹⁶³ Drafted in the mid- to late-1980s and enacted by the NPC in 1990, China had a strong hand in drafting the Basic Law.¹⁶⁴ In general, the Basic Law makes no significant mention of environmental policies or laws.¹⁶⁵ Article 7 makes land and natural resources state property, but makes their management the responsibility of the HKSAR.¹⁶⁶ Article 97 allows the HKSAR to set up organizations for "environmental sanitation."¹⁶⁷ Article 109 requires the HKSAR government to make policies in regard to protecting the environment.¹⁶⁸

The Basic Law also has provisions that may allow the central government to pressure or force the HKSAR government to bring its environmental laws into line with those of the PRC. Under Article 17, the NPC Standing Committee can invalidate laws passed by the Hong Kong legislature if the laws are not in conformity with the "Central Authorities" relationship with the HKSAR.¹⁶⁹ Under Article 159, the NPC is empowered to amend the Basic Law.¹⁷⁰ However, there may be inherent contradictions in other Articles of the Basic Law as to how much Beijing can directly and overtly influence HKSAR environmental policies.¹⁷¹

162. *China Must Map Out*, *supra* note 135.

163. Davis, *supra* note 3, at 277-78.

164. *Id.* at 278, 305.

165. Liebman, *supra* note 1, at 237-38.

166. *Id.* at 237-38; *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Adopted on April 4, 1990, 3rd Session, 7th National People's Congress of the P.R.C. [hereinafter *Basic Law*].

167. Liebman, *supra* note 1, at 237-38; *Basic Law*, *supra* note 166.

168. Liebman, *supra* note 1, at 237-38; *Basic Law*, *supra* note 166.

169. *Basic Law*, *supra* note 166; Davis, *supra* note 3, at 291.

170. *Basic Law*, *supra* note 166.

171. Liebman, *supra* note 1, at 291.

Despite the provisions for Chinese sovereignty that are present in the Basic Law, Hong Kong's political structure is actually more autonomous under Chinese rule than it was under British rule because of the Basic Law.¹⁷² "Colonial Hong Kong's laws and government structures have hardly been models of liberal-democratic ideals," and local citizens had virtually no input on British policies and only a limited voice in local laws.¹⁷³ As a colony, Hong Kong shared in the freedoms but not the democratic process of the United Kingdom.¹⁷⁴ Colonial laws permitted censorship and the suppression of political dissent, although the British government did allow a Bill of Rights Ordinance and other reforms to be enacted in the decade prior to the retrocession.¹⁷⁵

China may not need or want to directly and overtly exert its influence over Hong Kong, especially since other countries with a financial interest in Hong Kong might react negatively to such action.¹⁷⁶ By the time of the retrocession, "China [had] put in place a post-1997 political regime occupied almost entirely by its loyal lieutenants."¹⁷⁷ Tung Chee-hwa was named Chief Executive of the HKSAR by a PRC-backed Selection Committee.¹⁷⁸ HKSAR leaders, therefore, generally favor mainland policies, and Beijing officials thus have no reason to interfere with HKSAR policies.¹⁷⁹ The bottom line is that Chinese national policies can and do affect Hong Kong policies, especially in areas like the environment where the Basic Law is relatively silent.

B. Recent Developments

Three years after the retrocession, Hong Kong remains very polluted. Air pollution is estimated to be responsible for two thousand deaths each year in Hong Kong.¹⁸⁰ Tung Chee-hwa admitted recently that Hong Kong still has serious problems in terms of its living environment.¹⁸¹ For example, three-quarters of

172. deLisle, *supra* note 4, at 79-80; *see also* Bloch, *supra* note 8, at 601; Wesley-Smith, *supra* note 59, at 440-41.

173. deLisle, *supra* note 4, at 79-80; *see also* Bloch, *supra* note 8, at 601.

174. Bloch, *supra* note 8, at 601.

175. deLisle, *supra* note 4, at 80-81; Davis, *supra* note 3, at 286-87.

176. Davis, *supra* note 3, at 275-76.

177. *Id.* at 305.

178. deLisle, *supra* note 4, at 99.

179. Davis, *supra* note 3, at 306-07.

180. *Even Bronze Lions Wear Antipollution Masks in H.K.*, ASIAN ECON. NEWS, May 31, 1999, available at 1999 WL 8874147.

181. Michael Wong, *Tung's World-Class Vision*, H.K. STANDARD, Oct. 7, 1999, available at 1999 WL 28655283.

the sewage discharged by Hong Kong into the harbor has been only minimally treated at best.¹⁸² Despite having enacted a number of environmental protection laws and having established enforcement mechanisms for these laws, Hong Kong's continued obsession with trade and the economy has suppressed vigorous enforcement of these laws.¹⁸³ Comparatively, China appears to be taking a more aggressive approach in enforcement of environmental laws, and in terms of political emphasis on the environment and environmental protection laws, China has already surpassed Hong Kong.¹⁸⁴

Rob Law, Director of Environmental Protection for the HKSAR, claimed the total level of pollution-related fines has risen dramatically over the past few years.¹⁸⁵ Other environmental officials, though, concede anti-pollution laws are lax and ineffective.¹⁸⁶ There is a lack of coordination among government departments engaged in environmental protection.¹⁸⁷ Operators of illegal diesel fuel stations are often back in operation within a day of being arrested,¹⁸⁸ and an Environmental Impact Assessment Ordinance (EIAO), which received international acclaim when passed in 1998,¹⁸⁹ is facing challenges.¹⁹⁰ Professor Lam Kin-che, director of the Chinese University's Centre for Environment, said "action more than words was needed in

182. John Gittings, *Kowtow Command Angers Hong Kong Democrats*, THE GUARDIAN (London), Oct. 9, 1999, available at 1999 WL 25738006; Julie Schmit, *Hazardous to Your Health - and Pocketbook*, USA TODAY, Oct. 22, 1999, at 14A.

183. Liebman, *supra* note 1, at 240-43; see generally Bachner, *supra* note 61, at 370-71, 382.

184. See generally Liebman, *supra* note 1, at 240-43; Bachner, *supra* note 61, at 370-71, 382.

185. *Senior HK Official on Environmental Protection*, XINHUA ENGLISH NEWSWIRE, Feb. 23, 1999, available at 1999 WL 7920495 [hereinafter *Senior HK Official*].

186. Schmit, *supra* note 182, at 14A.

187. David Evans, *Green Lobby Warns of Economic Growth Threat*, S. CHINA MORNING POST, June 9, 1999, at 1, available at 1999 WL 19485370.

188. Glenn Schloss, *Jail Urged for Fuel Cheats "Lenient Penalties" Allow Illegal Filling-Station Operators to Thrive*, S. CHINA MORNING POST, Nov. 22, 1999, at 4, available at 1999 WL 28999219.

189. *Senior HK Official*, *supra* note 185.

190. Plato K.T. Yip, Asst. Dir., Friends of the Earth, *Government Cutting Environmental Corners* (letter to the editor), S. CHINA MORNING POST, Nov. 27, 1999, at 14, available at 1999 WL 30350177. The Environmental Impact Assessment Ordinance requires developers to apply for environmental permits and subject the undeveloped land to studies before construction can begin. The ordinance has been criticized for not being stringent enough and allowing the EPD too much discretion, which is often skewed in favor of developers. See Ravina Shamdasani, *Activists Claim Lax Investigation Guidelines Allow Developers Free Hand to Push Through Projects Environment Reports "Flawed,"* S. CHINA MORNING POST, Oct. 2, 2000, at 4, available at 2000 WL 26864428.

combating environmental problems."¹⁹¹ In a recent opinion poll, eighty percent of respondents said the HKSAR government has not done enough to control pollution.¹⁹²

Arguably, there are some signs that HKSAR policies will have more emphasis on environmental protection and the enforcement of environmental laws in the future. Tung Chee-hwa, in his 1999 annual policy address to the Hong Kong legislature, said "tough action" was needed to reduce pollution, and acknowledged pollution affected Hong Kong's economy by deterring foreign investors.¹⁹³ He also said the principle of sustainable development (recently embraced by China) was an important concept for the HKSAR to adopt, and proposed allocation of \$100 million to educate the public about the concept.¹⁹⁴ Within a fortnight of Tung's speech, South China's Guangdong Province and the HKSAR announced formation of a special cooperation group for sustainable development.¹⁹⁵ Furthermore, to support his claim that "[i]t is high time we faced up to the problem," Tung Chee-hwa announced a \$30 billion, 10-year environmental plan for the HKSAR.¹⁹⁶ New measures calling for an 80% reduction in vehicle emission pollutants by 2005 and a new sewage treatment system were also recently announced for Hong Kong.¹⁹⁷

Critics, however, said Tung Chee-hwa's focus on the environment in his speech was only to avoid contentious political issues, especially regarding demonstrations marking the Tiananmen Square massacre of 1989.¹⁹⁸ Democratic party members and pro-democracy groups, who in the past tended to be advocates of greater environmental protection,¹⁹⁹ said the speech was "hollow" and "boring."²⁰⁰ Shortly after his speech, Tung Chee-hwa said on a call-in radio show that the "[g]overnment

191. Tessi Cruz, *Joint Fight Against Pollution*, H.K. STANDARD, Oct. 7, 1999, available at 1999 WL 28655299.

192. Ambrose Leung Tsung-Yan, *Economic Concerns Beat Environment*, S. CHINA MORNING POST, Dec. 3, 1999, at 2, available at 1999 WL 30350771.

193. Gittings, *supra* note 182.

194. Wong, *supra* note 181.

195. *Guangdong, HKSAR Cooperating in Environmental Protection*, WORLD NEWS CONNECTION, Oct. 15, 1999, available at 1999 WL 26453841.

196. Chris Yeung, *Tung's \$30b Green Crusade - Environment and Education Targeted to Make SAR World-class City*, S. CHINA MORNING POST, Oct. 7, 1999, at 1, available at 1999 WL 26575740.

197. Gittings, *supra* note 182.

198. *Id.*

199. Bloch, *supra* note 8, at 280.

200. Wong, *supra* note 181.

could not rush into tough legislation."²⁰¹ And his recent call for the HKSAR's incorporation of sustainable development was actually first made in 1993 by officials in the colonial government.²⁰²

VI. LOOKING INTO THE 21ST CENTURY

The Czech experience over the past decade evidenced positive effects on environmental law and policy resulting from a transition from a Communist to a democratic constitutional government. But Hong Kong's transition from rule by a Western democratic country to a Communist state will probably not have a negative, or reverse, effect on Hong Kong's environmental laws and policies in the foreseeable future. After examining the Czech transition from Communist rule (which devastated the country's environment) to a democratic government (which resulted in significant progress being made in cleaning up the environment and protecting it from further harm), one might reasonably apply a reverse analogy and expect a transition to Communist rule to negatively impact the emphasis and enforcement of laws protecting Hong Kong's environment. Professor Bryan Bachner of the City University of Hong Kong argued the transition to Chinese sovereignty would not bode well for Hong Kong's environment.²⁰³

However, unlike the Czech Communists, the current Chinese Communist regime at least seems to be more enlightened about environmental protection, although this enlightenment is probably primarily due to China's realization of the importance and interdependence of environmental impact, especially pollution and environmental degradation, on the economy. Chinese leaders, and now perhaps some HKSAR leaders, have also finally seemed to realize the importance of citizen involvement in environmental protection and the enforcement of these laws.²⁰⁴ Of course, there are some troubling developments as well, such as the Three Gorges Dam project,²⁰⁵ but the overall

201. Ng Kang-Chung & Jimmy Cheung, *Green Campaign Will Create Jobs*, S. CHINA MORNING POST, Oct. 8, 1999, at 4, available at 1999 WL 26575888.

202. Bachner, *supra* note 61, at 374-75.

203. *Id.*

204. See Gittings, *supra* note 182; *Top Legislator*, *supra* note 159; see generally Bloch, *supra* note 8, at 607-08; *China: Students Ready to Save the World*, CHINA DAILY, Feb. 9, 2000, at 1, available at 2000 WL 4115121.

205. McCutcheon, *supra* note 74, at 406-07. The Three Gorges Dam is a project to build a hydro-electric power generation facility. There are concerns the dam will not allow sufficient down-river water flow to dilute sewage, and the habitats of four endangered

policy trend is promising so long as China's actions in the future continue to match its rhetoric.

Thus far, retrocession has produced few significant changes in overall environmental policy. Although the United Kingdom is generally considered to be a liberal Western democracy, Hong Kong had neither autonomy nor any real voice in British government.²⁰⁶ Except for binding Hong Kong to international treaties, the British national government did not provide much policy support for environmental laws, but instead left this area up to the local Hong Kong government.²⁰⁷ Provided China does not frequently act to quash HKSAR legislation or impose national law under Articles 18, 19, 158, 159, or 160 of the Basic Law,²⁰⁸ Hong Kong may at least theoretically have become more democratic and autonomous under a Communist sovereign. Mainland China, though, can still exert considerable influence over HKSAR policies through indirect means.²⁰⁹ This influence may already be resulting in indirect pressure on the HKSAR government to emphasize and enforce environmental protection laws.²¹⁰

While both China and Hong Kong already have a number of environmental laws on the books, only China has recently appeared to be more serious about enforcing them on a wide basis.²¹¹ If the HKSAR government is able to relinquish some of its emphasis on the economy and actually follow through on Tung Chee-hwa's statements by more strictly enforcing environmental laws already in place, such a real emphasis on environmental policies could eventually mirror that of mainland China.²¹² But given the attitude of the HKSAR leaders, such action would probably result from the realization of the negative impact a deteriorating environment might have on the economy and productivity rather than altruistic concerns for the environment.

species may be destroyed by the project. The project will "inundate 28,000 acres of high-quality farmland" and deprive others downstream the "use of the river for agriculture and fishing." *Id.* at 407.

206. Bloch, *supra* note 8, at 601.

207. *See generally id.* at 603; Bachner *supra* note 61, at 365-70.

208. *Basic Law*, *supra* note 166.

209. Davis, *supra* note 3, at 305; Gittings, *supra* note 182.

210. *See generally* Wong, *supra* note 181; Gittings, *supra* note 182; Yeung, *supra* note 196.

211. *See generally* Liebman, *supra* note 1, at 240-43.

212. *See* Wong, *supra* note 181; Gittings, *supra* note 182; Yeung *supra* note 196; Jennifer Ehrlich & Cheung Chi-Fai, *SAR Chokes as Pollution Levels Soar*, S. CHINA MORNING POST, Mar. 29, 2000, at 1, available at 2000 WL 14847508.

Despite passage of the EIAO, little significant action seems to have yet taken place under Tung Chee-hwa's leadership of the HKSAR other than rhetoric and the announcement of new measures and proposals.²¹³ Since the retrocession, it is apparent there has only been a continuation of the relative minimal emphasis and minimal enforcement of regional environmental laws that Hong Kong had under British rule. Recent Harvard Law School graduate Benjamin Liebman pointed out "Hong Kong's paradox is that it may have both too much and too little autonomy in environmental lawmaking."²¹⁴ Because the Chinese government appears to be more active than the HKSAR government in environmental protection, Liebman was probably correct in stating that Hong Kong may "suffer from the non-application of [Chinese] national environmental standards."²¹⁵

At least for the foreseeable future, and in contrast to what one might expect after examining the Czech experience, the emphasis on and enforcement of laws protecting Hong Kong's environment may actually increase somewhat under Chinese sovereignty over prior levels under British rule. For example, the EPD recently denied renewal of permits which allowed a South Korean contractor to dump vast quantities of contaminated mud in the South China Sea,²¹⁶ and also denied approval to build a railroad through an environmentally sensitive valley.²¹⁷ But at the same time, the HKSAR Financial Secretary dismissed recycling efforts by "saying the recycling industry had no future in the [HK]SAR."²¹⁸ The accuracy and reliability of EIAO-required assessments have been questioned.²¹⁹ Additionally, while some leaders have at least publicly stated a policy of greater environmental protection through the law is necessary to ensure Hong Kong's continued success as an international center of trade and finance, businesses still are commercially interested in Hong Kong despite its environmental problems.²²⁰

213. Wong, *supra* note 181; Gittings, *supra* note 182; Yeung *supra* note 196.

214. Liebman, *supra* note 1, at 294.

215. *Id.*

216. Jennifer Ehrlich, *Muddy Waters: A Review of Toxic Dumping has Dredged Up a Problem for CT9*, S. CHINA MORNING POST, Oct. 7, 2000, at 13, available at 2000 WL 26865149.

217. *An End to Apathy . . .*, S. CHINA MORNING POST, Oct. 18, 2000, at 23, available at 2000 WL 26866197.

218. *Recycling Pays Off with the Right Will*, S. CHINA MORNING POST, Oct. 5, 2000, at 18, available at 2000 WL 26864862.

219. Felix Chan, *Greens Attack Environment Reports*, S. CHINA MORNING POST, Oct. 23, 2000, at 5, available at 2000 WL 26866566.

220. David Evans, *Poor Air Fails to Hurt Lure of SAR*, S. CHINA MORNING POST, Oct. 27, 2000, at 3, available at 2000 WL 26866990.

The prognosis for the emphasis on and enforcement of Hong Kong's environmental laws is one of guarded, limited and probably incremental progress. Support for protection of the HKSAR's environment, while still overshadowed by economic concerns, is on the rise, but it remains an uphill battle. Results from any new environmental laws and enforcement initiatives will likely be mixed, although there should be some improvement over the status quo during British rule. The determining factor in how much progress is made and how quickly it happens will likely be the degree of success internal and external forces, particularly mainland Chinese leadership efforts, have in pressuring HKSAR leaders and the EPD to follow through on their commitments with real action in promulgating and enforcing environmental laws and regulations. Direct interference by mainland China in this area could be viewed as a harbinger for intervention in other policy specters, and could cause uneasiness in the Hong Kong population and international business community. Therefore, any pressure applied by China will likely be subtle and indirect. It is apparent action must be taken to cease and attempt reversal of environmental degradation in the HKSAR, lest it become uninhabitable for both businesses and people.

CHINA'S ONE NATION, TWO-SYSTEM PARADIGM EXTENDS ITSELF BEYOND THE MAINLAND'S BORDERS TO THE SOUTHERN PROVINCIAL GOVERNMENT OF HONG KONG

WILLIAM I. FRIEDMAN

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I. INTRODUCTION

Since 1978 when China's Premier Minister, Deng Xiaoping, adopted the nation's "open door" policy¹, China has gradually moved away from its Marxist past toward a more Capitalist driven market structure. In July 1999, China's National People's Congress ("NPC") even went so far as to enact its first comprehensive national Securities Law to support the nation's economic reforms.² Since then, however, China has struggled to establish a credible and reliable Securities Law to contravene the corrupt practices of its Communist government, which has been in

1. Todd Kenneth Ramey, *China: Socialism Embraces Capitalism? An Oxymoron For The Turn Of The Century: A Study Of The Restructuring Of The Securities Markets And Banking Industry In The People's Republic Of China In An Effort To Increase Investment Capital*, 20 HOUS. J. INT'L. L. 451, 456 (1998) (stating that Deng Xiaopong's "open door" policy centered on economic reforms utilizing market mechanisms and foreign resource to speed up the growth and modernization of the Chinese economy).

2. Please insert Footnote here indicating what the law is called and any description of such

power since the country's 1949 Revolution. The weaknesses of China's legal system are attributable to the inherent conflict between the nation's Communist government and Capitalist market structure, which has worked to undermine the impact of China's written laws. Hence, the worthlessness of China's written laws, combined with "the many rigidities of [its] economy and political barriers,"³ has made the international community fearful of investing its capital in China's red chip companies.⁴

In sharp contrast to the problems associated with China's legal system is the southern provincial government of Hong Kong, which has in place, as established under British colonial rule, a "credible and reliable legal system to underpin its economy."⁵ The strength of Hong Kong's legal system is the main ingredient to the success of its market economy, as without it, the market economy is but a "jungle economy," which is not a place where reasonable persons would knowingly invest their life savings.⁶ Hong Kong's legal system consists of the law-making parliament, an uncorrupted police that enforces the laws, and independent courts and judges that interpret the laws and resolve legal disputes.⁷ More importantly, the laws in Hong Kong "appl[y] equally to those who govern and those who are governed," thereby creating an environment where nobody is above the law, from the President to those of a citizen or corporation.⁸ Furthermore, Hong Kong's laws are clear, predictable, and easily understandable, and therefore not arbitrary, capricious or uncertain, like in China.⁹ Moreover, the laws offer transparency and openness in the market, through the guarantee of such democratic values as freedom of speech and press, and the mandatory disclosure requirements in the marketplace.¹⁰ In sum, Hong Kong's "rule of law"¹¹ has transformed this once "barren" island into a safe haven for the world's investments, as the "rule of law" is the underpinning of the territory's lucrative and stable market economy, and enjoys an esteemed status as an international financial center.

3. THE HONG KONG READER: PASSAGE TO CHINESE SOVEREIGNTY 201 (Ming K. Chan and Gerard A. Postiglione eds., 1996) [hereinafter HONG KONG READER].

4. **Please insert Footnote defining "red chip companies."**

5. *How Hong Kong can change China*, THE ECONOMIST, June 28, 1997 at 15.

6. CHRISTOPHER PATTEN, EAST AND WEST: CHINA, POWER AND THE FUTURE OF ASIA 230 (1998).

7. *Id.*

8. *Id.* at 229.

9. *Id.* at 230, 235.

10. *Id.* at 231, 234.

11. **Please insert Footnote defining "rule of law" for example see pg 229 of East and West...**

Consequentially, many of Mainland China's red chip companies and the world's blue chip companies¹² have set up shop in Hong Kong instead of Shanghai.¹³ Hong Kong, which has developed into a gateway to the vast economic hinterland of China, has taken on the role of a forum for channeling foreign investment into Mainland China's enterprises, as well as a forum for Mainland China to engage in securities trading with the international community.¹⁴ Thus, the efficiency of Hong Kong as a "middleman" has proven crucial to China's economic interactions with the world,¹⁵ as it will aid the Beijing government through the torturous and difficult process of its economic reforms. As an indirect result of this relationship, however, the two territories' economies will gradually become more integrated. Thereafter, the Beijing government will learn that it may no longer reap the benefits of its economic relationship with Hong Kong without a political agenda arising. Consequently, any attempt by the Beijing government to separate economics and politics in order to maintain its "one nation, two system" paradigm, will fail.¹⁶ Thus, China's Communist Party has subconsciously put into motion a process of modernity that will revolutionize its economy as well as the politics of its government. This process will eventually result in the fall of the old Chinese Communist Guard by giving rise to a new era in Chinese history that is founded on the "rule of law," market economics and democratic values.

It is, however, feasible, although highly unlikely, that the Beijing government would choose to suffocate Hong Kong's economy for its own short-term financial gains in order to further its nationalistic policy objectives of having Shanghai replace Hong Kong as the country's primary financial center. This is a foreseeable result since the British government, prior to its hand-over of Hong Kong to China, had failed to replace its colonial government in Hong Kong with a democratically driven institution of government. Thus, Hong Kong's laws are all susceptible to the discretionary authority of its territory's Governor, Tung Chee-hwa, a political appointee of the Beijing government. Consequentially, the activities of Hong Kong's government and market officials are attributable to the political whims of Governor Tung Chee-hwa. Additionally, Hong Kong's

12. **May need a Footnote here defining "blue chip"**

13. **Please insert Footnote supporting this statement.**

14. **Please insert Footnote supporting this statement.**

15. HONG KONG READER, *supra* note 3, at 206.

16. PATTEN, *supra* note 6, at XXX. **Please correct page number - possibly pg 20 or 78 also why "nation" and not "country?"**

Basic Law is allocated to China's NPC supreme decision-making authority with respect to its interpretation of the Law as well as the determination of the territory's fiscal operations, thus placing Hong Kong at the impulse of the Beijing government's nationalistic initiatives.¹⁷

It is highly unlikely, however, that the Beijing government would ever dare to act in a manner that would impede with Hong Kong's status as an international finance center, since such an act would close the gates of China's doorway to the world's capital. This outcome would be entirely unacceptable in the eyes of the Beijing government since it is dependent upon the venues of Hong Kong to raise capital from the international community to salvage its ailing state-run economy from dissolution and insolvency and to push forward with its economic reforms.¹⁸ Moreover, China needs to demonstrate to the world that its philosophy of a "one nation, two system" paradigm is a success in order to be able to one-day fashion a similar plan of reunification with neighboring Taiwan, as it ambitiously endeavors to establish a "One China." Thus, the Beijing government's policy of a "one nation, two system" paradigm must succeed, even if this governmental policy will consequentially serve to undermine the reign of the old Communist Guard in China.

Part I of this Note discusses the history of Hong Kong as it takes the reader back to the early part of the nineteenth century when the Chinese island of Hong Kong – a deserted and impoverished territory – was captured by the British. This section also gives an in depth explanation of the 1984 Sino-British Joint Declaration, which led to the promulgation of the Basic Law of Hong Kong, and the passage of Hong Kong to Chinese sovereignty on July 1, 1997. Moreover, this section explores the concerns of the international community and the questions that still lie ahead with respect to the reunification of China and Hong Kong.

Part II discusses Hong Kong's two-tier regulatory approach toward the territory's securities market – the Securities and Futures Commission and the Hong Kong Stock Exchange. This section also discusses how both legal institutions are held accountable to the discretionary authority of Hong Kong's Governor, Tung Chee-hwa.

17. Please insert Footnote supporting this statement.

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Part III discusses Hong Kong's Code on takeovers and mergers and its lack of legal force. This section also explores the role of the Beijing government in Hong Kong's takeover and merger process. Furthermore, this section reviews the impact of Mainland China's companies' employment of less stringent accounting standards on Hong Kong's takeover and merger process. Moreover, this section looks at the impact of the corruption that is often instilled in Mainland China's companies upon Hong Kong's takeover and merger process.

Part IV comments on an incident in which Hong Kong's Governor, Tung Chee-hwa, chose to exploit a strategy of government intervention, instead of *laissez-faire* economics, in his dealings with market speculation on the Hong Kong Stock Exchange. This section also comments on the consequences of this policy shift, of which gave rise to a whole array of insider trading concerns in Hong Kong's stock market. Additionally, this section deals with the Hong Kong government's subsequent decision to retract from its initial position, which was pro-government intervention, in favor of a policy of *laissez-faire* economics.

Part V elaborates on the dangers of corruption in a market economy and the crucial role that Hong Kong's Independent Commission Against Corruption ("ICAC") will play in preserving the integrity of the territory's marketplace after its passage to Chinese sovereignty. This section also comments on Hong Kong's Governor Tung Chee-hwa's discretionary authority over the ICAC.

Part VI tackles the issue of a media free Hong Kong, as guaranteed under Hong Kong's Basic Law. This section also looks at the potential threat posed to the future of Hong Kong's freedom of speech and press by the Beijing government following the territory's passage to Chinese sovereignty.

Part VII discusses the Hong Kong law that requires shareholders to disclose their substantial interests in publicly held companies. This section also discusses the requirement that every public company publish a prospectus when doing a share offering, as well as the obligation of a public company to disclose information to the market on a continuous basis.

Part VIII explores Hong Kong securities laws, which explicitly make it unlawful for a *tipper* or *tippee* to be involved in a transaction that involves the insider dealing of a listed security of a corporation. This section will also comment on the threat of insider dealing that has been posed by the Beijing government since Hong Kong's passage to Chinese sovereignty, and the exacerbation of this threat by Hong Kong's failure to criminalize

insider dealing in its market. Part IX discusses the benefits of private litigation in a nation's stock market. This section also explores the express private right of action by shareholders in the Hong Kong stock market, which is in direct contravention with China's marketplace. And finally, part X discusses Hong Kong's judiciary branch and the question of its independence from the influences of the Beijing government.

II. HISTORICAL BACKGROUND

In 1839, China, who was suspicious of "barbarians," insisted that trade with the outside world be conducted through Canton (modern-day Guangzhou) on its own national terms, contrary to Britain's policy, which advocated the free trade of opium.¹⁹ This disagreement led to the fighting of the Opium War between 1839 and 1842.²⁰ At the conclusion of the War, China's forces were humbled as Britain's military seized control over the island of Hong Kong.²¹ When hearing about the capture of Hong Kong, Britain's Foreign Secretary, Lord Palmerston, was infuriated at Captain Charles Elliot over his seizure of this "barren island, with hardly a house on it."²² At the time, Hong Kong was predominantly a fishing village with a substandard economy, and so was considered the least important of the islands situated in the Pearl River.²³ On August 29, 1842, the Chinese formally ceded control of Hong Kong to Great Britain in the signing of the Treaty of Nanking.²⁴ On April 5, 1843, the Charter of Hong Kong was enacted under Letters Patent of Queen Victoria, which were to cease to operate in Hong Kong on July 1, 1997.²⁵ Further incursions between the British and Chinese at the end of the nineteenth century led to the cessation of new territories that formed the northern portion of modern-day Hong Kong.²⁶

19. *1898 and all that – a brief history of Hong Kong*, THE ECONOMIST (June 26, 1997), at 22, available at www.economist.com/displayStory.cfm?Story_ID91779.

20. *Id.*

21. *Id.*

22. *Id.*

23. Ted Hagelin, *Reflections on the Economic Future of Hong Kong*, 30 VAND. J. TRANSNAT'L L. 701, 705 (1997).

24. Berry Fong-Chung Hsu, *Legislative Control of Hong Kong Financial Markets: Some Aspects of Banking and Securities Regulations*, 28 LAW & POLY INT'L BUS. 649, 651 (1997).

25. *Id.*

26. *1898 and all that—a brief history of Hong Kong*, *supra* note 19. See also Fong-Chung Hsu, *supra* note 24, at 651.

From 1842 to 1997, the British transformed Hong Kong from a “barren island” into one of the great economic powers in the world. Today, Hong Kong is a financial powerhouse, as it has “one of the four largest securities markets in the world.”²⁷ Its securities market and stock exchange is the eighth largest trading market in the world, second only to the Tokyo Stock Exchange in the Asian region.²⁸ “[F]our thousand years of Chinese history had produced nothing like [modern-day] Hong Kong, a city where the “rule of law” provided that security and majestic neutrality within which bank balances, ideas, and values could all flourish.”²⁹

In 1984, Britain and China signed a Joint Declaration, in which the two countries agreed that the island of Hong Kong would revert back to Chinese sovereignty on July 1, 1997 as a Special Administrative Region (“SAR”) of the People’s Republic of China.³⁰ Under the guidance of this Joint Declaration, the NPC enacted Hong Kong’s Basic Law on April 4, 1990, thus guaranteeing the existence of a “one nation, two system” paradigm between Hong Kong and China.³¹ Hence, the Basic Law, under Article 8, preserved Hong Kong’s autonomous nature as a territory. It also stipulated that the “rule of law” in Hong Kong would remain unchanged for 50 years after the passage of Hong Kong to Chinese sovereignty, unless amended by the legislature of the Hong Kong SAR.³² Furthermore, the Basic Law guaranteed the preservation of Hong Kong’s capitalist system and way of life by explicitly prohibiting the institution of a “socialist system” for 50 years after Hong Kong’s reunification with China.³³ Moreover, Article 110 maintained the policy that Hong Kong’s monetary and financial systems would be governed by its “rule of law” as opposed to China’s laws.³⁴ It also vested in the Hong Kong SAR Government independent authority over the formulation, regulation, and protection of monetary and financial policies and the territory’s financial business and markets.³⁵ In essence, the

27. Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge For China, Hong Kong, And Taiwan*, 20 NW. J. INT’L L. & BUS. 1, 40 (1999).

28. *Id.* at 41.

29. PATTEN, *supra* note 6, at 153.

30. Fong-Chung Hsu, *supra* note 24, at 651.

31. *Id.* at 652.

32. *Id.* at 651-53.

33. *Id.* at 652.

34. *Id.* at 652-53.

35. *Id.* at 653.

Basic Law had the overall effect of promoting the message of “Hong Kong people ruling Hong Kong.”³⁶

The Basic Law, however, possessed two critical qualifications to Hong Kong’s autonomy.³⁷ First, China’s NPC was granted with the final authority concerning the interpretation of the provisions of the Basic Law.³⁸ Hence, the scope of Hong Kong’s autonomy would therefore be dependent upon the decision-making authority of the Beijing government.³⁹ Second, while the Basic Law granted Hong Kong broad economic freedom, it also commanded that the territory operate on a balanced budget.⁴⁰ This stipulation gave China’s NPC the authority to monitor Hong Kong’s fiscal operations and to approve of its annual budget. Thus, China’s NPC had gained “considerable de facto power over Hong Kong’s budget process and, ultimately, over Hong Kong’s choice of economic priorities.”⁴¹

In an effort to mitigate the fears of the Hong Kong people and international community with respect to these two qualifications, the Basic Law explicitly reinforced its stated objective that Hong Kong would continue to maintain its esteemed reputation as an international center for trade, commerce and finance. The Basic Law also stipulated that China would continue to maintain a “free flow of capital within, into and out of the Region,” free of any governmental intervention from China’s NPC.⁴² Furthermore, the Basic Law made it clear that “no foreign exchange control policies” would be applied in the Hong Kong SAR.⁴³ Moreover, the Basic Law provided that Hong Kong would continue to pursue a policy of free trade in safeguarding the free movement of goods, intangible assets, and capital.⁴⁴

The Basic Law further touched upon issues of human rights in that it guaranteed the right of the Hong Kong people to such democratic values as freedom of speech, press, assembly, and religion.⁴⁵ It also provided that the Hong Kong people would have the right to challenge government decisions through the means of

36. *All Eyes on China*, THE ECONOMIST, June 28, 1997, at 21 available at http://www.economist.com/displayStory.dfm?Story_ID=150705.

37. Hagelin, *supra* note 23, at 714.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 714-715.

42. *Id.* Although, the thought is supported by this cite, the exact quote cannot be found, please either give exact cite or remove quotation marks.

43. *Id.* Same problem as above

44. *Id.*

45. *All Eyes on China*, *supra* note 36.

its judiciary branch.⁴⁶ Therefore, “just about everything denied to Chinese citizens [was] being promised to Hong Kong.”⁴⁷ In essence, the Beijing government had promised, through its promulgation of the Basic Law, that it would not interfere with the sovereignty of Hong Kong’s “rule of law,” market economy, and democratic values.

At the strike of midnight on June 30, 1997, the whole world watched with nervous excitement as the island of Hong Kong peacefully reverted back to Chinese sovereignty, and the experiment of a “one nation, two system” paradigm became a reality for the governments of China and Hong Kong. Since the eve of Hong Kong’s reunification with China, the international community has observed Hong Kong’s market with a watchful eye and have attempted to decipher the implications of this former British colony’s passage to Chinese sovereignty on its marketplace. The international community has since focused its concerns on the question of whether China’s Communist government would truly endeavor to fulfill its obligations as specified under its 1984 Joint Declaration with Britain and Hong Kong’s Basic Law. There is, however, still the concern over the question, that even if China does fulfill its obligations pursuant to its international agreement with Britain and Hong Kong’s Basic Law, will China’s corrupt government exploit Hong Kong’s capital market for its own short-term financial gains? These concerns are at the heart of the main issue: of whether China wants its “one nation, two system” paradigm to succeed, or whether, instead, China will attempt to further its nationalistic objectives of having Shanghai replace Hong Kong as the country’s primary financial center.

III. THE REGULATORY REGIME

The development of Hong Kong’s regulatory regime was a direct result of the stock market crashes of 1973 and 1987, which adversely affected the Hong Kong Stock Exchange’s international reputation and eroded confidence in the Hong Kong market.⁴⁸ The regime consisted of a two-tier approach to the regulation of Hong Kong’s securities market – the Securities and Futures Commission (“Commission”) and the Hong Kong Stock Exchange (“Exchange”).

46. *Id.*

47. *Id.*

48. Fong-Chung Hsu, *supra* note 24, at 688-91.

On May 1, 1989, the Commission was borne as the primary regulatory body to Hong Kong's securities market.⁴⁹ The Commission maintains the following responsibilities with respect to the market:

- (a) to advise the Financial Secretary on all matters relating to securities and future contracts;
- (b) to enforce without prejudice the laws relating to the securities market by way of investigation and prosecution, and to ensure that persons comply with Ordinances that relate to the securities market;
- (c) to report to the Financial Secretary any reasonable suspicions of insider dealing as promulgated under Section 9 of the Securities (Insider Dealing) Ordinance;
- (d) to supervise and monitor the activities of the Stock Exchange Companies and clearing houses;
- (e) to take all necessary and reasonable steps to safeguard investors' interests relating to their dealings in the securities market;
- (f) to promote and encourage proper conduct amongst members of the Stock Exchange Companies and clearing houses and other registered persons;
- (g) to suppress illegal, dishonorable and improper practices in dealings concerning the securities market, which includes trading and the provision of investment advice as well as other services;
- (h) to promote and maintain the integrity of registered persons and encourage such persons to promulgate balanced and informed advice to their customers and the public in general;
- (i) to review and propose legal reforms relating to the securities market;
- (j) to encourage the development of the securities market in Hong Kong and the increased use of

49. *Id.* at 656-657.

- such markets by investors in Hong Kong and elsewhere;
- (k) to promote and develop self regulation in the securities market;
 - (ka) to cooperate with and assist regulatory organizations or other authorities, in Hong Kong or elsewhere, regarding the securities market, subject to the provisions of this Ordinance; and
 - (l) to perform all other functions promulgated under any other Ordinance.⁵⁰

As an agency of the Hong Kong government, the Commission's activities are governed by the territory's "rule of law."⁵¹ The legal underpinnings of this governmental agency are, however, dependent upon the discretionary authority of Governor Tung Chee-hwa, as he possesses the statutory authority to appoint and remove the agency's members⁵² and to determine the wages of its members.⁵³ Moreover, he is empowered with the authority to issue binding directives on the Commission.⁵⁴ Although there exists an appeals process for dissatisfied investors, known as the Securities and Futures Appeals Panel, this Panel is similarly held accountable to the discretionary authority of the Governor.⁵⁵ There is also the Court of Final Appeal, known as the court of last resort,⁵⁶ however, the independence of this judiciary body from the powers of the Governor is deemed to be a controversial issue in Hong Kong. (The Court of Final Appeal is discussed more thoroughly in Part X of the Note.)

The self-regulatory organization of the Exchange was borne in 1986 out of the 1980 Stock Exchanges Unification Ordinance, which consolidated Hong Kong's four stock exchanges (Hong Kong Stock Exchange Limited, Far East Stock Exchange Limited, Kam Ngan Stock Exchange Limited, and Kowloon Stock Exchange Limited) into a Unified Exchange.⁵⁷ In November 1991, the Commission and Exchange signed a Memorandum of

50. X, Ch. 24 Pt. II §§ 4-5 (1997).

51. Please insert Footnote supporting this statement.

52. X *supra* note 50 at Ch. 24 Pt. II §§ 5, 10-11, 12. See also Fong-Chung Hsu, *supra* note 24, at 657.

53. X *supra* note 50 at Ch. 24 Pt. II § 7.

54. Id. at Ch. 24 Pt. II § 11.

55. Id. at Ch. 24 Pt. II § 18.

56. Id. at Ch. 395 Pt. IV §§ 31-32

57. Id. at Ch. 361 Pt. I § 2.

Understanding Governing Listing Matters, in which the Exchange “assume[s] responsibility for the day-to-day supervision and regulation of listed companies and the people running the financial markets with respect to all listed matters.”⁵⁸ The Exchange also ensures the maintenance of a fair and orderly market⁵⁹ and is embodied with rule-making authority, subject to the Securities Ordinance, concerning securities listings and the capital adequacy requirements of its members.⁶⁰ Moreover, the Exchange maintains disciplinary authority over its listed companies and members, as it is empowered with the ability to suspend, de-list or sanction a listed company, or impose obligations against a person liable for misconduct in the securities market.⁶¹

The responsibilities of the Exchange are, however, subject to the guidance of the Commission and its rule-making authority.⁶² Hence, the Commission may direct the Exchange to amend a rule, if deemed unconstitutional under Hong Kong’s securities laws, or enact a rule in furtherance of the nation’s securities laws.⁶³ However, the Exchange may not enact or amend a rule without the prior approval of the Commission.⁶⁴ To enforce its supremacy as the primary rule-making authority in Hong Kong, the Commission retains the right to withdraw its recognition of the Exchange if it fails to comply with any of its duties as a self-regulatory organization.⁶⁵ Moreover, the Commission possesses unlimited policing powers in its regulation of Hong Kong’s securities market.⁶⁶

This two-tier regulatory approach – the Commission and Exchange – has successfully put in place a “rule of law” that is able to efficiently govern Hong Kong’s securities market. This regulatory regime and its laws have helped to restore investor protection and confidence in Hong Kong’s securities market since the market crashes of 1973 and 1987. Hong Kong’s regulatory regime is, however, susceptible to the political whims of Governor Tung Chee-hwa, who maintains discretionary authority over the regulatory functions of the Commission and Exchange.

58. *Id.* at 296. Author’s cite but cannot find this quote

59. *Id.* at Ch. 361 Pt. III § 27A.

60. *Id.* at Ch. 361 Pt. V § 34.

61. *Id.* at Ch. 361 Pt. V §§ 34-35.

62. *Id.* at Ch. 361 Pt. V § 34(2).

63. *Id.*

64. *Id.* at Ch. 361 Pt. V. § 35.

65. *Id.* at Ch. 361 Pt. V § 36.

66. *Id.* at Ch. 333 Pt. III §§ 23-27.

Consequentially, the international community is fearful that the Governor will exploit his position to negatively impede in the effectiveness of Hong Kong's regulatory regime. This is, however, highly unlikely, since a failure on the part of the Governor to abide by the expertise of the members of the Commission and Exchange would ultimately cause the integrity of Hong Kong's marketplace to become greatly diminished, thereby displacing the territory's status as an international financial center. This would, in turn, inflict great economic pain on the Beijing government, which is dependent upon the venue of Hong Kong to raise capital from the international community to salvage its ailing state-run economy from dissolution and insolvency and to push forward with its economic reforms. Moreover, China's future relationship with neighboring Taiwan, and whether it will be able to fashion a plan of reunification similar to that of Hong Kong, will be dependent upon the success of its "one nation, two system" paradigm. Thus, Governor Tung Chee-hwa really has no choice, but to leave the regulation of Hong Kong's securities market to the Commission and Exchange, as it is not in the interest of the Beijing government for him to impede in the responsibilities of the territory's regulatory regime.

IV. THE CODE ON TAKEOVERS AND MERGERS

There is no legal framework in Hong Kong regulating takeovers and mergers of public companies, as the Code on Takeovers and Mergers, which was issued by the Commission in March 1992, has no legal force.⁶⁷ Instead, the Code serves as a purely voluntary doctrine, which provides guidelines for companies concerning the issue of takeovers and mergers.⁶⁸ Therefore, "its effectiveness [will depend] on the attitudes of, and observance of it by, the participants in the securities market,"⁶⁹ as the Takeovers and Mergers Panel has only the power to "issue a private reprimand, a public statement or public censure against offenders of the code."⁷⁰ Nonetheless, market participants, such as the Hong Kong Stock Exchange, have the power to sanction

67. Fong-Chung Hsu, *supra* note 24, at 711.

68. Nathan N. McMurray, *Enforcing Voluntary Compliance: The Need to Strengthen Hong Kong's Merger and Acquisition Regulations*, 12 COLUM. J. ASIAN L. 75, 77 (1998).

69. Fong-Chung Hsu, *supra* note 24, at 712 (quoting Alan Au, *Hong Kong Code on Takeovers and Mergers & Toothless Watchdog or Handmaiden of Equality*, 17 H.K.L.J. 24, 26-27 (1987)).

70. Fong-Chung Hsu, *supra* note 24, at 712.

offenders of the Code, thereby adding some “teeth” to the doctrine.⁷¹

The Code, all in all, mandates that:

acquirers ... disclose information necessary for the target’s shareholders to evaluate the offer and reach an informed decision. The offer must remain open for a minimum length of time and unequal offers to different shareholders are forbidden. Target boards ... must submit bids to shareholder vote and may not take action to discourage the making or completion of bids. In practice, this means that target boards may not ... implement defensive tactics ... [or help] favored bidders.⁷²

Since the passage of Hong Kong to Chinese sovereignty, Mainland China’s red chip companies have migrated to Hong Kong to list “H shares”⁷³ on their stock exchange, beyond the reach of Beijing’s regulators whose regulation of takeovers and mergers is far more extensive than that of Hong Kong.⁷⁴ As a result of this mass exodus of Chinese companies, the Beijing government has reasserted its control over the Hong Kong takeover process by necessitating its consent to all takeovers and mergers involving public utilities, infrastructure, and telecommunications.⁷⁵ Moreover, according to Hong Kong’s Basic Law, the Beijing government has expressly reserved its right to intervene in situations involving issues of national security.⁷⁶ Hence, it has retained the undisputed authority to impede in a takeover or merger on the grounds that the transaction would adversely affect its national interests, thus softening the nation’s “fears that state assets were leaking away to foreign investors.”⁷⁷

The takeover and merger process in Hong Kong has been further impeded by China’s employment of “different and often less stringent accounting standards,” which are non-compliant

71. McMurtray, *supra* note 68, at 78.

72. *Id.* at 79.

73. **Please insert Footnote defining "H shares."**

74. *Id.* at 80. **Note: if above is added then this will no longer be *Id.* but should be *supra*.**

75. *Id.* at 90 (citations omitted).

76. *Id.* at 89 (citation omitted).

77. *Id.* (quoting Renee Lai, *Overseas Activity in M&A 'Alive and Well'*, S. CHINA MORNING POST, Feb. 23, 1996, at 3).

with internationally accepted standards.⁷⁸ Hong Kong, who, as a member of the General Agreement on Tariffs and Trade (“GAAT”) and the World Trade Organization (“WTO”), uses accounting principles that are in compliance with internationally accepted standards, this is in sharp contrast to China’s substandard accounting standards.⁷⁹ In the short-run, the less stringent accounting standards of Mainland China’s enterprises will serve to hamper Hong Kong’s takeover and merger process by causing the valuation of China’s enterprises to be either undervalued or overvalued, and perhaps even to contain some hidden liabilities, thereby scaring many investors away. However, in the long-run, China’s enterprises, which choose to list on the Hong Kong Stock Exchange, will be forced to change their accounting standards so that they are in compliance with the generally accepted accounting standards of the international community. Thus, this is not a problem that should jeopardize the future status of Hong Kong’s marketplace, as it is merely a bump in the road that will, either sooner or later, be overcome by the desire of China to do business with the international community.

Another potentially disturbing problem concerning the takeover and merger process in Hong Kong involves the corruption that is instilled into Mainland China’s companies. Market insiders are fearful that well-connected Chinese companies will receive special treatment from Hong Kong’s regulators.⁸⁰ They particularly fear that the Takeover Committee will fail to fully enforce the Code against Mainland China’s companies that willfully violate the Code by either leaking out confidential information to favored parties, failing to disclose required information to disfavored parties, or exploiting defensive tactics.⁸¹ Although “[w]ell-connected firms and individuals ... might benefit in the short term from the Code’s erosion ... in the long run the adverse effect of lost investor confidence would probably overwhelm the short term advantages.”⁸²

Since Hong Kong’s Code on takeovers and mergers does not possess any statutory force, rendering it incapable of imposing civil or criminal liability on its violators, the burden rests on the

78. *Id.* at 83.

79. **Please insert Footnote supporting this statement**

80. *Id.* at 86-87 (quoting Mark Clifford, *Can Hong Kong Learn to Behave?*, BUS. WK., Sept. 2, 1996, at 42). **Note if above is added then this will no longer be Id. but will be supra.**

81. *Id.* at 87 (citation omitted).

82. *Id.* at 95.

Takeover Committee and market participants (i.e., Hong Kong Stock Exchange) to enforce its guidelines.⁸³ Therefore, any failure on the part of the Takeover Committee and market participants to enforce the Code in a fair and impartial manner would result in the Code's erosion, causing the integrity of Hong Kong's marketplace to become greatly diminished.⁸⁴ Hence, the Beijing government has a national interest in the viability of the Code, as the undermining of it would only serve to displace Hong Kong's status as an international financial center. This would, in turn, inflict great economic pains on the Beijing government, which is dependent upon the venues of Hong Kong to raise foreign capital for its debt-ridden state-run economy, and to implement its economic reforms.⁸⁵ Moreover, the erosion of the Code would prove futile to China's "one nation, two system" paradigm, which would be devastating to the Beijing government's objective of being able to fashion a plan of reunification with neighboring Taiwan on terms similar to that of Hong Kong. Thus, Hong Kong's Governor, Tung Chee-hwa, must make it his personal responsibility to ensure that the Code is enforced in a fair and impartial manner, irrespective of personal relationships that may exist between Mainland China's companies and government regulators. Even though a vast opportunity exists for Chinese meddling in Hong Kong's takeover and merger process, the Beijing government should be reluctant to intervene as a *laissez-faire* policy would be in the best interests of the Hong Kong securities market as well as Mainland China.

V. HONG KONG'S POLICY OF *LAISSEZ-FAIRE* ECONOMICS VERSUS CHINA'S POLICY OF GOVERNMENT INTERVENTION

Hong Kong's government has long been recognized as a territory with a government that advocates a policy of *laissez-faire* economics towards its marketplace.⁸⁶ Therefore, market forces, not State directives, are expected to determine the valuation of the territory's stock market. It is this non-interventionist style of government that has contributed to the long-standing integrity of Hong Kong's marketplace and its renowned status as an international finance center.⁸⁷ Since the return of Hong Kong to

83. Please insert Footnote supporting this statement.

84. Possible Footnote needed here

85. Please insert Footnote supporting this statement.

86. Please insert Footnote supporting this statement.

87. Please insert Footnote supporting this statement.

Chinese sovereignty, however, Hong Kong's policy of *laissez-faire* economics appears to have subsided in favor of government intervention as a strategy for dealing with the market's troubles.⁸⁸

During the summer of 1998, hedge funds and investment banks were selling Hong Kong dollars, thus causing interest rates to skyrocket and the stock market to decline.⁸⁹ During this market trend, the hedge funds and investment banks were also selling the stock market short, thereby making a killing in the market.⁹⁰ Consequentially, however, this trading activity led to an atmosphere of increased market speculation on the Hong Kong Stock Exchange.⁹¹ Hence, Governor Tung Chee-hwa intervened, without the consent of the legislature, by ordering Hong Kong's central bank – the Hong Kong Monetary Authority – to buy up shares in the market.⁹² In the end, the Hong Kong Monetary Authority's buying spree dwarfed all other buyers on the Hong Kong Stock Exchange as it purchased HK \$118 billion (US \$15.1 billion) and became the largest shareholder in some of the territory's most prestigious blue-chip companies.⁹³ Thereafter, the Governor justified his interventionist style of government by claiming that its purchases achieved their specific objective of successfully putting a halt to market speculation, which was directly attributable to the territory's hedge funds and investment banks.⁹⁴

Although the Hong Kong government was able to ruin this moneymaking scheme while simultaneously profiting from its dealings, its shift in policy from *laissez-faire* economics to government intervention blemished the credibility of the territory's market.⁹⁵ Even though the Hong Kong government promised to sell its shares back to the private sector, thereby putting to rest the world's fears of Hong Kong becoming transformed into a state-run economy, this instance of government intervention caused bona fide investors to steer clear

88. *Market Force*, THE ECONOMIST Aug. 22, 1998, at 57. See also, *Making Tracks*, THE ECONOMIST, Oct. 9, 1999, at 90.

89. **Please insert Footnote supporting this statement.**

90. *Id.* **Note: if above is added then this will no longer be Id. but will be supra.**

91. **Please insert Footnote supporting this statement.**

92. See generally *Making Tracks*, supra note 88.

93. *Making Tracks*, supra note 88, at 79.

94. *Fair Shares*, THE ECONOMIST, Oct. 31, 1998, at 79.

95. *Fashionable*, THE ECONOMIST, Sept. 5, 1998, at 67.

of Hong Kong's stock market.⁹⁶ Subsequently, investors found it more difficult to decipher what lay behind the price movements in Hong Kong's stock market – whether it was market forces or the interventionist policy of the State.⁹⁷ Consequentially, Hong Kong's stock market experienced decreased market liquidity and increased market speculation and volatility since investment decisions were being premised, no longer solely on market factors, but instead, on government policy as well.⁹⁸

Hong Kong's image was further wounded by the “intolerable conflicts of interest” that was generated by its government's dealings in the stock market.⁹⁹ For instance, the government became the owner of 8.8% of HSBC, the largest bank in Hong Kong, which was regulated by the Hong Kong Monetary Authority.¹⁰⁰ The government also became the “owner of nearly 12% of New World Development and of more than 10% of Cheung Kong, two giant property conglomerates,” while having the role as the sole supplier of fresh land for development in Hong Kong.¹⁰¹ Thus, the most troubling notion about Governor Tung Chee-hwa's decision to intervene in its stock market was the issue of insider trading, as the government's dealings created an overlap between the public and private sectors.¹⁰² The Hong Kong government has, however, since redeemed itself in the eyes of the world by selling its ownership of the shareholding companies back to the private sector and employing alternative non-interventionist means (i.e., its rule-making authority) for fighting market speculation.¹⁰³

China must realize that any more abandonment of Hong Kong's long-treasured policy of *laissez-faire* economics in favor of its own policy of government intervention would greatly diminish the integrity of Hong Kong's marketplace, possibly causing the territory to return to its historical prospects as a “barren” island. These are ramifications that the Beijing government cannot afford to endure as Hong Kong's marketplace is crucial to Mainland China's doorway to the world's capital, particularly since its state-run economy is on the brink of bankruptcy, and its economic

96. *Market Force*, *supra* note 88.

97. *Id.*

98. **Please insert Footnote supporting this statement.**

99. *Making Tracks*, *supra* note 88.

100. *Fair Shares*, *supra* note 94.

101. *Id.*

102. *Id.*

103. *Fashionable*, *supra* note 95.

reforms are in dire need of funding.¹⁰⁴ Moreover, the Beijing government must comply with Hong Kong's policy of *laissez-faire* economics if it seriously wants its "one nation, two system" paradigm to succeed, which is essential to its ability to fashion a plan of reunification with neighboring Taiwan on terms similar to that of Hong Kong.

VI. HONG KONG'S INDEPENDENT COMMISSION AGAINST CORRUPTION ("ICAC")

Corruption is like a "heavy tax" on a nation's economic activity.¹⁰⁵ It serves to weaken private markets as it "misallocates economic resources and creates inefficiencies in market competition" by distorting the competitive equilibrium and supply and demand factors.¹⁰⁶ Aside from being a "political irritant" and "destabilizer of regimes," it serves to deter foreign investors from risking their money in a nation's market.¹⁰⁷ Hong Kong, however, has so far been able to remain remarkably free of corruption through the establishment of the ICAC in 1974.¹⁰⁸ The ICAC has since been preserved, by Article 57 of the Basic Law, following Hong Kong's passage to Chinese sovereignty.¹⁰⁹

The ICAC can be expected to be the most seriously tested of all the governmental organizations following the passage of Hong Kong to Chinese sovereignty, as corruption is fluid in Mainland China.¹¹⁰ This corruption is attributable to the overlap between the Beijing government and private sector,¹¹¹ which, in turn, has made personal relationships the cornerstone of that nation's economic activity.¹¹² This corruption, which has been culturally instilled in Mainland China's companies, will certainly impact Hong Kong's marketplace through their listings on the Hong Kong Stock Exchange. Thus, the viability of the ICAC shall prove to be crucial to the maintenance of Hong Kong's corrupt-free market.

104. **May need Footnote supporting statement of "brink of bankruptcy," possible *supra* to note 18 of this draft.**

105. PATTEN, *supra* note 6, at 224.

106. Hagelin, *supra* note 23, at 726.

107. **Please insert Footnote supporting statement and relating to "political irritant" and "destabilizer of regimes"**

108. *Id.* at 727. **Note if above is added then this will no longer be *Id.* but will be *supra*.**

109. *Id.* at 728.

110. *Id.*

111. Brian Daly, *Of Shares, Securities, And Stakes: The Chinese Insider Trading Law And The Stakeholder Theory Of Legal Analysis*, 11 AM. U. J. INT'L. L. & POL'Y 971, 1008 (1996).

112. Hagelin, *supra* note 23, at 726.

However, the legitimacy of the ICAC is under threat as Article 57 of the Basic Law has raised a potential conflict of interest by making the activities of the organization accountable to Hong Kong's Governor Tung Chee-hwa.¹¹³ Hence, the Governor is wearing two hats. On one hand, the Governor, as a political appointee of the Beijing government, is a representative of the interests of Mainland China's enterprises that have listed on the Hong Kong Stock Exchange. On the other hand, he possesses a defining role in the ICAC, whose sole objective is to fight corruption in Hong Kong's marketplace.¹¹⁴ Consequently, Hong Kong's remarkably corrupt-free society is lingering on the sanctity of the ICAC, which, is dependent upon the Governor's seriousness in preserving a corrupt-free Hong Kong.¹¹⁵

China's motivation to fight corruption in Hong Kong is founded on its need to maintain the long-standing integrity of Hong Kong's marketplace and its status as an international financial center, as it is dependent upon the venues of Hong Kong to raise capital from the international community. Its motivation is also founded on its bid to ensure the success of its "one nation, two system" paradigm, which is essential to its ability to fashion a plan of reunification with neighboring Taiwan on terms similar to that of Hong Kong. Thus, Hong Kong's Governor Tung Chee-hwa has every incentive to oversee the conduct of the ICAC, free of any influence from his personal relationships with Mainland China, with the vision of maintaining the "rule of law" in Hong Kong, which explicitly prohibits practices of corruption in its marketplace.

VII. MEDIA FREE HONG KONG

"The free exchange of business information and ideas is essential to the operation of a market economy,"¹¹⁶ as the democratic right to a free-media promotes transparency and openness in the market.¹¹⁷ People cannot be expected to invest wisely in a stock market if they are restricted in the news that they can read or the opinions that they can advance, and if the information is inaccurate in consideration of the government's policy of censorship.¹¹⁸ Thus, a toleration of a free press and

113. *Id.*

114. *Id.*

115. *Id.* at 727.

116. *Id.* at 725.

117. PATTEN, *supra* note 6, at 234.

118. *Id.*

speech are essential ingredients to a country's race for economic growth.¹¹⁹

In direct contravention to China, Hong Kong's Basic Law guarantees to its citizens the democratic values of free speech and press. In turn, this has laid down the foundation for a more transparent, open and healthier business environment in Hong Kong. However, these democratic rights are vulnerable to the political whims of Hong Kong's Governor, Tung Chee-hwa.¹²⁰ For instance, Hong Kong's Ordinances allocate to the Governor the right to seize and censor information if exercised in the public interest.¹²¹ The Governor is also empowered with the right to control the flow of information, since the territory has no "Freedom of Information Law."¹²² Furthermore, the Governor is empowered, pursuant to the Emergency Regulations Ordinance¹²³, with the authority to enact regulations restricting the territory's freedom of speech and press, as long as it is exercised in line with the objective of maintaining public order.¹²⁴ These statutory restrictions on the citizens of Hong Kong's right of free speech and press have placed fear into the hearts of the international community and people of Hong Kong; although, they have yet to come to light since Hong Kong's passage to Chinese sovereignty.¹²⁵

The transparency and openness of Hong Kong's market has, however, dissipated since its return to Chinese sovereignty. First, "[t]here is no doubt that self-censorship is practised [sic] by the Hong Kong media."¹²⁶ This is particularly true with respect to Hong Kong's reporters and writers, who are responsible for the coverage of companies from Mainland China, as they are reluctant to publish a negative story for fear of being arrested and punished by the Beijing government.¹²⁷ Second, there has been a sudden lack of media access to Hong Kong's government, as well as an increased secrecy in the territory's judiciary branch.¹²⁸ Of course, there is

119. *Id.* at 177.

120. Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 *TRANSNAT'L LAW* 383, 396 (1998).

121. PATTEN, *supra* note 6, at 177.

122. Cullen, *supra* note 120, at 397.

123. **Please provide statute/regulation number and corresponding text.**

124. *Id.* at 398. **Note if the above is added then this will no longer be Id. but will be supra.**

125. **May need Footnote here.**

126. *Id.* at 407. **Note if above is added then this will no longer be Id. but will be supra.**

127. *Id.* at 407-08.

128. *Id.*

also the continuing concern that the transparency and openness of Hong Kong's market will dissipate further as companies from Mainland China start to buy into the territory's media, which has already occurred with respect to Hong Kong Television Broadcaster, ATV.¹²⁹ Nonetheless, Hong Kong is presently the greatest example of a nation's exercise of its freedom of speech and press as every international paper and electronic media currently maintains operations in Hong Kong, and the territory enjoys the most news media per heads of population than any area in the world.¹³⁰

Although Governor Tung Chee-hwa has the legal authority to restrict Hong Kong citizens' democratic right to a media-free Hong Kong, it would be unwise for him to implement such a program of government censorship, because the effect would translate into financial suicide for the Beijing government. First, government censorship in Hong Kong would only serve to diminish the integrity of its marketplace, causing investors to pull their funds out of Hong Kong and thereby closing the gates to China's doorway to the world's capital. Second, it would foreclose on any chance that China may have in exploiting the success of its "one nation, two system" paradigm during its negotiations with neighboring Taiwan concerning a plan of reunification of similar terms to that of Hong Kong. Thus, to the extent that China's economy is dependent upon the success of its "one nation, two system" paradigm, the Beijing government will not stray from its guarantee of the democratic values of a free press and speech, as provided under the terms of Hong Kong's Basic Law.

VIII. DISCLOSURE IN THE MARKETPLACE

To create a more level playing field among market participants so as to lessen the information deficit between companies and investors and to break the manager's monopoly over corporate information, the law in Hong Kong requires that public companies and shareholders disclose certain information to the public. For instance, the Securities (Disclosure of Interests) Ordinance imposes a mandatory disclosure requirement on shareholders who have acquired a greater than ten percent interest in a company's shares.¹³¹ The objective of the Ordinance is to provide the investment community with a list as to the identity of company shareholders that are able to exert a control

129. *Id.* at 409.

130. *Id.*

131. X, *supra* note 50, at Ch. 396 Pt. II § 3-6.

or influence over the company's policies to better enable investors to make their investment decisions.¹³²

In addition to the shareholder disclosure requirement, the Securities Ordinance requires that a company offering shares to the public issue a prospectus, which offers to the investing public a full description of the company and its share offering.¹³³ Moreover, Hong Kong's laws require a public company to publish information to the investing public on a continuous basis.¹³⁴ Hence, a public company is required to update its prospectus every six months and issue a company report on an annual basis.¹³⁵ There is also a continuing obligation on a public company to publish information concerning its financial position.¹³⁶

The information disclosed, whether it is mandatory or voluntary, must be accurate, and therefore, not misleading.¹³⁷ To ensure the accuracy of a prospectus, Hong Kong's laws require that an auditor, who is to be at arms-length from the company, issue a report, which states that the prospectus represents a "true and fair view" of the company's affairs.¹³⁸ However, there exists great controversy in Hong Kong as to what constitutes a "true and fair view" of a company's affairs.¹³⁹ The Commission has no obligation to ensure the accuracy of a company's prospectus prior to approving its issuance to the public, but it does maintain the authority to refuse to register a prospectus if it believes the information to be inaccurate.¹⁴⁰ In the Hong Kong government's commitment to maintaining the veracity of a company's prospectus, its legislature has allocated civil and criminal penalties to parties liable for the publication of an inaccurate statement in their company's prospectus.¹⁴¹

Hong Kong's mandatory disclosure requirements for public companies and shareholders have promoted a greater transparency and openness in the territory's marketplace, thereby improving

132. Fong-Chung Hsu, *supra* note 24, at 700.

133. *Id.* at 701.

134. **Please insert Footnote supporting this statement.**

135. *Id.* at 706. **Note if the above is added then this will no longer be Id. but will be supra.**

136. *Id.*

137. *Id.* at 701.

138. *Id.* at 702.

139. *Id.*

140. *Id.*

141. **Note Author's Footnote # 113 - Section #'s are not within this Regulation - could Author be referring to Fong-Chung Hsu, pg. 705?**

investor confidence in the market. However, a failure on the part of the Hong Kong government to enforce its disclosure requirements would greatly diminish the long-standing integrity of its marketplace, thereby causing investor confidence to plummet and China's doorway to the world's capital to dry up. Although, in the short-run, the Hong Kong government's refusal to enforce its disclosure requirements could prove fruitful, enabling managers to profit as a result of their monopoly over corporate information in Hong Kong; in the long run, the ramifications of such a policy would outweigh any such benefits. Thus, Hong Kong's Governor, Tung Chee-hwa, must ensure that corporate and investor disclosure are enforced in the marketplace, as it is a significant variable to the maintenance of Hong Kong's status as an international financial center. It is also vital to the success of Beijing's "one nation, two system" paradigm, which is crucial to China's desire to fashion a plan of reunification with neighboring Taiwan on terms similar to that of Hong Kong.

IX. INSIDER DEALING

Hong Kong's securities laws explicitly make it unlawful for a *tipper* or *tippee*¹⁴² to commit a transaction that involves the insider dealing of a listed security of a corporation.¹⁴³ A three-member Insider Dealing Tribunal is the governmental body responsible for the handling of the investigation and hearing of all alleged violations of insider dealing.¹⁴⁴ The powers of the Tribunal are unlimited with respect to its investigation of alleged insider dealing violations, as it may impose either a fine or imprisonment on anyone who dares to obstruct the investigation process.¹⁴⁵ During the hearing stage, the alleged violators of Hong Kong's insider dealing laws are allocated their "due process" right to be heard by the Tribunal.¹⁴⁶

Once the Tribunal has rendered its ruling, the party convicted of insider dealing may receive any or all of the following judicially imposed punishments:

- (a) An order that the person should not be a director, a liquidator, or a receiver of manager of

142. Please insert Footnote that defines "Tipper or Tippee."

143. X *supra* note 50 at Ch. 395 Pt. II §§ 9-10.

144. *Id.* at Ch. 395 Pt. III § 15.

145. *Id.* at Ch. 395 Pt. III §§ 20-27.

146. *Id.* at Ch. 395 Pt. III § 16

- the property of a listed company or any other specified company.
- (b) An order that the person should not be, directly or indirectly, a part of management of a listed or any other such company for a period not exceeding 5 years.
 - (c) An order that the person pay to the government an amount up to the amount of profit gained or loss avoided resulting from the insider dealing.
 - (d) An order imposing a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by any person resulting from the insider dealing.¹⁴⁷

Once there has been an adverse finding by the Tribunal, the convicted party will have the right to appeal the Tribunal's ruling to the Court of Final Appeal.¹⁴⁸

Hong Kong's explicit prohibition of insider dealing is, however, weakened by the fact that it fails to criminalize these transactions. Instead, the Tribunal is only permitted, by law, to impose a punishment of civil liability on violators of Hong Kong's insider dealing provisions.¹⁴⁹ Even though the criminalization of insider dealing would raise the burden of proof for the prosecutor, it would demonstrate the seriousness of the government's efforts to battle insider dealing, while maintaining in tact civil penalties, which carry a lesser burden of proof.

This issue of insider dealing poses a serious threat to the integrity of Hong Kong's stock market, a threat that the international community fears will be magnified because of the passage of Hong Kong to Chinese sovereignty. China is renown for its insider dealing violations as the overlap between the government and private sector has made personal relationships the cornerstone of that nation's economic activity.¹⁵⁰ The seriousness of this concern is what gave rise to the Chairman of the Commission's "salutary warning that Hong Kong should not allow itself to become, the Wild West of the Far East."¹⁵¹

It is imperative that the Hong Kong government, under the leadership of Governor Tung Chee-hwa, uphold the territory's

147. *Id.* at Ch. 395 Pt. III § 23.

148. *Id.* at Ch. 395 Pt. IV § 31.

149. Fong-Chung Hsu, *supra* note 24, at 708.

150. Daly, *supra* note 111, at 1008.

151. PATTEN, *supra* note 6, at 228.

“rule of law,” which explicitly prohibits insider dealing in its stock market.¹⁵² By doing so, Mainland China will be sacrificing its short-term insider dealing profits for the long-term viability of the market’s integrity and its status as an international financial center. Irrespective of the fact that this goes against Mainland China’s cultural acceptance of insider dealing, the enforcement of Hong Kong’s insider dealing laws is a prerequisite to the success of China’s “one nation, two system” paradigm. Otherwise, anything short of fair and equitable shareholder treatment in Hong Kong’s stock market would provoke the investment community to pull their money out of Hong Kong, thereby closing the gates to China’s doorway to the world’s capital. Thus, China has little choice but to comply with the enforcement of Hong Kong’s insider dealing laws as its state-run economy is in dire straits and its economic reforms are in need of funding from the international community. Moreover, the success of China’s “one nation, two system” paradigm is at stake if China refuses to comply with the enforcement of Hong Kong’s insider dealing provisions, thereby jeopardizing its goal of fashioning a plan of reunification with neighboring Taiwan on similar terms similar to those of Hong Kong.

X. PRIVATE LITIGATION

“[E]ffective private remedies have proved [to be] an indispensable and essential part” of securities law enforcement.¹⁵³ Private remedies not only help to compensate defrauded investors, but they also provide deterrence against securities fraud and other misconduct.¹⁵⁴ Furthermore, they provide “[d]irect incentives . . . for victimized investors to detect, report, and assist in the apprehension [and prosecution] of violators,”¹⁵⁵ thereby supplementing the enforcement activities of the regulatory bodies, which are under-staffed and under-trained, to clean up the abuses of the securities market.¹⁵⁶ “Without a private right of action, individual shareholders are without redress for egregious, even criminal, behavior on the part of [company] management.”¹⁵⁷

152. Please insert Footnote supporting "prohibits insider dealings..."

153. Wenhai Cai, *Private Securities Litigation In China: Of Prominence And Problems*, 13 COLUM. J. ASIAN L. 135, 136 (1999).

154. *Id.*

155. *Id.* at 142.

156. *Id.* at 139.

157. Daniel M. Anderson, *Taking Stock In China: Company Disclosure And Information In China's Stock Markets*, 88 GEO. L.J. 1919, 1940 (2000).

Thus, a government that is serious about the enforcement of its securities laws must explicitly render to its shareholders the ability to raise a private cause of action against a listed company and its officers and directors.

The law in Hong Kong empowers a shareholder with the right to bring forward a private cause of action against a person, who, “by any fraudulent, reckless, or negligent misrepresentation, induces another person...to acquiring, disposing of, subscribing for, or underwriting securities” for the purpose or effect of securing a profit.¹⁵⁸ If found liable, that person shall be required to pay compensation to the injured shareholder for his pecuniary loss.¹⁵⁹ The law in Hong Kong also entitles a shareholder to bring forward a private cause of action, seeking compensation for any pecuniary loss that he may have suffered as a result of his reliance on a “false, misleading, or deceptive” statement in his purchase or sale of shares.¹⁶⁰

These two express private rights of action serve to safeguard the interests of the investor in the Hong Kong stock market, thereby increasing investor confidence in the market. Irrespective of the fact that a shareholder’s private right of action goes against Mainland China’s Marxist ideology, Hong Kong’s Governor, Tung Chee-hwa, must nevertheless maintain this measure of investor recourse in its stock market since investor protection and confidence are vital to the success of Hong Kong’s market. Thus, any decision by the Beijing government to repeal the shareholder’s private right of action in Hong Kong’s stock market would only serve to undermine its status as an international financial center. Moreover, it would inflict harm on China’s bid for a successful “one nation, two system” paradigm, thereby ruining its government objective of being able to fashion a plan of reunification with neighboring Taiwan on similar terms to those of Hong Kong.

XI. THE JUDICIARY BRANCH AND WHETHER IT IS INDEPENDENT OF BEIJING

Financial systems cannot exist without adequate legal institutions, as a nation’s market requires a viable judiciary branch to interpret and enforce the laws of the land. A judiciary branch is an indispensable part of government whose primary purpose is for the protection of the “rule of law,” an essential

158. X, *supra* note 50, at Ch. 335 § 8.

159. *Id.*

160. Fong-Chung Hsu, *supra* note 24, at 704. *See also* X, *supra* note 50, at Ch. 395 §

ingredient to a country's economic success.¹⁶¹ The ability of the judiciary branch to enforce the "rule of law" and to challenge the government when it actively violates a nation's laws is vital to a healthy business environment.¹⁶²

As a safeguard to the viability of the Hong Kong's judiciary branch, the Court of Final Appeal was established as "the ultimate guarantor" of Hong Kong's legal system.¹⁶³ However, market insiders are fearful that Hong Kong's judiciary branch will succumb to external pressures from Beijing in its interpretation and enforcement of Hong Kong's "rule of law," thereby giving preferential treatment to Mainland China's companies. This fear is well-founded in that the Basic Law explicitly holds Hong Kong's judiciary branch accountable to Governor Tung Chee-hwa.¹⁶⁴ Furthermore, the 1984 Sino-British Joint Declaration requires that the Chief Justice of the Court of Final Appeal to be of Chinese descent, while the other three presiding judges may be of any nationality.¹⁶⁵ Moreover, Hong Kong's Basic Law provides that a judge may be removed for multiple reasons, thereby implying that "judges who want to keep their seats will be under tremendous pressure to find in favor of the Chinese government."¹⁶⁶

The fear of the Beijing government exerting its influence over Hong Kong's judiciary branch grows deeper when it actually threatens the territory's autonomy. This autonomy is impeded by the Basic Law's allocation of jurisdiction to China's NPC concerning "acts of state," which is an exemption to the legal jurisdiction of Hong Kong's judiciary branch that has been left to the discretion of the NPC to interpret.¹⁶⁷ Since Hong Kong's passage to Chinese sovereignty, this open-ended question of China's jurisdiction over matters concerning "acts of state" had only been exercised by the NPC one time, in 1999, when the Beijing government asserted its jurisdiction over a Hong Kong immigration issue.¹⁶⁸ In that instance, the NPC had overruled the decision of Hong Kong's Court of Final Appeal, much to the

161. John McDermott, *The "Rule of Law" in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L. J. 263, 275 (1997).

162. *Id.*

163. *Hong Kong Diminished*, THE ECONOMIST, July 1, 1999, at 16.

164. *Id.*

165. McDermott, *supra* note 161, at 279.

166. McMurtray, *supra* note 71, at 88.

167. McDermott, *supra* note 161, at 276.

168. *Whose law?*, THE ECONOMIST, December 11, 1999, at 38.

discomfort of many Hong Kong citizens and the international community.¹⁶⁹

Hong Kong's "rule of law" and judiciary branch are the primary ingredients that distinguish Hong Kong's marketplace from that of China. Everyday, investors risk their capital in Hong Kong's marketplace because of the territory's added investor protection, as provided for by its "rule of law," which is interpreted and enforced by its judiciary branch. Hence, any failure on the part of Hong Kong's judiciary branch to act fairly, equitably, and impartially in its interpretation and enforcement of the territory's laws will only serve to harm the integrity of its stock market. Additionally, any infringement by the Beijing government on the autonomous nature of Hong Kong's judiciary branch will only draw short-term gains for the Chinese economy. However, in the long run, it will serve to induce investors to withdraw their capital from Hong Kong since reasonable persons will not be willing to invest their life savings in a market that is run by a totalitarian-driven government in which the rule of one party precedes the nation's laws. Thus, it is imperative that China resist the need to exert its influence or control over Hong Kong's judiciary branch so that it may maintain the viability of Hong Kong as a gateway to the world's capital, which is needed to save Beijing's ailing state-run enterprises and economic reforms. Moreover, it is essential to the success of China's "one nation, two system" paradigm that the Beijing government not close the door to future negotiations with neighboring Taiwan concerning a plan of reunification on terms similar to those of Hong Kong.

XII. CONCLUSION

Since the passage of Hong Kong to Chinese sovereignty on July 1, 1997, the Beijing government has complied with its obligations as specified under its Joint Declaration with Britain and Hong Kong's Basic Law. Therefore, Beijing's government has been able to maintain the long-standing integrity of Hong Kong's marketplace and its esteemed status as an international financial center. This has, in turn, allowed it to exploit the venues of Hong Kong's market to raise capital from the international community in order to salvage its ailing state-run economy from dissolution and insolvency by pushing forward with its economic reforms. Moreover, the Beijing government has been able to succeed in the implementation of its government policy of a "one nation, two

169. *Id.*

system” paradigm, as it has retained the territory’s “rule of law,” market economics and democratic values intact, despite their contravention with the Marxist ideology of China’s Communist Party. Hence, the Beijing government should now be able to enter into the negotiation process with neighboring Taiwan with a legitimate plan of reunification, that is premised on the success of its “one nation, two system” paradigm, and its positive handling of Hong Kong’s passage to Chinese sovereignty.

However, the situation in Hong Kong may deteriorate at any time due to the fact that Britain’s colonial government was left intact following Hong Kong’s passage to Chinese sovereignty. Hong Kong’s laws, allocate to Governor Tung Chee-hwa, a political appointee of the Beijing government, a dictatorial authority over the territory’s government and economy. This has made Hong Kong’s legal system and market structure vulnerable to the political whims of Governor Tung Chee-hwa. Hong Kong’s Governor, however, should be reluctant to assert his unhindered authority to intervene in Hong Kong’s legal system and market structure, as this behavior would only serve to greatly diminish the integrity of Hong Kong’s market, thereby displacing it as an international financial center. Hence, China cannot afford to endure any behavior that jeopardizes the status of Hong Kong’s market, because it is their primary gateway for raising capital from the international community. Moreover, the success of China’s “one nation, two system” paradigm is dependent upon the continued prosperity of Hong Kong’s marketplace, thus, making it essential to the Beijing government’s objective of being able to fashion a plan of reunification with neighboring Taiwan on terms similar to those of Hong Kong.

The decision of the Beijing government to extend its “one nation, two system” paradigm beyond its borders to the southern provincial government of Hong Kong, combined with the previously promulgated “open-door” policy of Deng Xiaopong, has let in, not only foreign capital, but also Western ideas. Thus, the futility of the Beijing government’s policy of building walls between its economic dealings with the Hong Kong market and its political dealings with the Hong Kong government has put in motion a process of modernity that will revolutionize Mainland China’s legal system and market structure. In the short term, this process will enable China’s Communist Party to retain its control of the government through its ability to continue to finance its failed government and economy through the venues of Hong Kong’s marketplace. However, in the long-run, China will become increasingly economically integrated with Hong Kong,

which is already demonstrated by the mass migration of China's red chip companies to list on the Hong Kong Stock Exchange, to the point that a political agenda will begin to arise. And eventually, Hong Kong's much stronger legal system and market structure will serve to displace China's Communist Party, thereby giving rise to a new era in Chinese history that is premised on the "rule of law," market economics and democratic values. Then, and only then, will the theory of Mainland China's chief economic city of Shanghai someday replacing Hong Kong as the country's primary financial center be feasible. For now, Shanghai is not deserving of retaining the status of China's primary financial center, due to Beijing's lack of a credible and reliable legal system to underpin its economy.

POLICY CONSIDERATIONS IN DETERMINING
THE HABITUAL RESIDENCE OF A CHILD AND
THE RELEVANCE OF CONTEXT

RHONA SCHUZ*

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I. INTRODUCTION

A. Background

Habitual residence has been chosen as the main connecting factor in many of the multinational conventions concluded under the auspices of the Hague Conference on Private International Law for nearly one hundred years.¹ It is now also used in other international conventions² and in the domestic legislation of a number of countries, including England and Canada. However, there was very little discussion as to the meaning of the concept until the explosion of litigation under the Hague Convention on the Civil Aspects of Child Abduction³ (hereinafter “the Abduction Convention”) began in the 1980s. Under this Convention, the determination of habitual residence is often critical to the outcome of an application for the return of the child in international abduction cases.

While the immediate consequences of the determination of the habitual residence of a child in other contexts, such as under the new Hague Convention dealing with the Private International law aspects of Parental Responsibility and Measures for the Protection of Children⁴ (hereinafter the “Protection Convention”) and in domestic child legislation, do not seem to be so drastic, the implications may be just as great. For example, the finding that country “A” has jurisdiction because it is the place of the habitual residence of the child may lead to the making of a decision or

1. It was first used in the Hague Convention on Guardianship in 1902, *available at* <http://www.hah.net/f/conventions/textofhtml1902#c>, and is currently the main connecting factor in the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

2. *See, e.g.*, the EC Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters (“Brussels II”) 1998 O.J. (C221) 20.

3. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* http://travel.state.gov/hague_childabduction.html [hereinafter Abduction Convention].

4. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, *available at* <http://www.hcch.net/e/conventions/text.34e.html> [hereinafter Protection Convention].

taking of a measure by a court or other authority in country “A” which is fundamental to the child’s future.⁵ Similarly, the finding that “X” has parental rights in relation to the child because the law of country “B” which is the place of the child’s habitual residence, governs this question, is of monumental significance to the life of the child. It is much too early to know how extensively the Child Protection Convention will be invoked, since the Convention has only been signed by a few countries and has not yet come into effect.⁶ Assuming that it does eventually attract a reasonable number of members, this Convention ought to be used considerably more than previous Hague Conventions because of the increased awareness of the importance of Hague Conventions in dealing with international child disputes as a result of the widespread use of the Abduction Convention.

Although the Reports of the Special Commission considered the Abduction Convention, the Reports pay only limited attention to the issue of determining habitual residence. Their overall impression is that courts have little difficulty in determining habitual residence in most cases.⁷ While this assertion is no doubt true, it does not mean that we can ignore the considerable difficulty experienced in “borderline” cases, most of which involve some form of relocation.⁸ The approach of many courts has been to focus exclusively on the purpose⁹ of the parents in relocating¹⁰ and, where typically the parents disagree about this, the whole dispute turns on the court’s assessment of which parent is telling

5. Even though all of the member states use the best interests standard in adjudication of custody disputes, the subjective nature of this standard makes it inevitable that it will be applied differently by judges who come from different cultural backgrounds. Stephen Parker, *The Best Interests of the Child - Principles and Problems*, in *THE BEST INTERESTS OF THE CHILD* 26, 29-31 (Oxford University Press, 1994).

6. See Protection Convention, *supra* note 4.

7. See Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 33 I.L.M. 225, 234 (1994) [hereinafter Second Special Commission Report].

8. The Second Special Commission Report does refer to the situation of servicemen stationed abroad. *Id.* The Third Special Commission Report, available at <http://www.hcch.net/e/conventions/menu28e.html>, mentions the difficulty of alternating custody arrangements. However, the treatment of these problems is only cursory.

9. Thus it is the settled purpose formula of *Regina v. Barnet London Borough Council* that has been stressed. [1983] 2 A.C. 309, 344 (H.L. 1982) (Eng.).

10. See, e.g., *F v. S* [1993] 2 F.L.R. 349 (Eng.); *Re R* [1992] 2 F.L.R. 481 (Eng.). In these cases, the question of the jurisdiction of the English Court depended on the intention of unmarried mothers in relocating abroad. In both of these cases, the Court of Appeal overturned the prior Court’s decision that the mother was no longer habitually resident in England.

the truth.¹¹ Given that Hague Convention proceedings are summary, they are not ideally designed to determine contradicted issues of fact.¹² Therefore it is particularly unfortunate that such a finding is liable to be determinative of the outcome in cases, the human consequences of which are so drastic.¹³

The present author has recently studied the connection between the habitual residence of the parents and that of the child in the context of the Child Abduction Convention and concluded that the optimal model is that where the habitual residence of the child is determined independently.¹⁴ In the course of the above study, it became clear that whichever model is adopted, and despite the apparently factual nature of the enquiry, ¹⁵determination of the habitual residence of a child is likely to be influenced by policy considerations, at least in borderline cases.¹⁶ It was thought that an examination of the actual and desired scope and impact of such considerations would be helpful in the search for a mechanism for deciding borderline cases. In order to make this research more meaningful it was

11. See, e.g., *Re F (A Minor) (Child Abduction)* [1992] 1 F.L.R. 548 (Eng.); see also *A v. A (Child Abduction)* [1993] 2 F.L.R. 225 (Eng.); *Moran v. Moran* [1997] S.L.T. 541 (Sess. 1995) (Scot.). Similarly, in the Australian case of *Laing v. Laing*, (1996) 21 Fam. L.R. 24 (See. 1995) (Austl.), much depended on whose version of the conversations and correspondence in relation to whether the husband had agreed to the wife's stay in Australia was accepted by the court.

12. Thus, often there is no oral evidence. *A v. A (Child Abduction)*, 2 F.L.R. at 235 (commenting that the judge was under "the disability in making findings of fact of not having heard the parties in the witness-box."). Similar comments were made by the Family Court of Australia in *Laing*, 21 Fam. L.R. at 33.

13. Although the decision under the Abduction Convention does not determine the merits of the custody dispute, it is undoubtedly influential. During the time that elapses pending the decision on the merits, facts are being created which will be relevant to the ultimate determination. In particular, the benefit of preserving the status quo will be one of the factors taken into account in determining the merits of the case and, in a borderline case, may even be conclusive. See Rohman et al., *The Best Interests of the Child in Custody Disputes*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* 59, 77 (Weithorn ed., 1987). Thus, the location where the child is resident at the time of the substantive hearing is likely to influence the outcome. Moreover, while all of the member states decide custody disputes in accordance with the welfare of the child, the implementation of this test is not uniform. See Parker, *supra* note 5. Furthermore, there may be profound lasting psychological effects resulting from both the abduction and return. See generally Marilyn Freeman, *The Best Interests of the Child? Is The Best Interest of the Child in the Best Interests of the Children?*, 11 INT'L J.L. POL'Y & FAM. 360 (1997) (summarizing the empirical research).

14. Rhona Schuz, *Habitual Residence of the Child under the Hague Child Abduction Convention: Theory and Practice*, 13 CHILD & FAM. L.Q. 1 (2001).

15. For discussion of the nature of the determination of habitual residence, see *infra* at Part B.

16. The present author also suggested in an earlier article that the courts were likely to manipulate findings of habitual residence in order to ensure that adjudication occurred in the most appropriate forum. Rhona Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law*, 44 INT'L & COMP. L.Q. 771, 792 (1995).

decided not to restrict the study to the Abduction Convention but also to examine and compare the policy considerations which would be relevant in others legislative contexts in which the habitual residence of the child is the main connecting factor.¹⁷

B. The Nature of the Determination of Habitual Residence

1. The Debate

It is a matter of contention whether determination of habitual residence of a child is a question of fact or a question of mixed fact and law.¹⁸ In the leading U.S. case of *Feder v. Evans-Feder*,¹⁹ which is one of the few cases where the issue is actually discussed,²⁰ the latter option was favored by the majority because in their view the determination “is not purely factual, but requires the application of a legal standard which defines the concept of habitual residence, to historical and narrative facts.”²¹ On the other hand, Justice Sarokin, dissenting, relying *inter alia* on the Perez-Vera Report, the relevant legislation and previous case law, concluded that the determination should be characterized as one of “factual finding.”²²

With respect, it is suggested that there has been a considerable amount of confusion in many of the judicial comments supporting the factual approach. On the one hand, they recite the official view that habitual residence has to be a matter of fact so that there will be uniform interpretation in all the member states.²³ Indeed, the main reason that the concept of habitual residence was chosen was to avoid the problems of

17. The choice of legislative instruments is discussed *infra* in Part C .

18. See the comment of Justice Sarokin that “federal and state courts have struggled over this precise issue, with some making findings of fact and others conclusions of law regarding a child’s habitual residence.” *Feder v. Evans-Feder*, 63 F.3d 217, 227 (3rd. Cir. 1995) (Sarokin, J., dissenting).

19. *Id.*

20. Previous cases have assumed without discussion, that the determination is a question of fact or of law. See, e.g., *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991) (question of fact); *In re Prevot*, 855 F. Supp. 915 (W.D. Tenn. 1994), *rev’d*, 59 F.3d 556 (6th Cir. 1995) (question of law).

21. *Feder*, 63 F.3d at 222.

22. *Id.* at 229. Justice Sarokin claims that the majority’s reasoning confused “ultimate facts” with “mixed questions of fact and law.” In his view, “while an ultimate fact may depend on subsidiary findings of act, it is nonetheless a factual finding”

23. The Official Reports to both the Abduction and Protection Conventions state that the question of habitual residence is a question of fact. See Perez-Vera Report on the Abduction Convention, Oct. 1980, vol. III ¶ 66, *available at* <http://www.hcch.net/e/conventions/menu28e.html> [hereinafter Perez-Vera Report]; Lagarde Report on the Child Protection Convention, Oct. 1996, vol. II ¶ 41, *available at* <http://www.hcch.net/e/conventions/exp134e.html> [hereinafter The Lagarde Report].

connecting factors, such as domicile, which had different legal definitions in different countries.²⁴ On the other hand, these very same cases provide definitions of habitual residence²⁵ and list the applicable principles for its determination.²⁶

2. Critique of the “Question of Fact” Approach

It is submitted that, the “factual” approach is too simplistic because it is not correct to assert “[t]he two words ‘habitual’ and ‘residence’ are quite capable of doing all the work which is required of them.”²⁷ There are many borderline cases where it would not be “an abuse of language” to say that the child was habitually resident in country “C” or country “D” or in both of them.²⁸

From a purely factual point of view, the classic example of a situation that is borderline is where the child relocated shortly before the date on which the child’s habitual residence has to be determined. The difficulty can be seen from the difference in views expressed by members of the Special Commission on the Protection Convention.²⁹ On the one hand, it was suggested³⁰ that “in normal cases, the habitual residence of a child changes when its parents move with their child from one State to another.” On the other hand, there were delegates who thought

24. See L.I. De Winter, *Nationality or Domicile?*, in RECUEIL DES COURS 419 (A.W. Sijthoff, ed., 1970).

25. The most commonly cited definition is that of Lord Scarman in *Regina v. Barnet London Borough Council*. [1983] 2 A.C. 309, 343 (H.L. 1982) (Eng.). “A man’s abode in a particular place or country which he has adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being, whether of short or of long duration.” *Id.* However, in the case of *Feder v. Feder*, 63 F.3d at 223, a revised definition was stated: “the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.” This definition was accepted by the whole court and has been cited in subsequent U.S. cases.

26. See *generally Re B (Minors) (Abduction No. 1)*, [1993] 1 F.L.R. 988, 991-92 (Eng.); *Cooper v. Casey*, No. EA102 of 1994, slip op. (Fam. Ct. Austl. May 5, 1995).

27. This assertion is made by E. M. Clive, *The Concept of Habitual Residence*, JURID. REV. 137, 147 (1997).

28. Thus, in the words of Justice Stevens, the reasoning by which habitual residence is determined “crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17 (1984).

29. In the absence of agreement, the issue is simply ignored in the final version of the Convention, which makes no attempt to define habitual residence. The Lagarde Report simply recites baldly that when habitual residence is acquired following relocation is a question of fact. The Lagarde Report, *supra* note 23, ¶ 41.

30. See PROCEEDINGS OF THE EIGHTEENTH SESSION OF THE HAGUE CONFERENCE (Vol. 2) 322, Minutes No. 4 (Permanent Bureau of the Conference ed., 1998) [hereinafter Hague Conference Proceedings].

that habitual residence should only change after a certain period of time had been spent in the new State.³¹ Mr. Adair Dyer, Deputy Secretary-General of the Hague Conference, pointed out that the first view caused problems where one member of the family had agreed to move on the basis of some misrepresentation or misunderstanding.³² Thus, in his view, simply crossing the border was not sufficient and a “more pragmatic and flexible approach should be used.”³³

It is submitted that the insistence of courts and writers that we are concerned with a question of fact stems from two concerns. First, there is a fear that habitual residence might become a technical term, with complicated legal requirements,³⁴ which could make it a potentially artificial connecting factor like domicile.³⁵ But this is very different from saying that it has to be determined in a legal vacuum without any legal guidance at all. The solution to this problem may be to acknowledge that the matter is not purely a question of fact but has “a largely factual emphasis.”³⁶ Thus, the legal standard is intended to give guidance as to how to interpret the facts rather than to fetter the courts with rigid rules.

Second, the need to ensure *prompt* return of children means that appeals (especially where return has been ordered) should be deterred. As seen from the case of *Feder*,³⁷ if the determination of habitual residence is one of fact, then it can only be reviewed on

31. *Id.* at 113, ¶¶ 21-23.

32. *Id.* at 323, Minutes No. 4.

33. *Id.* This seems to be another way of saying that it is necessary to take into account policy considerations such as protecting vulnerable family members.

34. DICEY MORRIS, *CONFLICT OF LAWS* 152 (13th ed. 2000) (expressing the hope “that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions.”). Similar sentiments are uttered in the leading U.S. cases of *Friederich v. Friederich*, 983 F.2d. 1376, 1401 (6th Cir. 1993) and *In re Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993). See also *C v. S (Minor: Abduction: Illegitimate Child)*, [1990] 2 All E.R. 449, 454-55 (H.L.) (Eng.).

35. Indeed to some extent this fear has been realized by the English court’s adoption of the parental rights’ approach to the determination of the habitual residence of children. *Schuz*, *supra* note 14. Thus, Lord Justices have criticized first instance courts for making habitual residence into an artificial legal construct. *Re M (Abduction: Habitual Residence)* [1996] 1 F.L.R. 887, 895 (Eng.). However, it is hardly surprising that lower courts have “fallen into this trap” when the widely cited “Shah formula” itself emphasizes intention in much the same way as domicile does, albeit that the content of the required intention is much less stringent. *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 343 (H.L. 1982) (Eng.).

36. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 90 (Oxford, 1999). It may well be that many of those who referred to the factual nature of the inquiry meant no more than this.

37. 63 F.3d 217 (3rd Cir. 1995).

appeal for clear error; whereas if it is a conclusion of law or a determination of mixed fact and law plenary review is permissible.³⁸ The solution to this concern is to provide specifically that the “clearly erroneous” standard³⁹ applies to review of determinations of habitual residence.⁴⁰

3. *The Relevance of the Nature of the Determination of Habitual Residence to the Role of Policy Considerations*

If the determination of habitual residence is indeed one of fact, then policy considerations should be of little relevance and the habitual residence of a person should be the same, irrespective of the legislative context in which the determination is made.⁴¹ However, the lack of appellate review and the fluidity of findings of ultimate fact mean that in borderline cases determinations are controvertible, and therefore there is considerable scope for the court to be influenced by policy considerations and to manipulate the facts in order to obtain the desired result.⁴²

On the other hand, if we recognize that we are not concerned with purely a question of fact, we will appreciate that the determination of habitual residence requires *interpretation* of that term. In order to interpret a term used in an international convention or domestic statute it is necessary to consider the context in which it is used and the objects and purpose of the legislative instrument in question.⁴³

38. *Id.* at 227. See also FRIENDENTHAL ET AL., CIVIL PROCEDURE 618 (3d. ed. 1989); but cf. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (referring to the different approaches taken to this issue by federal circuits).

39. See Lee, *supra* note 38, at 290 (contending that this is the only standard which is “consistent with a proper conception of the appellate function” in relation to mixed questions of fact and law).

40. The phenomenon of characterizing issues as questions of fact for some purposes and questions of law for other purposes is known. See RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 223 (4th ed. 1991) (referring to a particular determination which was considered to be one of fact in that it had no precedent value, but one of law in that there was appeal from the jury’s decision on the point).

41. The most widely cited definition of habitual residence, which was formulated by the House of Lords in the case of *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 310 (H.L. 1982) (Eng.), has been used in a wide variety of contexts. In his dissent, Lord Justice Scarman does specifically say in that case that the formula applies “unless it can be shown that the statutory framework or legal context in which the words are used require a different meaning.” *Id.* at 343. However, the author has not come across any case holding that a different meaning should be given to the phrase.

42. The question of whether habitual residence is established has been described as a matter of impression and degree. *Moran v. Moran*, [1997] 1 S.L.T. 541 (Sess. 1995) (Scot.).

43. Article 31 of the Vienna Convention on the Law of Treaties provides, “[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to

Context and objectives reflect policy considerations. Since the policy considerations informing different legislative instruments are not uniform, it follows that the same term might not bear an identical meaning in a different context in which it appears. Thus, contradictory determinations of habitual residence in different contexts may be the result of legitimate interpretation rather than illegitimate manipulation.⁴⁴ Therefore, an examination of the relevant policy considerations, as well as how conflicts between them should be balanced, is a valuable exercise that can often be referred to openly in court.

In conclusion, regardless of which side of the debate is correct, there is room for influence of policy considerations. The difference is that if habitual residence is characterized as a question of fact, such influence cannot be referred to openly. However, if it is acknowledged that the determination involves interpretation and application of a legal concept, policy considerations can be taken into account openly, at least in borderline situations.

C. Choice of Legislative Instruments for Comparison

It may be convenient simply to compare the Abduction Convention with the Protection Convention. However, such a limited comparison seemed insufficient, given the fact that the latter is not yet in force and has to date attracted few signatories. Thus, it was thought appropriate to consider domestic legislation in which the habitual residence of the child is the main connecting factor. Legislation in both the United Kingdom and Canada⁴⁵ use the habitual residence of the child as the main

the terms of the treaty in their context and in the light of its object and purpose.” *Id.* [emphasis added]. Case law involving other issues under the Abduction Convention has held that the Convention is to be interpreted purposively. *Re B (Minors) (Abduction)* (No. 1), [1993] 1 F.L.R. 988, 991 (Eng.). The purposive approach has also been used in relation to determinations of habitual residence under domestic statutes. *Compare* *Fareed v. Latif*, [1991] 31 R.F.L.3d. 354, 363 (Can.) (quoting *Baker v. Baker*, [1985] 49 R.F.L.2d 216, 218 (Can.) “The phrase ‘habitual residence’ contains words of wide import which have to be interpreted in the context of the legislation and the facts of the case.”) *with Regina*, 2 A.C. at 310 (construing “ordinary residence,” which was equated with “habitual residence,” counter to legislative intent).

44. BEAUMONT & MCELEAVY, *supra* note 36, at 113 (suggesting that a distinction can be drawn between the “interpretation” of habitual residence for the purposes of the Abduction Convention and where habitual residence is used in other contexts). *See also* P. Rogerson, *Habitual Residence: the New Domicile?*, 49 INT’L & COMP. L.Q. 86 (2000) (agreeing with Beaumont & McElevy and arguing that the English courts pay mere lip-service to the principle that the concept bears the same meaning in all cases).

45. Each province in Canada has enacted virtually identical legislation regulating jurisdiction in relation to custody matters. For convenience, the author will refer to the

jurisdictional basis in child custody cases.⁴⁶ However, the Canadian legislation includes a definition of the habitual residence of the child and so its value in the present context is limited.⁴⁷

D. Outline of the Article

In order to analyze critically the effect of policy considerations on determinations of habitual residence in different contexts, it is necessary first to examine the objectives of the various legislative contexts in question and to describe the role of the connecting factor of habitual residence therein, which will be done in Parts II and III respectively. In the main section of the article, Part IV, the relevant policy considerations are set out, and their scope and impact are analyzed critically. Finally, in Part V, the methodology of balancing conflicting policy considerations is discussed and tested in a number of typical borderline situations.

II. OBJECTIVES OF THE CHOSEN LEGISLATIVE INSTRUMENTS

A. *The Child Abduction Convention*

This Convention provides a mechanism that obliges courts in member states to order the prompt return of children up to the age of sixteen who have been abducted. The Convention's central objective is to protect children from the harmful effects of

Ontario legislation. Details of the other legislation can be found in J.G. CASTEL, *CANADIAN CONFLICTS OF LAWS* 400 n.236 (4th ed. 1997).

46. In the U.S., the Uniform Child Custody Jurisdiction Act § 9, 9 U.L.A. 551 (1968) [hereinafter UCCJA] uses the concept of the child's "home state" as the main basis for jurisdiction to make child custody determinations. While the authors of E.F. SCOLES ET AL., *CONFLICT OF LAWS* 665 (West Group, 3d ed. 2000), use "home state" interchangeably with habitual residence, it is submitted that the two concepts are by no means synonymous. Section 2(5) of the UCCJA defines "home state" as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least 6 consecutive months, and in the case of a child less than 6-months-old the state in which the child lived from birth with any of the persons mentioned." UCCJA § 2(5), 9 U.L.A. 286. Thus, the critical question is the length and not the quality of the residence. Quality seems only to be relevant in determining whether absences from the home state are "temporary" and so do not interrupt the continuity of the six-month period. Christopher L. Blakesely, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 475 (1998).

47. A child is habitually resident in the place where he or she resided: (a) with both parents; (b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or (c) with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred. Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(2) (1990).

international child abduction. Commentators have pointed out that the Convention does not focus on the welfare of individual children, but rather seeks to promote the best interests of children generally by ensuring that abducted children are returned promptly, and by deterring potential abductors.⁴⁸ An additional, perhaps subsidiary objective, is to ensure that the adjudication of the substance of the custody dispute takes place in the *forum conveniens*. Although this objective is not stated expressly in the Convention, it has been recognized by judges⁴⁹ and writers,⁵⁰ and would seem to explain the choice of habitual residence as the main connecting factor in the Convention.

The fact that application of the Convention protects children has caused some judges to take the view that the Convention should be applied wherever possible. Thus, any doubt as to whether the conditions for its applicability are fulfilled should be resolved in favor of the applicant.⁵¹ However, Beaumont and McEleavy argue that this policy is misconceived because: if a child does not have a factual connection to a State and knows nothing of it socially, culturally, and linguistically, there will be little benefit in sending him there.⁵²

On the other hand, the learned authors do recognize that non-application of the Convention in such a situation may also prevent the primary caregiver of the child from regaining care and control over the child.⁵³ This dilemma reflects the tension in the Convention between the child-parent connection on the one hand and the child-country connection on the other.⁵⁴ The connecting factor of habitual residence is at the heart of this tension.

48. Schuz, *supra* note 14, at 774-79.

49. See, e.g., *Murray v. Director of Family Services*, No. EA51 of 1993 (Fam. Ct. Austl., Oct. 6, 1993); *Re S (Custody: Habitual Residence)* [1998] 1 F.L.R. 122, 131 (Eng.) (quoting Perez-Vera Report, *supra* note 23, ¶¶ 19 & 66).

50. See, e.g., BEAUMONT & MCELEAVY, *supra* note 36, at 90.

51. *Cooper v. Casey*, No. EA102 of 1994, slip op. (Fam. Ct. Austl., May 5, 1995); *Re F (A Minor) (Child Abduction)* [1992] 1 F.L.R. 548, 555 (Eng.).

52. BEAUMONT & MCELEAVY, *supra* note 36, at 90.

53. *Id.* at 96.

54. This might be another way of expressing the conflict between the family law and private international law objectives of the Convention. Schuz, *supra* note 14, at 771-72. This tension is also reflected in the dispute over whether the child objection exception, found in Article 13(2), refers to the child's objection to returning to the other parent or to returning to the country of origin. Eventually, it was held by an English Court that an objection to either was sufficient. *Re M (A Minor) (Child Abduction)*, [1994] 1 F.L.R. 390, 396 (Eng.); *Re M (A Minor) (Abduction: Child's Objections)*, [1994] 2 F.L.R. 126, 135-36 (Eng.).

B. *The Protection Convention*

The Protection Convention addresses international jurisdiction, choice of law and recognition, in relation to measures aimed at protecting the child's person or property, including the allocation and exercise of parental responsibility.⁵⁵ The Convention is essentially a revision of the Convention of 1961. A revision was necessary because of deficiencies in the earlier Convention, which had few signatories. The objectives of the new Convention, which applies to children up to the age of eighteen, are essentially to provide an organized scheme for determining questions of international jurisdiction, choice of law, recognition and enforcement of judgments and measures in relation to nearly all aspects of parental responsibility and child protection.⁵⁶ It aims at avoiding conflicts between the measures taken by authorities in different member states.⁵⁷

C. *Domestic Jurisdiction Rules*

The jurisdictional provisions in domestic legislation are only designed to answer the question of whether the forum has jurisdiction in a particular case, and not whether any other country has jurisdiction.

One of the main purposes of the United Kingdom legislation was to create uniform jurisdiction rules governing residence and other similar orders for all parts of the United Kingdom⁵⁸ and to reduce the likelihood of concurrent jurisdiction.⁵⁹ Thus, jurisdiction may not be taken on the basis of presence where the child is habitually resident in another part of the United Kingdom.

55. See Protection Convention, *supra* note 4, art. 1.

56. *Id.* arts. 2, 3 (stating wide definitions); art.4 (stating exclusions).

57. See *id.* pmb1, ¶ 3.

58. See Law Com. No. 138 ¶ 3.10 (1985). The Family Law Act of 1986 Part I sets out the English jurisdictional rules for making orders under section 8 of the Children Act of 1989. *Id.* These rules include residence, contact, and prohibited steps or specific issue orders. Jurisdiction in relation to other matters concerning children is still mainly governed by the common law rules. NORTH & FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 864-67 (13th ed. 1999).

59. As in the U.S. and other multi-jurisdictional political units, wide and often unclear jurisdictional rules led to forum shopping and abduction from one jurisdiction to another by parents seeking sympathetic courts. Abduction within a political unit is much easier because there is no need to cross an international border. In the U.S., the UCCJA § 2(5), 9 U.L.A. 286 (1968), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 17338A (1994 & Supp. V 1999), are designed to combat this phenomenon. For a detailed discussion of the impact of this legislation see Blakesley, *supra* note 46, at 449-538.

It may be questioned why presence was retained as a basis of jurisdiction in other cases. The Law Commission was concerned that if presence were not sufficient, then in some cases there would be no court which could provide an effective remedy.⁶⁰ While this is no doubt correct, it would have been preferable to restrict jurisdiction based on presence to those cases, or at least to require that the applicant show why the case should be heard in England rather than the court of habitual residence. This is indeed the approach of the Canadian legislation,⁶¹ which only allows jurisdiction based on presence where additional criteria are satisfied.⁶²

Thus, it would appear that while the English legislation is designed to deter abduction *to* the forum from other parts of the political unit, it is not concerned with deterring abduction from abroad. In addition, the legislation attempts to deter abduction *from* the forum by deeming that habitual residence in England and Wales continues for a fixed time after abduction therefrom.⁶³

III. ROLE OF THE CONNECTING FACTOR OF HABITUAL RESIDENCE IN THE CHOSEN LEGISLATIVE INSTRUMENTS

A. *Under the Child Abduction Convention*

1. *In Determining the Applicability of the Convention*

The Convention is only applicable where the child has been abducted to a Convention country other than that of the child's habitual residence. Thus, operation of the Convention can be maximized by finding, wherever possible, that the child had a

60. See Law Com. No. 138 ¶¶ 4.24-4.25 (1985). It is of interest that in the consultation paper, the Commission had rejected presence as a general ground of jurisdiction. *Id.* ¶ 4.23.

61. See, e.g., Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(1) (1990) (Can.).

62. These include that substantial evidence concerning the best interests of the child is available in Ontario, *id.* § 22(b)(ii); that no application for custody or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident, *id.* § 22(b)(iii); that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario, *id.* § 22(b)(iv); that the child has a real and substantial connection with Ontario, *id.* § 22(b)(v); and that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario, *id.* § 22(b)(vi). Similarly, in the United States under the UCCJA, jurisdiction based on presence is only allowed by default where there is no court with jurisdiction as the "home state" or on the basis of "significant connection and substantial evidence." Blakesely, *supra* note 46, at 474. In practice, the difference between the situation in England and North America is not as pronounced if the English Courts make liberal use of their power to stay on the basis of *forum non conveniens* in cases where jurisdiction is based on presence alone.

63. See section 41 of the Family Law Act 1986, discussed below at Part III.C.2.

habitual residence immediately before the abduction, and that this is in a country other than the place of refuge.⁶⁴ In removal cases, this will generally involve finding that the child has acquired a habitual residence in the country where he was living before the removal;⁶⁵ whereas in retention cases it will involve finding that the child has not acquired a habitual residence in the country where he was living immediately before the retention.⁶⁶

It is unclear from the Convention's provisions whether it is sufficient that the place of habitual residence immediately before the abduction is a Convention country, or whether it is also necessary that the removal⁶⁷ must be *from* the place of habitual residence.

The only case which discusses this point fully⁶⁸ is the decision of the Full Family Court of Australia in *Hanbury-Brown v. Hanbury-Brown*.⁶⁹ The court held that taking into account the preamble and the Convention as a whole, the latter interpretation is the correct one. In particular, the words "removal" and "return" are co-relative terms and thus since return is *to* the place of habitual residence⁷⁰ the only logical conclusion would be that "removal" is *from* the place of habitual residence. With respect, this reasoning is questionable, since the need for prompt return of the child arises whenever the child is wrongfully removed to a country other than that of the habitual

64. *In re F (A Minor) (Child Abduction)*, [1992] 1 F.L.R. 548 (Eng.). The English Court of Appeals admitted that it was keen to find that habitual residence in Australia has been acquired for this reason. Similarly, the Australian Full Family Court in the case of *Cooper v. Casey*, No. EA102 of 1994, slip op. (May 5, 1995), urged courts to avoid finding that a child has no habitual residence, as this could defeat the Convention's purpose and subject children to repeated abductions by both parents. *But see* BEAUMONT & MCELEAVY, *supra* note 36, at 112 (arguing that this approach is misconceived).

65. This does not hold true if the new country is not a Convention country. *See, e.g., In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24, 33 (Eng.).

66. *Compare In re S (Minors) (Abduction: Wrongful Retention)*, [1994] 1 F.L.R. 70 (Eng.), with *Mozes v. Mozes*, 19 F. Supp. 2d 1108 (C.D. Cal. 1998).

67. The Convention applies either where the original removal is wrongful or where a lawful removal is followed by a wrongful retention.

68. It would seem to be implicit from the decision in *In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24 (Eng.), that the first view was considered to be correct. In this case, the children were removed from Iceland, which is not a Convention country, where their father was stationed as a U.S. serviceman. *Id.* at 27. The father unsuccessfully argued that the children were habitually resident in the United States at the relevant time. *Id.* at 33. However, the court seems to have assumed that the Convention would have been applicable had his contention been successful. In other cases, judges have casually referred to the removal from the place of habitual residence requirement. *See, e.g., Croll v. Croll*, 66 F. Supp. 2d 554, 558 (S.D.N.Y. 1999), *rev'd*, 229 F.3d 133 (2d Cir. N.Y. 2000); *Meredith v. Meredith*, 759 F. Supp. 1432, 1435 (D. Ariz. 1991).

69. (1996) 20 Fam. L.R. 334 (Austl.).

70. *See infra* Part III.A.3.

residence, irrespective of the country from which the child was removed.⁷¹ In the absence of an express provision on the point, it would be more sensible not to impose this additional restriction,⁷² which is likely to lead either to a strained interpretation of the phrase “removed from”⁷³ or to manipulation of the finding of habitual residence.⁷⁴

2. *In Determining Whether the Removal or Retention Was Wrongful.*

The law of the habitual residence determines wrongfulness. Thus, in cases where the removal is not considered wrongful by the place of habitual residence,⁷⁵ the mandatory return provision will not be triggered even though the removal is considered wrongful by other relevant laws. Thus again, application of the Convention can be maximized by finding that the child has not become or is no longer habitually a resident in the country that does not consider the removal or retention as wrongful.

3. *As the Place to Where the Child is Returned*

While the Preamble states that the procedures under the Convention are to ensure the prompt return “to the State of their habitual residence,” Article 12, the main operative provision of the Convention, simply states that return should be ordered without specifying to which country.⁷⁶ According to the Perez-

71. Thus, the argument based on the co-relativity of the terms is *non sequitur*. While the Australian court is correct in holding that the international nature of the Convention means that it was only intended to apply where there is a wrongful removal from one country to another, it was not necessary for them to take it further by requiring that the removal be from the country of habitual residence.

72. This might prevent the application of the Convention, even where all the countries involved are member states.

73. Thus, the Australian court explained that even where a child is physically removed from a third country, as for example when the child is on vacation, this is considered a removal from the habitual residence since the habitual residence “cloak” remains with the child while on vacation. *Hanbury-Brown v. Hanbury-Brown*, (1996) 20 Fam. L.R. 334 (Austl.).

74. For example, if the child is abducted from a third country where s/he was resident temporarily, the court might be tempted to find that there is a settled purpose and the residence is therefore habitual.

75. Neither under internal law or by application of choice of law rules. *See generally* BEAUMONT & MCELEAVY, *supra* note 36, at 46-48.

76. Many judges and academic writers assume, without discussion, that return is to the country of habitual residence. *See, e.g.*, *Prevot v. Prevot*, 855 F. Supp. 915, 922 (W.D. Tenn. 1994), *rev'd*, 59 F.3d 556 (6th Cir. 1995); *Friederich v. Friederich*, 983 F.2d 1396, 1403 (6th Cir. 1993). *See also* Michelle Morgan Kelly, *Taking Liberties: The Third Circuit Defines “Habitual Residence” under the Hague Convention on International Child Abduction*, 41 VILL. L. REV. 1069, 1071 (1996).

Vera Report, this omission was deliberate in order to provide the courts with some flexibility.⁷⁷ Thus, if the applicant is now living in a third State, return to the applicant should be ordered.

However, the Family Court of Australia in *Hanbury-Brown*,⁷⁸ basing itself mainly on the Preamble, held that the correct construction of the Convention is that the child should be returned to the place of his or her habitual residence. With respect, it is a pity to limit the powers of the court of the refuge state by requiring that return be ordered to the place of habitual residence,⁷⁹ when a wider construction of the operative provisions of the Convention is equally plausible.

The adoption of the narrower construction is likely to lead to manipulation of the determination of habitual residence where it is thought appropriate to return the child to a third state. For example, assume that the custodial parent is on a sabbatical abroad at the time of the abduction. It seems absurd to order the child to be returned to the country of origin, where there is no one to look after him.⁸⁰ Thus, the court would have little option other than to hold that the place of the sabbatical is the place of habitual residence,⁸¹ despite the fact that normally habitual residence would not be changed in such circumstance.⁸² Similarly, where the applicant's habitual residence has changed since the time of the abduction, it would make no sense to order return to the former habitual residence.⁸³

77. Perez-Vera Report, *supra* note 23, ¶ 110.

78. (1996) 20 Fam. L.R. 334 (Austl.).

79. See Schuz, *supra* note 14, at 782-83 (contending that it is not imperative that the child be returned to the place where the trial on the merits is to take place).

80. See David McClean, "Return" of *Internationally Abducted Children*, 106 L.Q. REV. 375 (1990), but compare BEAUMONT & MCELEAVY, *supra* note 36, at 31 (arguing that it is inappropriate to allow the dispossessed parent to relocate unilaterally when such a privilege is denied to the abductor).

81. It would seem to be a clear abuse of language to hold with the Australian court's approach to the question of removal from the place of habitual residence that returning the child to a third country is really like returning him to the country of habitual residence because the child remains under the cloak of the country of habitual residence while in the third country.

82. *Morris v. Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999).

83. Thus, in the case of *In re A (Minors) (Abduction: habitual residence)* and others, if Iceland had been a Convention country, it would have been appropriate to order return to the United States, where the father had returned following the termination of his army service. [1996] 1 All E.R. 24.

B. *The Protection Convention*

It has been claimed that the concept of habitual residence has never “been given as crucial importance” as in this Convention.⁸⁴ The use of habitual residence as the main connecting factor in the Convention has been described by commentators as the “underlying principle of the Convention”⁸⁵ and as the “clear dominant theme which runs right through the Convention.”⁸⁶ Thus, we will examine the role of habitual residence in relation to the three legal questions with which the Convention deals.

1. *Jurisdiction*

The habitual residence of the child is the main ground of jurisdiction⁸⁷ in relation to all matters, which are within the Convention.⁸⁸ The corollary of this principle is that contracting states may not take jurisdiction over children who are habitually resident in another contracting state other than in accordance with the Convention.⁸⁹ In particular, apart from emergency measures, jurisdiction may not be based on mere presence of the child.

Where the habitual residence is changed lawfully, the new habitual residence immediately acquires jurisdiction to deal with these matters. However, where habitual residence is changed as a result of wrongful removal or retention, the new state will not acquire jurisdictional competence until either (a) each person or body with rights of custody has acquiesced in the removal or retention or (b) the child has resided in the new State for a period of at least one year after the person having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return submitted during that period is still pending and the child is settled in his new environment.⁹⁰

84. Peter Nygh, *The New Hague Child Protection Convention*, 11 INTL. J. L., POL'Y & FAM. 344, 347 (1997).

85. A.M. Hutchinson & M.H. Bennett, *The Hague Child Protection Convention 1996*, FAM. L. 35 (1998).

86. Eric Clive, *The New Hague Convention on Children*, JURIDICAL REV. 169, 172 (1998).

87. Protection Convention, *supra* note 4.

88. These include all types of measures taken by judicial or administrative authorities for the protection of children whether of a public or private law nature, excluding maintenance obligations, trusts, succession, adoption, social security and public matters of a general nature. *Id.* art. 3.

89. In cases of urgency, Article 11, or pursuant to divorce jurisdiction provides that the conditions in Article 10 are satisfied. *Id.* arts. 10, 11.

90. *See id.* art. 7. For a discussion of the implication of this provision on the meaning of habitual residence, see *infra* Part V.B.4.

In relation to refugees or children whose habitual residence cannot be established, the State of the presence has jurisdiction.⁹¹

2. *Applicable Law*

While the *lex fori* applies to the actual exercise of the jurisdiction to take measures, the law of the habitual residence determines who has parental responsibility and how that responsibility can be exercised.⁹²

The Convention specifically provides that merely changing habitual residence cannot cause the loss of parental responsibility, although it may result in the acquisition thereof.⁹³ Thus, a court might be tempted to find that a new habitual residence has been acquired where this will have the effect of conferring parental responsibility on one party.⁹⁴

3. *Recognition and Enforcement*

There is automatic recognition and enforcement of measures taken by the authorities of other contracting states, subject to narrow exceptions. In practice, this will usually mean recognition and enforcement of the measures taken by the state of habitual residence.⁹⁵

C. *The Domestic Provisions*

1. *As the Main Basis of Jurisdiction*

Both English and Canadian legislation make habitual residence the main basis of jurisdiction in relation to custody. However, the significance of this is substantially undermined by

91. *See id.* art. 6. Otherwise the state where the child is present only has jurisdiction to take any necessary measure of protection in cases of urgency. *See id.* art. 11.

92. *Id.* art. 16. This rule applies both where parental responsibility is attributed by operation of law and where it is conferred by a judicial act.

93. *Id.*

94. For example, where the law of the old state does not confer parental responsibility on an unmarried father and the law of the new state does.

95. However, there is no review of the jurisdiction of the authorities that took the measures. Compare this with the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, under which recognition/enforcement of a custody decision may be denied where the jurisdiction of the authority making the decision was not based on the habitual residence of the defendant or of the child, or the last common habitual residence of both parents which is still the habitual residence of one of them. May 20, 1980, Eur. T.S. No. 106, art. 9, § 1(a-b).

providing that, subject to certain qualifications,⁹⁶ jurisdiction may also be based on presence.⁹⁷ Under the United Kingdom's legislation, the only qualification to jurisdiction based on presence is the negative requirement that the child is not habitually resident in another part of the United Kingdom.⁹⁸ Under the Ontario legislation, however, jurisdiction may only be based on presence when a list of conditions (some positive and some negative) is satisfied.⁹⁹ In particular, it must be shown that the child has a real and substantial connection with Ontario and that substantial evidence concerning the best interests of the child is available in Ontario.¹⁰⁰

The fact that jurisdiction may be based on presence reduces the significance of habitual residence. Where the child is present in the forum the case can be heard, without having to strain to find that the child is habitually resident in the forum. In such cases, the question of *forum conveniens* is a separate issue and therefore should not be taken into account in determining habitual residence.¹⁰¹ The Canadian statutes' conditions are clearly designed to determine whether the court to which the application is made, is the *forum conveniens*.¹⁰² While the English statute has no such provision, English courts refuse to exercise jurisdiction where respondents show that it is not a convenient forum.¹⁰³

2. Deemed Continuation After Wrongful Removal

The United Kingdom's legislation¹⁰⁴ provides that where a child under sixteen becomes habitually resident abroad without the agreement of all persons having the right to determine where he is to reside or in contravention of the order of the United Kingdom court, the child shall for the period of one year

96. These qualifications do not apply where exercise of the court's powers is necessary to protect the child. Family Law Act, 1986, § 2(2)(b) (Eng.); Children's Reform Act, 2 R.S.O., ch. C-12, § 23(b) (1990) (Can.).

97. In addition, Courts in which matrimonial proceedings between the parents have already been started have jurisdiction in relation to custody of the children of the marriage.

98. Family Law Act, 1986, § 3(b) (Eng.).

99. Children's Reform Act, 2 R.S.O. ch. C-12, § 22(1)(b) (1990) (Can.).

100. *Id.* § 22(1)(b)(ii), (v).

101. *See, e.g.,* *Suton v. Sodhi*, 1989 ACWSJ LEXIS 15790 (1980) (where the two issues were considered separately).

102. *See* *Smith v. Frank*, 1999 ACWSJ LEXIS 13070 (1999) (Can.); *Gilbert v. Gilbert*, [1985] 47 Rep. Fam. L. 2d 199 (Can.); *Sharpe v. Sharpe*, [1991] 71 Man. R. (2d) 64 (Can.).

103. *In re S* (Residence Order: Forum Conveniens), [1995] 1 F.L.R. 314, 325 (Eng.); *M v. B* (Residence: Forum Conveniens), 2 F.L.R. 819, 825-26 (Eng.).

104. Family Law Act, § 41(1) (1986).

thereafter be treated as if he or she continues to be habitually resident in England and Wales.¹⁰⁵ The similarities between Section 41 of the English Act and Article 7 of the Child Protection Convention will be noted.¹⁰⁶ However, the main difference is that under the English provision, the one year period during which the English habitual residence continues is a fixed period and cannot be extended even if a request for return has been made or the child is settled in a new environment.

IV. POLICY CONSIDERATIONS WHICH AFFECT DETERMINATION OF HABITUAL RESIDENCE OF THE CHILD

A number of policy considerations appear to have influenced determination of habitual residence of a child under the Abduction Convention. The appropriate scope of these considerations and to what extent these considerations are equally relevant in the other contexts in which the determination may be made will be examined below.

A. That a Child Should Be Protected From Abduction at All Times

1. Scope of the Policy of Protection From Abduction

Abduction may be effected either by “removal” or “retention” (“withholding”) which is the terminology used to describe abduction in most of the legislative instruments in question. The question arises whether the policy of protection from abduction arises equally in relation to the different methods of abduction.

On the one hand, it might be argued that removal is more harmful for a child than retention because it involves the traumatic experience of being taken, usually without prior warning, from the child's home to another country; whereas

105. Since, under existing English case law, one parent cannot usually unilaterally change the habitual residence of the child, (see *C v S (Minor) (Abduction: Illegitimate Child)*, [1990] 2 All E.R. 449, 455 (C.A.) (Eng.)), the provision is redundant and can operate only in exceptional cases. It is unlikely that it was the intention of the legislators that Section 41 should have such a narrow scope. Therefore, this Section could be seen as supporting the view that the parental rights' approach to determining the habitual residence of a child is no longer correct. Schuz, *supra* note 14.

106. Compare the Canadian legislation, which does not give any time limit for the deemed continuation of the habitual residence. Thus, the Ontario Act provides that “[t]he removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.” Children's Reform Act, 2 R.S.O. ch. C-12, § 22(3) (1990) (Can.). Presumably the provision ceases to apply if the foreign court does not order return.

retention is a more passive phenomenon simply involving failure to be returned to that home in accordance with an agreement between the parents.

While this distinction is valid and the lasting effects of the trauma should not be underestimated, the categorization as a removal or retention depends on the initial act only.¹⁰⁷ Thus, retention may be followed by a long period on the run, which will be very harmful to the child; whereas removal to a place with which the child is familiar and has substantial connections may cause little if any damage. Moreover, even if the child is retained in the country where he was visiting the non-custodial parent, adjusting to life there may be traumatic for the child. Living in a country where the child does not speak the language and has no friends is dramatically different than vacationing in a foreign country. Moreover, it is necessary to ensure that children are protected from retention after access visits or holidays so that parents and courts will not be discouraged from sanctioning such travel. Thus, in principle, the policy of protection against abduction should apply equally to removal and retention.

It might be argued that a distinction should be drawn between physical retention and retention by application to court¹⁰⁸ because, in the latter case, the court to which the application is made can protect the child without the need for protection under the Convention. However, the Abduction Convention was originally enacted because most domestic courts were not prepared to protect children from abduction by ordering their immediate return. Courts felt obliged to examine whether return was in the best interests of the child. In response, Article 16 of the Abduction Convention specifically provides that once

107. Thus, removal and retention are mutually exclusive and one cannot follow the other. *In re H (Minors) (Abduction: Custody Rights)*, [1991] 2 A.C. 476, 500 (H.L.) (Eng.).

108. It has been held in England that where a parent, who has the child with him outside the country of habitual residence with the consent of the other parent, applies to a court for a residence order which will enable the child to remain in that country with him after the expiration of the consent, an unlawful retention of the child occurs. *In re B (Minors) (Abduction) (No. 1)*, [1993] 1 F.L.R. 988 (Eng.); *In re A.Z. (A Minor) (Abduction: Acquiescence)*, [1993] 1 F.L.R. 682, 684 (Eng.). See also the US case of *Mozes v. Mozes*, 19 F. Supp.2d 1108 (C.D. Cal. 1998). It is not entirely clear when the retention occurs. Compare *In re S (Minors) (Abduction: Wrongful Retention)*, [1994] Fam. 70, 81 (Eng.) (holding that retention could date from the un-communicated decision not to return the child), with *Watson v. Jamieson*, 1998 S.L.T. 180, available at 1996 WL 1802591 (doubting whether even informing the other party of the decision to retain is sufficient to amount to unlawful retention until some action is taken). Apparently in some countries, applications for retention made under the Convention will not be considered until after the date on which the child ought to have been returned has passed. BEAUMONT & MCELEAVY, *supra* note 36, at 42.

courts are aware of the child's wrongful removal or retention, they should not make determinations of the child's best interests.¹⁰⁹ Thus the need to protect children from abduction is equally great when a lves the retention.

2. Manifestations of the Policy of Protection From Abduction

The policy of protection from abduction is manifested in the case law under the Abduction Convention in the form of two principles relating to habitual residence: (1) a child should not be without a habitual residence if at all possible; and (2) a child cannot be habitually resident in more than one country at any one time.¹¹⁰ It is important to consider the implications of these principles under the Abduction Convention, as well as whether these principles ought to apply equally in other contexts.

(a) A Child Should Not be Without a Habitual Residence if at All Possible

(i) Under the Abduction Convention

Courts are reluctant to find that a child has no habitual residence since this will deprive the child of the Convention's protection.¹¹¹ Some commentators argue that this approach is too simplistic because it does not consider whether the child has any real connection with either the country to which the child is returned or with the parent to whom the child is returned.¹¹² Thus, for example, if the custodial parent is the abductor, returning the child "home" may be inappropriate.¹¹³ Accordingly, the principle that a child should have a habitual residence at all times to ensure the child be protected from abduction should only apply where the child has a sufficiently close connection with the parent *or* the country to which the child is to be returned. Moreover, the strength of the protection consideration will depend *inter alia* on the closeness of this connection in

109. Abduction Convention, *supra* note 3, art. 16.

110. The policy of protection from abduction also requires finding that a child is habitually resident in a country other than the place of refuge and that there has been a breach of custody rights. *Id.* arts. 3, 4.

111. *In re F (A Minor) (Child Abduction)*, [1992] 1 F.L.R. 548, 555 (C.A. 1991) (Eng.).

112. BEAUMONT & McELEVAY, *supra* note 36, at 90.

113. *Id.* at 7-13 (pointing out that the stereotypical abduction situation envisioned by the drafters of the Convention was that of a non-custodial father abducting the children as a reaction to or in anticipation of losing a custody dispute; whereas in practice most abductions are by custodial mothers, often wishing to return to their country of origin following the breakdown of the relationship or to join a new partner).

comparison with the closeness of the connection with the country to which the child is abducted.

(ii) *Under the Child Protection Convention*

The Protection Convention seems to envisage the possibility of the child being without a habitual residence.¹¹⁴ For example, the jurisdiction chapter specifically provides that the country where the child is present shall have jurisdiction when the child's habitual residence cannot be established.¹¹⁵ Similarly, Article 7 seems to contemplate the possibility that following a wrongful removal, the child will lose habitual residence in one state without immediately acquiring a habitual residence in another state.¹¹⁶ In order to prevent the place of refuge from acquiring jurisdiction, the Article provides that the jurisdiction of the state of the habitual residence continues to have jurisdiction until the child acquires habitual residence in another state *and* has resided in that state for at least one year after the "non-abducting" parent knows or should have known of the child's whereabouts.¹¹⁷ Thus, as a result of this specific provision, a finding of no habitual residence does not enable an abductor to alter jurisdiction in the case of abduction *from* a contracting state.¹¹⁸

The choice of law chapter does not offer guidance on cases involving children with no habitual residence. The significance of the absence of a choice of law provision regarding such situations should not be exaggerated. First, it is important to note that in relation to most issues, the law of the forum state will be applied and that habitual residence is only used in relation to parental responsibility. Second, since the attribution of parental responsibility under the previous habitual residence continues to apply in addition to that of the new habitual residence, a gap occurring in the child's habitual residence is not a problem, unless the child never had a habitual residence. Third, in relation

114. *But see id.* at 113 (commenting that where habitual residence is used as the sole or main connecting factor in a choice of law or jurisdiction Convention, it would be inappropriate for there to be a lacuna in a person's habitual residence).

115. Protection Convention, *supra* note 4, art. 6(2). The language might suggest that children do always have a habitual residence, but such residence is impossible to definitely establish. However, the Lagarde Report, *supra* note 23, suggests that there will be some cases in which there is no habitual residence.

116. Protection Convention, *supra* note 4, art. 7.

117. Or in the meantime the "non-abducting" parent acquiesces.

118. Where the child is abducted from a non-contracting state to a contracting state, a finding of no habitual residence confers jurisdiction on the courts of the place to which the child has been abducted. *Id.* art. 6, § 2.

to the exercise of parental responsibility, the law of the country where the exercise takes place will apply, subject to the general requirement that this is not manifestly contrary to public policy taking into account the best interests of the child.¹¹⁹

Thus ironically, there seems to be less difficulty in finding that a child has no habitual residence under the Protection Convention than under the Abduction Convention. This should prevent the need to make artificial findings of habitual residence in order to further the policy of the Protection Convention.

(iii) *Under Domestic Legislation*

The case of *M v. M (Abduction: England and Scotland)*¹²⁰ demonstrates the consequences under the English legislation of a finding that a child who is present in the forum does not have any habitual residence.¹²¹ In that case, the family lived in Scotland for two years, but intended to move to England. The mother unilaterally took the children to England and initiated proceedings both in relation to the children and for divorce.¹²² The lower court found that the children did not have any habitual residence. So in determining which court was the *forum conveniens*, the court focused entirely on the welfare of the children.¹²³ After deciding that the English Court was the *forum conveniens*, the court issued an order prohibiting the father from removing the children from England.¹²⁴ However, the court of appeal found that the judge had erred and that the children were habitually resident in Scotland.¹²⁵

This finding changed the picture entirely. While the English court still technically had jurisdiction because matrimonial proceedings had been initiated in England, those proceedings were stayed because Scotland, as the place of habitual residence, was the more appropriate forum.¹²⁶ Hence, if there had been no matrimonial proceedings, the English court would not have had jurisdiction because of the child's habitual residence in Scotland.¹²⁷ Thus, we can see that the policy of protecting

119. *Id.* art. 22. This provision is a general restriction on the application of foreign law under the Protection Convention.

120. [1997] 2 F.L.R. 263 (C.A.) (Eng.).

121. Family Law Act, 1986, §2 (Eng.).

122. *M v. M (Abduction: England and Scotland)*, [1997] 2 F.L.R. 263, 265 (C.A.) (Eng.).

123. *Id.*

124. *Id.* at 267 (citing the opinion of the lower court judge).

125. *Id.* at 268.

126. *Id.* at 272-73.

127. Family Law Act, 1986, §§ 2, 3 (Eng.).

children against abduction requires courts to avoid a finding that a child has no habitual residence in the intra-UK context.¹²⁸

In the situation where the child is not present in the forum, the finding that the child has no habitual residence seems to deprive the forum of any possibility of jurisdiction. While Section 41 is designed to ensure continuation of the jurisdiction of English courts, close examination of the language shows that the provision only applies to situations in which the child *has* acquired a habitual residence in a foreign country after a wrongful removal.¹²⁹ Thus, it seems that where as a result of the removal from England the child does not have any habitual residence, the English court will not continue to have jurisdiction. Such a result is clearly absurd and cannot have been intended by the legislature, who presumably did not envision the possibility of a lacuna in the habitual residence of a child. No doubt, the courts would ensure that the English court had jurisdiction in such a case either by holding that the habitual residence in England continued or that a new habitual residence had been acquired abroad, thus activating Section 41.¹³⁰ In other words, the policy of protecting children against abduction again requires that the child has a habitual residence at all times.

It is of interest to note that under the Ontario statutory definition,¹³¹ one of the situations in the sub-paragraphs of Section 22(2) above must have occurred at some stage. It follows that there must always be one which last occurred, and therefore, it would not be possible for a child to have no habitual residence at any time.¹³²

128. *D v. D (Custody: Jurisdiction)*, [1996] 1 F.L.R. 574, 581 (Fam.) (Eng.) (discussing that even if the children do not have a habitual residence the later decision of the Scottish court made at a time when the children were present in Scotland must take precedence).

129. Family Law Act, 1986, § 41 (Eng.).

130. *Id.*

131. Ontario Childrens Law Reform Act, 1990, § 2.2(2).

132. Under the UCCJA, *supra* note 46, it is possible that there will be no “home state.” If there is no “home state” jurisdiction may be based on the child’s significant connection to a country or on their presence in a country. Blakesley, *supra* note 46.

(b) A Child Should Have Only One Habitual Residence at Any One Time

(i) Under the Abduction Convention

Case law has rejected the idea of dual habitual residence under the Abduction Convention.¹³³ While normal usage of the phrase habitual residence would not eliminate the possibility of a person having more than one habitual residence at any one time, the Abduction Convention was drafted on the premise that a child would only have one habitual residence at any given time. Therefore, a finding that a child has concurrent habitual residences does not fit comfortably within the framework of the Convention.¹³⁴

Most importantly, a finding of dual habitual residence will usually not protect a child from abduction since the most likely destination of an abduction will be the child's other habitual residence.¹³⁵ However, in situations where a child retains a strong connection with two countries, it could be argued that removal of the child from one country to the other does not cause detriment and therefore, the child only needs protection from removal to third countries. A finding of dual habitual residence will achieve such protection.

(ii) Under the Protection Convention

Similarly, the provisions of the Protection Convention suggest that the drafters of the Convention did not envisage the possibility of dual habitual residence.¹³⁶ Dual habitual residence would lead to concurrent jurisdiction, which is one of the phenomena that the Convention intended to avoid. In particular, the wrongful removal of a child from one habitual residence to the

133. See, e.g., *Hanbury-Brown v. Hanbury-Brown*, (1996) 20 Fam. L.R. 334 (Austl.) (dismissing the contention that children had dual habitual residence); *Friederich v. Friederich*, 983 F.2d 1396 (D. Utah 1993); *In re V (Abduction: Habitual Residence)*, [1995] 2 F.L.R. 992 (Fam.) (Eng.).

134. It is theoretically possible, however, for the Convention to apply whenever a child is abducted from *either* habitual residence.

135. See, e.g., *Watson v. Jamieson*, 1998 S.L.T. 180, available at 1996 WL 1802591 (regarding an alternating custody case where a finding of dual habitual residence would have been plausible but would not have changed the outcome).

136. Article 1, Protection Convention, *supra* note 4, refers in the singular to "the State" (whose authorities have jurisdiction) and to "the law" (which is applicable). The Lagarde Report, *supra* note 23, also clearly envisages that dual habitual residence is not possible. Paragraph 41 states that "the change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence." Lagarde Report, *supra* note 23, ¶ 41.

other would not preclude the country to which the child was removed from obtaining jurisdiction.¹³⁷ On the other hand, the introduction of a mechanism to facilitate cooperation between the authorities of contracting states could ensure that such cases are resolved in the most appropriate forum.¹³⁸

While it may seem that dual habitual residence would raise questions regarding the applicable law provisions, this fear is groundless. The law of habitual residence is only used in relation to parental responsibility. Once parental responsibility has been gained, it will not usually be lost by a change of habitual residence.¹³⁹ Thus, where a child has dual habitual residence, a parent will be treated as having parental responsibility if the parent has such responsibility under the law of *either* country. However, it would seem appropriate to apply the law of the habitual residence in which the exercise takes place. If the exercise takes place in a third country, it would seem appropriate to apply the law of the habitual residence that allows the exercise in question unless it is contrary to the public policy of the forum.¹⁴⁰

Allowing dual habitual residence would create the risk of inconsistent judgments in the two countries of habitual residence. However, this is no more problematic than inconsistent judgments resulting from a change in habitual residence. The solution would seem to be to recognize or enforce the later judgment.

(iii) Under Domestic Legislation

The English legislature did not anticipate the possibility of a child being habitually resident in two parts of the United Kingdom simultaneously. However, the fact that a child is habitually resident in a foreign country, as well as in England, should not affect the exercise of jurisdiction by an English court. Wrongful removal to the other habitual residence does not trigger the application of Section 41 because the child does not become habitually resident abroad in consequence of wrongful removal or retention.¹⁴¹ Thus the policy of protecting against abduction

137. Article 7 of the Protection Convention would not apply in such a situation because the child was already habitually resident in the country to which he or she is removed.

138. Protection Convention, *supra* note 4, arts. 8, 9, 30.

139. *Id.* art. 16, § 3.

140. *Id.* art. 22. Ontario Childrens Law Reform Act, 1990, § 2.2(2).

141. Family Law Act, 1986, §41 (Eng.).

would require a finding that England was the sole habitual residence at the time of the removal or retention, and that only thereafter was the foreign habitual residence acquired. The definition of habitual residence in the Ontario legislation does not allow for dual habitual residence as is evidenced by the fact that only one of the alternatives can have been the last to occur.¹⁴²

In summary, in all the contexts under discussion, the policy of providing protection from abduction requires that findings of dual habitual residence should be avoided in determining jurisdiction. However, if it is determined that a child does not need protection against abduction from two countries with which the child has a close connection, a finding of dual habitual residence will protect the child from abduction to a third country.

B. Abductors Should Not Be Rewarded

1. Scope of the Policy

There are two reasons why abductors should not be rewarded. First, one of the aims of the Convention is to deter potential abductors from abducting their children by showing them that they will not obtain any benefit therefrom.¹⁴³ Second, basic principles of justice require that a person should not benefit from an illegal act.

These policies apply in each case of wrongful removal, whether or not the child is considered to be in need of protection and whether or not the removal causes detriment to the child. However, these factors may affect the weight of the consideration. While no removal should be condoned, a removal to a strange place, which will be detrimental to the child, needs to be deterred more than a removal back to the country of origin, which the child only recently left.

Similarly, these policies should be considered when a non-custodial parent refuses to return a child to the custodial parent at an agreed time. It is not clear whether the policy of not rewarding abductors is relevant when the act of retention consists of the non-custodial parent applying to the court before the date of return for an order that will enable that parent to

142. Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(2) (1990) (Can.). Similarly there can only be one "home state" under the UCCJA because the child can only have lived in one place for the last six months. UCCJA § 2(5), 9 U.L.A. 286 (1968).

143. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

retain the child after the return date.¹⁴⁴ It may be argued that the aim of the Convention is to deter one party taking the law into their own hands by physically removing or retaining the child, rather than to deter submission to the law by making an application to a court. Furthermore, where the court is not the appropriate forum, the court can either refuse to hear the case or simply refuse the application. Either will result in non-return of the child on the required date being treated as a retention. While domestic courts are not always prepared to protect children sufficiently from removal and retention in the absence of an obligation to do so under the Abduction Convention, this is hardly the fault of the parent who applies for permission to retain a child. Thus, it is suggested that the policy of not rewarding abductors should not normally apply to cases where the act of retention is applying to court before the date of return.

2. *Re-abduction Cases*

The question arises as to how the policy of not rewarding abductors should apply to “re-abduction,” cases where, the “innocent” parent chooses to get the child back by re-abducting the child rather than through lawful means. If it is held that the child has acquired a habitual residence in the place of refuge in the time period between the abductions, then the Abduction Convention would apply to the re-abduction and the first abductor will be able to obtain return of the child. Such a result means that the parent is rewarded for having been the first to abduct the child. On the other hand, if it is held that habitual residence is not changed following wrongful removal, then the Convention would not apply and the second abductor rather than the first would be rewarded.

Two possible solutions can prevent “rewarding” either parent. The first is to hold that the policy of not rewarding the first abductor is effectively neutralized by the policy of not rewarding the second abductor and thus neither should be taken into account. Alternatively, it may be argued that the policy of not rewarding the first abductor is stronger because the second abductor is simply restoring the *status quo* and the result of his action, if not the means, is in accordance with the policy of the Abduction Convention.

144. *In re S* (Abduction: Wrongful Retention), [1994] Fam. 70; *Re B* (Minors) (Abduction) (No. 2), [1993] 1 F.L.R. 993; *H v. H* (Child Abduction: Stay of Domestic Proceedings), [1994] 1 F.L.R. 530 (Fam.) (Eng.).

C. Not to Discourage Beneficial Foreign Travel

1. The Basis of the Policy

Classic examples of situations which are borderline in relation to habitual residence are short term relocations and relocations for specific purposes such as sabbaticals, academic exchanges, and tours of duty abroad by employees who work for multinational companies.

In the Abduction Convention case of *In re Morris*,¹⁴⁵ the U.S. District Court for the District of Colorado specifically stated that when a parent travels abroad for academic reasons such as taking a sabbatical and the time period is fixed at less than a year, one parent's unilaterally changed intent is not enough to shift the habitual residence of a minor child. The court stated that: "[t]o find otherwise would have significant negative policy implications by discouraging extended international travel and temporary international employment for scholastic and professional enrichment."¹⁴⁶

The basis for the assumption that acquisition of habitual residence would deter academics and their families from traveling is not stated expressly in *Morris*, but may be inferred. A parent may fear that if things go wrong and he or she "goes home" with the child, this will be considered a wrongful removal with the result that return would be ordered to the country of the sabbatical. Similarly, a parent considering whether or not to travel abroad for a Sabbatical may not wish to risk the possibility that the Court in the foreign country will have jurisdiction to hear disputes about the custody of the child because then the child may have to stay in that country pending a decision.

2. Scope of the Policy

Two questions arise as to the scope of the policy. Should the policy be restricted to temporary relocations of less than one year,

145. 55 F.Supp. 2d 1156 (D. Colo. 1999).

146. *Id.* at 1163. Clearly, sabbaticals, which are being spent in one place, could otherwise lead to acquisition of habitual residence since both academic study and employment are considered to be settled purposes within the widely-cited Shah formula. *Feder v. Evans-Feder*, 63 F.3d 217, 223 (3d Cir. 1995); *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (holding that working under two year contract was sufficient to establish habitual residence); *Kapur v. Kapur*, [1984] 1 F.L.R. 920, 927 (Fam.) (Eng.) (declaring that one year course was sufficient).

as suggested in *Morris*, and what categories of temporary relocation are included in this policy?

In relation to the first question, the rationale of not deterring beneficial foreign travel would seem to apply equally to relocations for longer than one year. However, in such cases this policy may be of less weight because the factors in favor of acquisition of a habitual residence in the foreign country will be stronger.¹⁴⁷

In relation to the second question, I suggest that where the very nature of the employment will involve working abroad, such as in the case of diplomatic staff, servicemen and jobs requiring foreign assignments, there is no fear of discouraging such travel. Those that choose to engage in such work simply have to accept the risks involved in living abroad, including the implications of a change of habitual residence.¹⁴⁸ Thus, the policy is restricted to cases where the travel abroad should be regarded as an opportunity for scholastic or professional enrichment¹⁴⁹ rather than as a normal part of the job.

This formulation of the policy raises questions regarding how the phrase “scholastic and professional enrichment” should be interpreted. Does there have to be a direct relationship between the travel and the activities in the state of origin? It is suggested that the main consideration should be whether the travel could be considered “beneficial” in the eyes of the state of habitual residence before the travel.¹⁵⁰

147. Clive, *supra* note 86, at 141 (commenting that he has not come across any case in which habitual residence has not been acquired where the child has been resident in the relevant country for twelve months). Also, one year was chosen as the period during which jurisdiction should not be lost after a wrongful removal. There were proposals during the drafting stage of the Protection Convention that habitual residence should only be acquired after one year generally or at least in cases of wrongful removal. *Id.* These were rejected on the basis that the time period required in each case is a question of fact. *Id.* Nonetheless, there seems to be some sort of consensus that habitual residence will normally be acquired after one year's residence. See also the discussion on how to balance conflicting policy considerations in cases of temporary relocations, *infra* Part V.B.3.

148. See, e.g., *In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24, 31 (Fam.) (Eng.). The argument that the residence in Iceland was not voluntary was rejected on the basis that “when the father elected to join the U.S. forces such embraced the fact that he would, no doubt from time to time, be required to move to different countries following the Stars and Stripes.” *Id.*

149. For example, the Jewish Agency sends Israeli teachers to work in Jewish communities throughout the world to teach Hebrew and Jewish studies. This ought to be seen as an “opportunity” for the teacher to gain professional enrichment by teaching in a foreign country.

150. For example, working as a volunteer for an international agency in a third world country should qualify, but simply going to work in such a country to experience life there should not.

The court in *Morris* considered travel in terms of the parent's purpose. However, this policy should also apply to situations where the travel is organized for the child's benefit. Travel for the benefit of the child includes a temporary relocation to the country where the other parent lives,¹⁵¹ in order to have greater access to that other parent and his/her culture.¹⁵²

Finally, it is also important to note that the need to allay the concerns of parties planning sabbaticals applies equally in relation to the Protection Convention and domestic legislation since acquisition of habitual residence in the foreign country will bestow jurisdiction on the foreign court and lead to application of that court's law.

D. Not to Discourage Parents From Trying to Save Their Marriage

1. The Scope of the Policy

Most countries, in varying degrees, support efforts to prevent the breakdown of marriages,¹⁵³ often because it is thought to be contrary to the child's best interests.¹⁵⁴ Two types of cases can be identified where finding that a new habitual residence has been acquired may discourage parents from trying to save their marriages and thus contradict the policy of matrimonial harmony for the child's best interests.

The first category of cases involves marriages that have begun deteriorating before the relocation.¹⁵⁵ For example, one parent may wish to relocate for employment or personal reasons and the

151. This is referring to a prolonged visit to the other parent's country and not to a rotating custody arrangement.

152. For reference to the concept of access to the respective cultures of both parents, see generally Adair Dyer, *The Hague Convention on the Civil Aspects of International Child Abduction - Towards Global Cooperation: Its Successes and Failures*, 1 INT'L J. CHILD. RTS. 273 (1993).

153. For example, by funding marriage guidance services, imposing a duty on lawyers and/or courts to promote reconciliation, Canadian Divorce Act, R.S.C. ch. 3 §§ 9, 10 (1985) and by providing that attempted reconciliations do not prejudice the right to petition for divorce, English Matrimonial Causes Act, 1973 ch. 18, § 2.

154. Thus, some jurisdictions make divorce harder to obtain where there are minor children. Family Law Act, 1996, § 11(5)(a) (Eng.). Similarly, under Swedish law there is a "waiting" period of six months to one year. Ake Logdberg, *The Reform of Family Law in the Scandinavian Countries*, in *THE REFORM OF FAMILY LAW IN EUROPE 201-03* (A.G. Chlores ed., 1978). For an American proposal, see Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981).

155. See, e.g., *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Re F*, [1992] 1 F.L.R. 548, 558 (Fam.) (Eng.) (citing mother's affidavit); *In re B (Minors) (Abduction)* (No. 1), [1993] 1 F.L.R. 988 (Fam.) (Eng.).

other reluctantly agrees to move with the hope that the relocation will improve the marriage. When the marriage fails to improve, the “reluctant” parent may wish to return with the child to the country where the parties were formerly living. A finding that the child has become habitually resident in the country to where the parties have relocated will prevent any such unilateral return by the “reluctant” parent. If the Convention applies in such a situation, the “reluctant” parent may well not be prepared to take the risk of being “stuck” with the child in the new country if the marriage does not improve and so will refuse to accompany the other parent. Thus, any chance of saving the marriage will be lost and the policy of fostering reconciliation will not be furthered.

In the second category of cases, the parties separate and one parent takes the child to live in a new country with the consent of the other parent or of the court, at which point habitual residence in the original country is lost. Later, that parent returns in order to attempt reconciliation. When such attempt fails the parent unilaterally removes the child to the “new” country.¹⁵⁶ The question arises whether habitual residence is reacquired in the country of origin during the attempted reconciliation. Clearly, a positive answer to this question might deter the custodial parent from making such an attempt.

In both situations, the policy of not discouraging attempts to save marriages would require finding that no new habitual residence had been acquired. The question arises as to the length of time for which this policy applies. Clearly, the policy can only prevent a habitual residence from being acquired for a limited period of time. Thus, the longer that the parties live together after the relocation or reconciliation, the weaker the argument becomes until eventually at some point the attempt to save the marriage must be deemed to be successful based on the fact that the parties are still living together.¹⁵⁷

This policy consideration is equally applicable under the Child Protection Convention and domestic legislation.

156. See, e.g., *In re B*, [1994] 2 F.L.R. 915 (Can.).

157. Guidance as to the appropriate period of time can be found in domestic divorce legislation that provides for attempted reconciliations. See, e.g., Matrimonial Causes Act, 1973, 18, § 5 (Eng.) (establishing the period in England as six months).

2. *The Case Law*

While the author has not found any case where the policy of not discouraging attempts to save marriages is clearly laid out,¹⁵⁸ it is hinted at in the opinion of the district court in *Feder v. Evans-Feder*.¹⁵⁹ The court seemed concerned that Mrs. Feder should not lose out as a result of her “last attempt to save her troubled marriage.”¹⁶⁰ The Appellate Court, however, discounted to a large extent Mrs. Feder’s reservations in moving to Australia because only conduct and overtly stated intentions should be relevant. It is suggested that this approach is inconsistent with the policy of encouraging the saving of marriages because in a situation where one parent is trying to save the marriage, it is likely to be counter-productive for that parent to declare openly to the other that (s)he is only agreeing to accompany his/her spouse abroad in a final attempt to save the marriage.¹⁶¹ Rather, the “reluctant” party’s motives should be relevant provided that there is some independent evidence of them.¹⁶²

158. In the case of *In re B*, 2 F.L.R. at 915, it was held that the period of the attempted reconciliation (a little over two months) in Ontario was not sufficient for a settled purpose necessary for habitual residence to be formed. This finding is far from self-evident given that in other cases as little as one month residence has been sufficient. Furthermore, in this case, under the law of Ontario, the child was habitually resident in Ontario because that was the last place where he had resided with his parents and Ontario was clearly the *forum conveniens*. Thus it is plausible that the judge was influenced perhaps subconsciously by the policy of not discouraging attempts to save marriages. But see *Laing v. Laing*, (1996) 21 Fam. L.R. 24, where the judge found, among other things, that a period of six weeks spent by the child in the U.S. during an attempted reconciliation between her parents would have been sufficient to re-establish her habitual residence there and that the residence of the parents together during this time was for a settled purpose. *Id.* at 40. This finding clearly ignores the policy of encouraging reconciliation. However, the failure to consider this policy can perhaps be explained by the fact that the judge actually found that the child had never lost her habitual residence in the U.S. in the first place.

159. *Feder v. Evans-Feder*, 866 F. Supp. 860 (E.D. Penn. 1994), *vacated by* 63 F.3d 217 (3d Cir. 1995).

160. *Id.* at 863; *Re B (Minors) (Abduction) (No. 2)*, [1993] 1 F.L.R. 993, 999 (referring to “a couple fighting commendably to save their marriage, for their own sake and that of the children.”) He then goes on effectively to make this “fight” a settled purpose, sufficient to establish acquisition of habitual residence in Germany. *Id.* For an analysis of the case, see *infra* Part V.B.2.

161. *Feder*, 63 F.3d at 229.

162. For example, from a relative or friend that has been confided in or from a lawyer who was consulted, as in *Feder* itself. *Id.* at 219.

*E. Agreements Should Be Honored**1. The Scope of the Policy*

Honoring agreements is a fundamental moral value and legal principle.¹⁶³ Even where the court's own jurisdiction is involved, it is reluctant to allow one party to breach an agreement. Thus, a court will usually refuse to exercise its jurisdiction in a civil action that is brought in breach of a foreign jurisdiction clause.¹⁶⁴

Application of this principle to Hague Convention abduction cases would not help where the child's current habitual residence was in a place other than that agreed by the parties because there would still be an obligation to return the child to the original place of habitual residence.¹⁶⁵ Thus, effect can only be given to the agreement if it is interpreted as an agreement that the country which is given exclusive jurisdiction be treated as the child's habitual residence. Since this is clearly in accordance with the intention of the parties, this will normally be the appropriate interpretation.¹⁶⁶ The policy that agreements should be honored requires that effect be given to this agreement unless there are good reasons to the contrary. *A fortiori*, effect should be given to agreements between the parties and court orders that provide either expressly or implicitly that a child's habitual residence should be in a certain country.¹⁶⁷

163. The rule, which is frequently applied in case law, that one parent cannot unilaterally change a child's habitual residence without the consent of other parent could be understood as an aspect of the policy of honoring agreements because, even though there will not usually be any express agreement about where the parties will live, there will be a tacit agreement. However, in such a case the policy of honoring agreements is simply another way of expressing the policy of protection against abduction because the attempt to change the habitual residence unilaterally will invariably involve a removal or retention without consent. In contrast, here we are concerned with the effect of the agreement of the parties that the child's habitual residence will or will not change as a result of a relocation (either temporary or permanent).

164. See the leading U.S. cases of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 192 (1972) and *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) and the leading English cases of *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. The Eleftheria*, [1970] P. 94 (Eng.), *Aratra Potato Co. v. Egyptian Navigation Co.*, [1981] 2 Lloyd's Rep. 119 (C.A.) (Eng.), and *D.S.V. Silo-Und Verwaltungs-Gesellschaft M.B.H. v. The Sennar (No. 2)*, [1985] 1 W.L.R. 490, 500 (H.L.) (Eng.).

165. For discussion of whether the child might be returned to a third country, see *infra* Part III.A.

166. However, an agreement that a child will return to a country after a period abroad (shuttle custody arrangements) should not be interpreted as an agreement that the child retains habitual residence in the first country, unless of course dual habitual residence is possible. See *supra* Part A.2.b.i.

167. In the Israeli case of *Moran v. Moran*, F.M.A. 90/97 (unreported), the district court, gave permission to one parent to take a child out of her home country while she studied abroad for two years. The court then ordered that Israel remain the child's

A typical situation, where the principle that agreements should be honored would be a relevant consideration would be where the parties have agreed that the children will travel abroad for a specific purpose and for a limited period of time. Where one parent later reneges on this agreement and does not wish the child to return, a determination that a new habitual residence has been acquired will assist that parent in breaching the agreement. The policy of honoring agreements is achieved, therefore, by not allowing a new habitual residence to be established for the child.¹⁶⁸ Conversely, where parties agree to relocate permanently, they effectively agree to change their habitual residence. A unilateral decision by one to go back to the country of origin may be seen as a breach of this agreement. Thus, the policy that agreements should be honored would require that a habitual residence be acquired in the new country.¹⁶⁹

The concept that an agreement as to habitual residence should be honored gives rise to a number of difficulties. Traditionally, courts have been reluctant to give effect to agreements between spouses (at least if they were made while they were living together harmoniously), either on the basis that the agreements were made without intent to create legal

habitual residence. In the later case of *Dagan v. Dagan*, F.M.A. 70/97 (unreported), Justice Porat claims that the condition in *Moran* was invalid and should not have been made, but Justice Rotlevi disagrees, arguing that such provision can prevent subsequent retention in the "new" habitual residence in contravention of the original court order.

168. This was the result in the Australian case of *In re Artso*, (1991) F.L.C. 81,633, where the parties came to Australia from England for a trial period. The wife was unhappy and returned to England. Her subsequent application for their return was successful because the children remained habitually resident in England. In the Australian Family Court case *De Lewinski v. the Legal Aid Comm'n of New South Wales*, the court held that the children's residence in Australia with their mother for six months was insufficient to establish habitual residence where the purpose of the stay was to visit the mother's family. Unreported, Family Court of Austl., Nicholson CJ, Ellis and Warnick JJ (July 11, 1997), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author). Furthermore, it was intended that they would return to the United States to resume residence with their father. Thus, the mother's refusal to return their children to the United States was wrongful.

169. See, e.g., *Paterson v. Casse*, Unreported, Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author). The parties came to Australia with the intention of remaining permanently if they could obtain residence. After two months, the father told the mother that he wished to return to Mauritius with the children. He subsequently brought proceedings under the Convention on the basis that his wife wrongfully retained the children in Australia. The court held that the children were no longer habitual residents in Mauritius because of the agreement between the parties to remain permanently. However, the judges did appreciate the difficulties involved in such agreements and specifically raised the question as to whether the breakdown of the marriage, to which apparently the parties had not turned their mind, would vitiate the agreement. *Id.*

relations or that the agreements were against public policy.¹⁷⁰ However, the modern approach is to promote “private ordering”¹⁷¹ subject to the Court’s power to veto agreements inter alia because of inconsistency with the welfare of the child¹⁷² or because of abuse of disparity of bargaining power between the parties.¹⁷³ In the present context, the fact that the agreement relating to the habitual residence was inconsistent with the child’s welfare would constitute a good reason for not honoring it.¹⁷⁴ However, the court cannot get involved in analyzing whether the agreement has been achieved unfairly because that is inconsistent with the summary nature of Abduction Convention proceedings.¹⁷⁵

The second and more substantive difficulty is that the “agreement” approach contradicts the physical factual nature of habitual residence. Thus, the Report of the Third Special Commission expressly rejects the power of agreements or court orders to create a habitual residence that does not match with the factual habitual residence of the child.¹⁷⁶

A third problem is that very often there will be a dispute about what was agreed upon between the parties. As soon as the court is prepared to take into account the fact of the agreement, then it is inviting the parties to submit large quantities of evidence, which will delay the proceedings.¹⁷⁷ Since the existence of the alleged agreement is simply one consideration in

170. For example, if the agreement contemplated divorce. See S.M. CRETNEY & J.M. MASSON, *PRINCIPLES OF FAMILY LAW* 96-97 (6th ed. 1997).

171. See, e.g., Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1399-1403 (1984) (explaining that this policy is applied to ante-nuptial and separation agreements alike); CRETNEY & MASSON, *supra* note 170, at 397; Uniform Marriage and Divorce Act, ¶ 306.

172. Thus, terms of any agreement which provide for support, custody, and visitation of children are often not considered binding on the court. However, in practice courts rarely interfere with agreements made by parents in relation to custody. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-56 (1979).

173. See Sharp, *supra* note 171, at 1403-06.

174. See, e.g., Schuz, *supra* note 14, at 785.

175. The intimate and intricate nature of intra-marital relationships makes it difficult to discern when the natural and often subtle pressures which cause one party to agree with the other overstep the boundary and become unfair exploitation or manipulation of the other’s weakness or emotional blackmail.

176. Reports of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 8, ¶ 16.

177. In the Israeli case of *Dagan v. Dagan*, F.M.A. 70/97 (unreported), the Respondent brought forty documents, eight tapes and twelve witnesses, of which a substantial proportion related to the question of the intentions of the parties when going to live in the U.S. Justice Porat complained that much of the evidence was unnecessary and that conducting Hague Convention proceedings in such a manner frustrates the purpose of the Convention.

determining habitual residence, getting bogged down in issues of proving what was agreed is inappropriate. Furthermore, the summary nature of the proceedings means that the court in Abduction Convention cases is not ideally suited to deciding contradicted issues of fact.

However, while such difficulties are formidable, it is suggested that they should limit the scope of the application of the fundamental principle that agreements should be honored rather than extinguish it completely. The solution may be that the policy should only be relevant (i) in "borderline" cases where it is not an abuse of language to say that the child's habitual residence is in accordance with the agreement;¹⁷⁸ (ii) where it is very clear on the facts that an agreement existed; and (iii) there is no serious suggestion that the agreement was not made voluntarily.¹⁷⁹ The policy is equally applicable under the Child Protection Convention and domestic legislation.

2. *The Case Law*

In the sabbatical cases, there is support for the policy that one parent cannot unilaterally (i.e. in breach of agreement) change the nature of the child's residence in the place where the sabbatical is being spent.¹⁸⁰ In the case of *In Re S (Minors)(Abduction: Wrongful Detention)*, the mother's assertion that the children had acquired a habitual residence in England was seen as part of the wrongful retention because it was in breach of the parties' agreement that they would return to Israel at the end of the sabbatical.¹⁸¹

The question of the relevance of an agreement between the parties in determining the habitual residence of the child was discussed in the Israeli case of *Dagan v. Dagan*.¹⁸² In this case, an Israeli couple went to live in New Jersey with the intention of staying there for approximately two years. After two and a quarter years, when the husband refused to return to live in Israel, the wife returned to Israel with their one year old son, who had been born in New Jersey. The court unanimously agreed

178. Thus, for example, no effect would be given to an agreement, which provided that the child was habitually resident in a country where he had never been a resident or that he remained habitually resident in a country despite a prolonged absence.

179. Thus, for example, no effect would be given to an agreement which was made as a result of threats of violence or other coercive behavior as in *In re Application of Ponath*, 829 F. Supp. 363 (D. Utah 1993).

180. See, e.g., *In re Morris*, 55 F. Supp 2d. 1156 (D. Colo. 1999).

181. [1994] Fam. 70 (Eng.).

182. District Court F.M.A. 70/97 (T.A.) (not yet reported) (Isr.).

that the child was a habitual resident of New Jersey.¹⁸³ However, Justice Rotlevi indicated that if the evidence had shown that the agreement was to stay in the United States for a fixed period and the conduct of both parties had not shown an intention to extend the stay, then the agreement of the parties could have changed the child's habitual residence.¹⁸⁴

With respect, this view is not sustainable on the facts of this case because the child had never been resident in Israel. Thus, to hold that he was a habitual resident of Israel is simply inconsistent with the facts. An agreement should not be able to create a habitual residence in a place where the child has never been resident,¹⁸⁵ but may be relevant in determining whether the child's residence in a particular place has become habitual.¹⁸⁶ More commonly, the agreement should be able to prevent the loss of a habitual residence because it manifests a preservation of the links with the "old" country and limits the quality of the residence in the "new" country.¹⁸⁷

However, none of the cases address the question of what is the maximum length of time for which such an agreement could be effective. The longer the child is a resident in the new country, the stronger the policy considerations will be in favor of a new habitual residence being acquired. At some point such considerations will tip the balance.

183. *Id.*

184. Justice Rotlevi argues that if the advance agreement of one parent to the other removing the child is a defense to mandatory return (Abduction Convention, *supra* note 3, art. 13(a)), then the agreement of one parent in advance that the child's habitual residence will not be changed should also be a good defense. Moreover, an agreement that the court in the country of origin will retain jurisdiction over the child should be interpreted as an agreement that that country be treated as the child's habitual residence. However, Justice Porat insists that what is relevant is the physical situation and that the intentions and plans of the parties are irrelevant. *Id.* One flaw in Justice Rotlevi's reasoning is that a change of habitual residence may lead to the Convention not being applicable at all, whereas if the defense of consent is made, the court still has discretion to order return under the Convention. *Id.*

185. *In re M* (Abduction: Habitual Residence), [1996] 1 F.L.R. 887, 895 (C.A.) (Eng.).

186. *Paterson v. Casse*, (unreported) Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author); *Schroeder v. Vigil Escalare-Perez*, 664 N.E.2d 627, 632-33 (Ohio Com. Pl. 1995) (emphasizing the fact that "the parties had mutually agreed that [the child] would remain in the custody of the plaintiff for an indefinite period in Ohio"). Similar wording is used in the case of *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 270 (N.D. Ohio 1993).

187. Thus, in the case of *Mozes v. Mozes*, 19 F. Supp. 2d 1108 (C.D. Cal. 1998), the fact that the parties agreed that the wife and children would spend fifteen months in the United States should have been a relevant factor. However, as in *Dagan*, there was some evidence that it was intended that this period might be extended and that the husband had indicated that he consented to such an extension. District Court F.M.A. 70/97 (T.A.) (unreported) (Isr.).

F. Disputes Should Be Decided in the Forum Conveniens

1. The Relationship Between Habitual Residence and Forum Conveniens

One of the objectives of all the legislation under consideration is to ensure that disputes should be adjudicated in the *forum conveniens*. The choice of the factor of habitual residence was clearly designed to further this objective.¹⁸⁸ While the view that the habitual residence of the child will always be *forum conveniens* seems extreme,¹⁸⁹ it is clear that habitual residence is a factor of considerable weight in determining what is the *forum conveniens*.¹⁹⁰ Thus, conversely, in determining habitual residence in a borderline case involving directly or indirectly an issue of jurisdiction, which country is the *forum conveniens* ought to be a persuasive consideration.

2. The Relevance of Context

Despite the fact that the objective of adjudication in the *forum conveniens* is common to all the legislative instruments in question, determination of the *forum conveniens* may be affected by the legislative context in which it is being made.

(a) The Time Factor

Under the Abduction Convention, the critical point in time is immediately before the abduction or wrongful removal. This means that events occurring after that time should not be taken into account unless they constitute one of the exceptions, even though it is clear that such events may be very relevant in determining the *forum conveniens* for the substantive dispute.¹⁹¹ Under the Child Protection Convention and the domestic legislation, the critical point in time would be either the commencement of proceedings or the time at which the particular

188. Perez-Vera Report, *supra* note 23, ¶ 16; Lagarde Report, *supra* note 23, ¶ 5.

189. In *H v. H (Minors) (Forum Conveniens) (Nos. 1 & 2)*, [1993] 1 F.L.R. 958 (Eng.), Judge Waite rejected counsel's argument that the habitual residence is to be considered automatically as the natural forum. *Id.* at 963-64. However, other judges do not agree with this. *In re S (Residence Order: Forum Conveniens)*, [1995] 1 F.L.R. 314, 323-24 (Thorpe J.) (Eng.)

190. Even Judge Waite concluded that "the child's habitual residence is a factor in all cases persuasive, in many determinative, but in none conclusive." *H v. H*, 1 F.L.R. at 974.

191. Abduction Convention, *supra* note 3, art. 13, § 1. This is also true when twelve months has elapsed since the removal and the child has become settled in his new environment. *Id.* art. 12.

measure in question is taken.¹⁹² Thus, in the case of removal, post-removal events will clearly be relevant in determining habitual residence.¹⁹³

(b) The Corollary of Determining the Forum Conveniens

Under the Abduction Convention, the decision as to *forum conveniens* determines the critical issue of whether the child is to be returned.¹⁹⁴ This factor may work both ways. On the one hand, the court may be keen to find that the Convention is applicable in order to reverse the harmful effects of abduction and to deter others from abducting their children in accordance with the overall policy of the Convention.¹⁹⁵ On the other hand, the court may not wish to return the child in a particular case either because it thinks that the policy of the Convention does not so require or because it wishes to act in the best interests of the particular child, contrary to the policy of the Convention. In the latter case, the court may prefer to come to the “desired” result by manipulating the meaning of habitual residence rather than by a wide interpretation of the Article 13 defenses,¹⁹⁶ which is generally seen as undermining the Convention and therefore likely to be overturned on appeal.¹⁹⁷

Whereas, under the Child Protection Convention and domestic legislation, the decision as to whether the court has jurisdiction to take the measures in question will not *per se* bring about any change in the child’s place of residence.¹⁹⁸ Thus, the court is less likely to be tempted to take into account extraneous considerations.

(c) Perceived Convenience

The Child Protection Convention and the domestic legislation can apply in cases where there has been no abduction. In such cases, the child and both of the parents may all live in the same

192. Clive, *supra* note 86, at 173 (pointing out that the Protection Convention does not state which of these two points in time is the appropriate one).

193. Where the conditions of Article 7, Protection Convention, *supra* note 4, are fulfilled, the previous habitual residence retains jurisdiction for a fixed period of time.

194. Schuz, *supra* note 14, at 782-83 (explaining why return and adjudication do not necessarily have to go hand in hand).

195. *See supra* Parts II.A and IV.A.2.

196. Abduction Convention, *supra* note 3.

197. *B v. B* (Abduction: Custody Rights), [1993] Fam. 32 (C.A.) (Eng.); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995); *Roe v. Roe*, C.A. 4391/96 50(3) P.D. 338 (Isr.)

198. *See, e.g., Sutton v. Sodhi*, [1989] 94 N.S.R.2d 126 (Can.).

country at the time of the determination of habitual residence. This scenario, which cannot normally¹⁹⁹ arise under the Abduction Convention, is likely to affect the determination of the *forum conveniens*. In borderline cases where all the parties are living in the forum, it will be more convenient to find that the authorities of that state have jurisdiction on the basis of habitual residence there.²⁰⁰

Whereas, in a similar abduction case, the court in the state of refuge which subsequently has to determine what the habitual residence of the child was immediately before the abduction cannot be influenced by the apparent convenience of determination in the country where all the parties are present, because this is no longer the case. Thus, for example, assume that the parties in *Re S*²⁰¹ had remained in England after their separation and there was a dispute about whom the child should live with while in England. On the assumption that the Protection Convention were in effect in England, the English court would only have jurisdiction to consider the mother's application for a residence order if the child is habitually resident in England. The fact that the parties are all in England at the moment will be an important factor in determining what is the *forum conveniens* in this situation. While much of the evidence about the parents' respective parenting abilities will be in Israel, it may be easier to bring evidence to England than to transport the parties to a court hearing in Israel. Thus, the policy consideration of adjudication in the *forum conveniens* will weigh differently in a non-abduction case than in the parallel abduction situation.

199. If one parent applies to the court in a foreign country for a custody order because the marriage has broken down while the parties are living abroad temporarily, the other party might apply for a return order under the Convention postponed to the date that visit was intended to end. *Paterson v. Casse*, (unreported) Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author).

200. Under the Protection Convention, jurisdiction can be transferred to that state from the state of habitual residence on the basis that it is the *forum conveniens*. Protection Convention, *supra* note 4, arts. 8, 9.

201. *In Re S (Minors) (Abduction: Wrongful Retention)*, [1994] Fam. 70 (Eng.).

V. BALANCING CONFLICTING POLICY CONSIDERATIONS: THEORY AND PRACTICE

A. General Considerations

1. Introduction

Having identified the policy considerations, which are likely to be relevant, the critical question is how conflicting considerations are balanced. Since courts rarely refer to policy considerations openly, this Part of the Article first considers the different balancing methods, which might be adopted. Then some borderline cases are analyzed to see to what extent the decisions and reasoning are consistent with the policy considerations hypothesis presented in this paper.

2. The Qualitative Method

The qualitative method of balancing requires determining the relative strength of each consideration on the particular facts of the case. For example, the weight of the policy of protecting the child from abduction will depend on how detrimental the particular abduction is to him, which in turn depends *inter alia* on whether he has any previous connection with the country of refuge. Similarly, the strength of the policy of adjudication in the *forum conveniens* depends on how clear it is that a particular country is indeed a more appropriate forum than another.

Where there are more than two relevant considerations which point in different directions, the weight of each consideration will be placed in the appropriate side of the scales and the habitual residence determined according to the heavier side. For example, where one policy consideration is strong, it might outweigh two weaker ones.

One problem with this approach is the difficulty of measuring the relative strength of different policy considerations when “like” is not being compared with “like.” Under the comparative impairment approach,²⁰² the comparison is facilitated by

202. This approach is used in a variety of different contexts. For example, under the Government Interest Analysis approach to choice of law, a true conflict may be solved by determining which Government’s interest would be more severely impaired. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1718 (1963). For a judicial application of this approach see *Bernard v. Harrah’s Club*, 546 P.2d 719 (Cal. 1976). Another example can be found, in a quite different context, in the frozen embryo dispute decided by the Israeli Supreme Court, C.A. 2401/94, *Nachmani v. Nachmani* (unreported), where one method of resolving the conflict between the wife’s right to

examining the extent to which each particular policy involved would be impaired if effect were not given to it in the particular case. Given that the policy of protecting children from abduction has been expressly adopted by the countries who are members of the Abduction Convention, it seems likely that other policies will be subsidiary thereto. However, this will only be true where the particular case is really within the protection policy as envisioned by the drafters of the Convention.²⁰³

3. *The Quantitative Method*

In cases where there are more than two relevant considerations, the quantitative approach could be adopted where one result is supported by a greater number of policy considerations than the other. For example, two considerations which point in one direction should take precedence over one which points in the opposite direction.²⁰⁴

This approach is in some ways simpler than the weight approach, but has obvious drawbacks. In particular, it seems inappropriate that a weak consideration should be given the same weight as a strong one. Moreover, there is a degree of overlapping between some of the considerations, which reduces further the accuracy of the numerical method. For example, the considerations of protecting the child from abduction and not rewarding abductors are effectively two sides of the same coin. Moreover, the numerical approach does not allow for the importance in the relative weight of particular policy considerations to be adjusted the light of the context in which the determination is being made.²⁰⁵

parenthood and the husband's right not to be a parent was by examining which party's right would be more severely impaired if effect were not given to it. For a summary of the decision in this case, see Rhona Schuz, *The Right to Parenthood: Surrogacy and Frozen Embryos*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 237, 247 (A. Bainham ed., 1996).

203. Discussed *supra* at Part IV.A.

204. Such an approach is advocated by the President of the Israeli Supreme Court in relation to statutory interpretation, where the three sources from which the purpose of the statutory provision can be derived (the language of the statute, the legislative history, the fundamental principles and the general methodological and constitutional structure) do not all support the same interpretation of the provision. A. BARAK, *INTERPRETATION IN LAW* 2 748-58 (Nevo, 1993) (in Hebrew).

205. J.J. Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations*, 9 *OXFORD J. LEGAL STUD.* 205, 229 (1989).

4. *The Relevance of Context*

The way in which the weight to be attached to a particular consideration may be affected by legislative context can best be illustrated by considering how a case made in one context would have been decided if, with the appropriate variation of facts, it were made in another context.

Consider the case *F v. S*,²⁰⁶ in which an unmarried mother took her child to Spain. The father instigated wardship proceedings in England and the question arose as to whether the English court had jurisdiction.²⁰⁷ The answer depended on the habitual residence of the child at the date of the commencement of the proceedings.²⁰⁸ The evidence as to the intention of the mother was contradictory.²⁰⁹ The appellate court overturned the judge's finding that the child and mother were no longer habitually resident in England.²¹⁰ This decision was no doubt influenced by the court's perception that England was the *forum conveniens*.

However, I suggest that, if the facts had been varied and the father had abducted the child from Spain to England, the picture would have looked rather different. In this scenario, the policies of protecting the child from abduction and of not rewarding abductors would have conflicted with the policy of adjudication in the *forum conveniens*. In the author's view, it is likely that more weight would have been given to the former policies and thus it would have been held that the child was habitually resident in Spain so as to ensure that return to the custodial parent could be ordered, despite the fact that England was considered the more appropriate forum.

B. Specific Situations

1. *Introduction*

In this section, case law relating to three situations in which difficulty has been encountered in determining habitual residence will be analyzed in light of the policy considerations. Judicial opinions and outcomes will be examined for evidence that this approach is used either consciously or subconsciously by the

206. [1993] 2 F.L.R. 349 (C.A.) (Eng.).

207. *Id.* at 687.

208. *Id.* at 688.

209. *Id.* at 691.

210. *Id.* at 692.

judges, and for consistency with the two methods of balancing conflicting considerations.

2. "Disharmonious" relocations

(a) *The Conflicting Considerations*

Here we are concerned with the situation where a marriage is in a crisis and one party reluctantly relocates with the other in the hope that the relationship will improve. On the one hand, as in all relocation cases, the policies of protecting children from abduction and not rewarding abductors require that a new habitual residence is acquired as soon as possible.²¹¹ On the other hand, the policy of not discouraging attempts to save marriages requires that the old habitual residence be retained. Furthermore, it may well not be clear which country is the *forum conveniens*

(b) *The Case Law*

In the English case of *Re F*,²¹² the child had been in Australia with the parents for three months before the father returned with the child to England. The facts were sufficiently ambivalent to support either a finding that habitual residence in Australia had been acquired or that it had not.²¹³ As we have seen, the court expressly mentions the policy of ensuring that children are protected from abduction. However, there is no hint that the policy of encouraging attempts to save marriages, or *forum conveniens*, which would appear to support the opposite finding,²¹⁴ was taken into account. This could be because the

211. This assumes that the child spends long enough in the new country that returning him there is not like returning him to a strange country.

212. [1992] 1 F.L.R. 548 (C.A.) (Eng.).

213. The court treated the fact that the nineteen packing cases had been sent by sea as strong evidence that they intended to settle in Australia. *Id.* at 554. However, there was also considerable evidence in favor of the father's view that they were visiting for an extended holiday with the intention of considering whether to live there for any length of time. *Id.* at 549-50. For example, they had return tickets and the father had a visitor's visa. *Id.* The possibility that the parties indeed had different purposes does not seem to be considered. Indeed, such a scenario is consistent with the fact that the parties had had marital difficulties. *Id.* at 550. The boxes might have been sent because the wife wanted to send them and the husband did not want to cause a dispute by refusing. Furthermore, no consideration is given to the fact that in Australia they had not yet settled in any one place, but had lived in three different places in three months. *Id.*

214. In light of the fact that during the first eleven months of his life the child had lived in England in one place, and that during the three months he spent in Australia he had lived in three different cities, it would seem that more evidence would be available in England.

policy of protecting children was considered to be stronger because it was not entirely obvious that England was the *forum conveniens* and the evidence regarding saving the marriage was weak. Thus, this case would be consistent with the qualitative approach.

The American case of *Feder v. Evans-Feder*²¹⁵ is different from *Re F* in that Mr. Feder had employment in Australia and the parties bought a house there and lived there together with their four-year-old son for almost six months.²¹⁶ Moreover, the marital problems were more serious as evidenced by the fact that Mrs. Feder consulted a divorce lawyer before finally deciding to join her husband in Australia.²¹⁷

The district court seemed to have been sympathetic to Mrs. Feder's attempt to save the marriage,²¹⁸ but the circuit court discounted her motives.²¹⁹ Neither court referred to the policy of protecting children from abduction.²²⁰ In relation to the policy of *forum conveniens*, the district court emphasized the connections with Pennsylvania and referred to the mother and child going back home.²²¹ Similarly, the dissenting judge in the circuit court mentioned expressly that reversal of the district court's judgment would lead to the child being taken from his mother's home in Jenkintown, where he has spent virtually all of his years, in contrast to the time spent with his father in Australia and that he may later be returned to her in the U.S.²²² On the other hand, the majority judgment in the circuit court put emphasis on the child's connections with Australia, and in particular, the fact that he attended preschool part-time and was enrolled in kindergarten for the coming year.²²³

215. 866 F. Supp 860 (E.D. Pa. 1994).

216. *Id.* at 863-64. However in the case of *Walton v. Walton*, 925 F. Supp. 453 (S.D. Miss. 1996), the parties stayed in Australia for one and a half years and the child was not removed back to the same place in the United States where she had lived before the relocation. *Id.* at 454-55. Thus, it was clear that the policy of encouraging attempts to save marriages was clearly outweighed by other policy considerations.

217. *Feder*, 866 F. Supp. at 863.

218. This may have been because Mrs. Feder emphasized that the reason that she moved to Australia was in order to attempt to salvage the marriage. *Id.* at 868. Perhaps, the English court would have been more sympathetic to the father in the case of *Re F* if he had put forward a similar case.

219. *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3 Cir. 1995).

220. No return order was actually made by the appeals court because the case was remanded back to the district court, to consider whether any of the exceptions applied.

221. *Feder*, 866 F. Supp. at 868.

222. *Id.*

223. *Feder*, 63 F.3d at 237.

The above analysis of the opinions in terms of policy considerations shows that the case is consistent with the quantitative method of balancing considerations. Since the policies of encouraging marriages to be saved and of protecting children from abduction clash, *forum conveniens* is the determining factor. Each judge decided the case according to what he believed to be the *forum conveniens*.

While it is assumed that the decision is also consistent with the qualitative method, there is insufficient indication in the judgments as to the strength of the policy considerations to predict how much weight is given to the respective policies.

In the case of *Re B (Minors)(Abduction)(No. 1)*,²²⁴ a German wife and English husband lived in Scotland since their marriage.²²⁵ In 1991, the marriage had become unhappy and the mother took the children to Germany. The husband persuaded her to come back to Scotland, but agreed that after they sold their property there, they would go to live in Germany for a while to give them a breathing space to resolve their differences and plan a fresh course for their future family life.²²⁶ After six months in Germany, the husband realized that the marriage could not be saved, so while on a vacation in England, he applied to the court for a divorce, an order restraining removal of the children from England and a residence order.²²⁷ The mother responded by applying for the immediate return of the children to Germany under the Convention, on the basis that they had been unlawfully retained in England.²²⁸ Her case depended upon showing that the children were habitually resident in Germany.

An analysis of the conflicting policy considerations shows on the one hand that the policy of protecting the children from retention would require finding that a habitual residence had been acquired in Germany. On the other hand, however, the policy of not discouraging attempts to save a marriage would require finding that no such residence had been acquired, although it is not clear to what extent this policy should allow the “reluctant” parent to move to a third country.

What is the *forum conveniens*? Arguably, it is Scotland, where the parties had been living “normally” for most of the children’s lives. However, between England and Germany, it

224. [1993] 1 F.L.R. 988 (Fam.) (Eng.).

225. *Id.* at 989.

226. *Id.*

227. *Id.*

228. *Id.*

would seem that Germany was a more natural forum. Thus, under the numerical approach, the balance would come down in favor of Germany as the habitual residence. All considerations seem weak here and thus it is not easy to apply the qualitative approach.

The court's decision that the children were habitually resident in Germany was based on the finding that the parties had a settled purpose of using their stay in Germany as a platform from which to resolve their differences and work out the future course of the marriage.²²⁹ While none of the policy considerations outlined above are mentioned expressly in the judgment, the court's concern that Abduction Convention proceedings should be decided quickly²³⁰ suggests that they gave priority to the need to protect children from abduction. Moreover, their statement that Germany was being used as a base for the parties to plan their future suggests that Germany was seen as a more appropriate forum than England.

It may be interesting to consider how the case would have been decided if the father had applied to the Scottish court for a residence order during a short family holiday in Scotland. It may be that under the qualitative approach the fact that Scotland was the *forum conveniens* together with the fact that greater weight ought to be attached to the policy of encouraging attempts to save marriages should have tipped the balance in favor of finding that no habitual residence had been acquired in Germany.

3. Fixed Term relocations

(a) The Conflicting Considerations

On the one hand, the policy of protecting children from abduction requires that a new habitual residence is acquired as soon as possible.²³¹ On the other hand, the policy of encouraging beneficial foreign travel, where applicable, requires that the old habitual residence is retained. The question of *forum conveniens* depends very much on the facts of the case. The fact that the marriage has broken down and that one party wishes to stay permanently in the foreign country will be a relevant factor.

229. *Id.* at 991.

230. *Id.* Thus, habitual residence had to be determined by taking a general view rather than by an intricate examination of every word and action.

231. Again, this assumes that the child spends long enough in the new country that returning there is not like returning to a strange country.

(b) *Case law*

The English case of *In Re S (Minors)(Abduction: Wrongful Retention)*²³² contains perhaps the most controversial finding of habitual residence made in any court decision. Following the present author's suggestion that the finding is inconsistent with the *Shah* formula,²³³ it has been described by leading authors as "difficult to accept"²³⁴ and by an experienced Israeli judge as "exceptional and wrong."²³⁵ Moreover, it was distinguished on quite inadequate grounds in the very similar U.S. case of *Mozes*.²³⁶

It will therefore be of some interest to apply the policy considerations approach to these two cases. Both involved Israeli children who had gone to live abroad for a period of at least one year. In the former case, both parents who had sabbatical positions at academic institutions in the United Kingdom accompanied the children.²³⁷ When there were marital difficulties, the father returned to Israel, but the mother decided to remain in England with the children on a permanent basis and applied to the English court for a residence order.²³⁸ The father claimed that the mother had wrongfully retained the children and sought their return to Israel.²³⁹ In the latter case, the father did not accompany the family, who were to spend fifteen months in Los Angeles in fulfillment of the wife's life long dream.²⁴⁰ After one year, following the wife's filing of an action for divorce and custody in the United States, the husband claimed wrongful retention and sought return of the children to Israel in accordance with the original plan.²⁴¹

In the former case, the English court decided that the children's habitual residence was at all times in Israel because the mother could not unilaterally change their habitual

232. [1994] 1 Fam. 70.

233. Schuz, *supra* note 14, at 791.

234. BEAUMONT & MCELEAVY, *supra* note 36, at 111.

235. Dagan v. Dagan, F.M.A. 70, ¶ 17 (1997) (unreported).

236. *Mozes v. Mozes*, 19 F.Supp. 2d 1108 (C.D. Cal. 1998). The basis of the distinction was that the children in *Re S* had only been in England for six months. In fact, a careful reading of that case shows that the children had been in England for at least eight months at the date of the wrongful retention (*Re S*, 1 Fam. at 73-74). Furthermore, it is unlikely that the decision of the English court would have been any different if the children had already been in England for a longer period.

237. *Re S*, 1 Fam. at 73.

238. *Id.* at 74.

239. *Id.* at 74-75.

240. *Mozes*, 19 F. Supp. 2d at 1111.

241. *Id.* at 1112.

residence.²⁴² The court does not seem to consider that the children's habitual residence could have changed on their arrival in England with both parents for a settled purpose.²⁴³ Conversely, the District Court for the Central District of California held that the Mozes children had become habitually resident in the United States.²⁴⁴

An analysis of policy considerations in *Re S* shows that the policy of not discouraging beneficial foreign travel, the policy that agreements should be honored and the policy of protection from abduction would all require that the children remain habitually resident in Israel. On the question of *forum conveniens*, it would seem that because the children had spent most of their life in Israel and that the father had returned there, Israel was the *forum conveniens*. Thus, *all* considerations pointed in the same direction, that the children remained habitually resident in Israel.

Moreover, there is nothing in the case to suggest that the decision would have been any different had the original sabbatical been planned to last for one and a half years and the retention had taken place after one year. The additional time spent in England would not seem to change the relevant policy considerations. While the arguments in favor of England being the *forum conveniens* would have strengthened as time went on, it is hard to accept that an extra four or five months would have tipped the balance.

Thus, it seems that it will be difficult to explain the decision in the case of *Mozes* by reference to policy considerations. While the policy of not discouraging beneficial travel is not relevant, the argument that Israel is the *forum conveniens* is stronger in this case. Since the children were older, the information about them available in Israel would probably be more significant. Moreover, since the father had not accompanied the family, all of the evidence about the father's relationship with his children was in Israel, where the father was still living. Given that the original plan had been for the mother and children to return after fifteen months,²⁴⁵ it would seem that Israel remained the *forum conveniens* for adjudication of the custody dispute. In any event, even if this is in doubt, the policy of protecting children against

242. *Re S*, 1 Fam. at 82.

243. *Id.*

244. 19 F. Supp. 2d at 1116.

245. However, there was some evidence that the father had agreed to an extension. *Id.* at 1111-12.

retention should have tipped the scales in favor of a determination that the children were still habitually resident in Israel. Thus, the decision is either wrong²⁴⁶ or based on other policy considerations particular to the facts of the case.²⁴⁷ Of course, it should be pointed out that if the period spent in the U.S. had been longer, then at some point in time the U.S. would have become the *forum conveniens* and the policy of protection from retention would have weakened.

(c) *An Alternative Solution*

The above examination of case law and analysis of the relevant considerations show that when relocation is for a period of up to one year, the policy considerations are likely to weigh heavily in favor of a retention of the original habitual residence. However, the longer the sabbatical extends over the one year period, it becomes increasingly less tenable both from a factual and policy perspective to hold that no habitual residence is acquired in the country where the sabbatical is being spent.

On the other hand, when the parties are intending to return to the country of origin after a fixed period, it does not seem appropriate to hold that the habitual residence there is lost. Moreover, the need to protect the children from abduction back to their country of origin when they are, in any event, meant to be returning there is likely to be a weak consideration. Similarly, it is not clear that a need to protect from retention exists in a country where the child is living for an extended period of time.

Thus, it is suggested that an appropriate method of dealing with longer sabbaticals is to hold that there is dual habitual residence in the country of origin and the country where the sabbatical is being spent. Such a finding not only accurately reflects reality, but also produces the desired result, that the child is not protected against abduction back to the country of origin or retention in the country where the sabbatical is being spent, but is protected against abduction to any third country. This is, of course, in accordance with the spirit of the agreement between the parties that they would be returning to the country of origin.²⁴⁸ While this solution may lead to conflicts between

246. For a discussion of the appeal of this case, which was decided after this Article was written, see *infra* Part VII.

247. There is some evidence that the father was seeking return of the children only as a tactic in negotiating a divorce settlement with the mother. *Mozes*, 19 F. Supp. 2d at 1112.

248. However, the removal may be before the agreed period has expired.

countries with concurrent jurisdiction, these conflicts should be resolved by cooperation and judicial discretion while taking into account the particular circumstances of the case rather than by inappropriate determinations that habitual residence has changed.

4. *Re-abduction Cases*

(a) *The Conflicting Considerations*

On the one hand, the policy of protection from re-abduction requires a finding that habitual residence has been acquired in the country of refuge unless the child was originally abducted by a non-custodial parent *and* has not yet formed any links with the place of refuge. On the other hand, the policy of not rewarding the first abductor requires that no such habitual residence is acquired. In determining *forum conveniens*, the abduction may be relevant since the fact that an abducted child is liable to be returned must, at least initially, affect the nature of his links with the country of refuge.

The dilemma of how to deal with the consequences of wrongful removal, which is not reversed by return, was faced by the drafters of the Child Protection Convention. The drafters had to decide under what circumstances the new state would acquire jurisdiction in relation to the child. As we have seen, the compromise, which was finally adopted, provided that jurisdiction would only be acquired by the state of refuge when the child's habitual residence has changed and either there is acquiescence in relation to the change in habitual residence or one year has elapsed since the other parent knew or ought to have known the location of the child, no application for return is pending, and the child is settled in the new environment.²⁴⁹

What does the inclusion of this provision tell us about the effect of abduction on habitual residence? It seems the provision was only required because of some uncertainty as to when a new habitual residence be acquired in such a situation. If it were thought that habitual residence could only be acquired upon one of the two conditions in Article 7²⁵⁰ being fulfilled, then it would

249. This provision is virtually identical to Section 41 of England's Family Law Act of 1986. Thus, the following discussion about Article 7 of the Protection Convention, *supra* note 4, applies equally to Section 41 of the English Act.

250. Protection Convention, *supra* note 4.

not be necessary to state those conditions.²⁵¹ Thus, it must be assumed that the drafters of the provision envisioned that a child's habitual residence could, in some circumstances, be changed as a result of wrongful removal or retention.²⁵² Otherwise, the provision would be redundant.

How does this provision balance the conflicting policy considerations? First, when there is acquiescence or consent the wrongful nature of the removal or retention is effectively cancelled out. Thus, the case becomes a simple relocation situation and the policy of not rewarding the abductor is not relevant because the abductor is no longer considered to be an abductor.

Second, the one- year time period combined with the requirement that the child be settled in his or her new environment seem to reflect the consideration of *forum conveniens*. In other words, where the child has been in the place of refuge for less than one year, it is assumed that that country has not become the *forum conveniens*. Thus, the policy of adjudication in the *forum conveniens* together with the policy of not rewarding the original abductor require that the old state retain its exclusive jurisdiction and would override the policy of protecting the child from re-abduction. Conversely, where the child has been in a the place of refuge for at least a year, that country may have become the *forum conveniens*. In this case, the policy of adjudication in the *forum conveniens* together with the policy of protecting the child from re-abduction would require that the state of refuge have exclusive jurisdiction and would override the policy of not rewarding the original abductor.²⁵³ This solution can be seen to be consistent with the quantitative approach.

251. Check Nygh, *supra* note 84, at 348 (claiming that the provision "implies that a child's habitual residence can only be changed (a) with the authority, consent or acquiescence of all parties having parental responsibility, and (b) by a period of factual residence in another State for some settled purpose"). With respect, for the reasons stated in the text, no such implication can be made from the provision. Indeed, perusal of the proceedings at the Hague Conference shows that the reason that Article 7 of the Protection Convention, *supra* note 4, deals with the effect of wrongful removal or retention on jurisdiction, and not on habitual residence, is because there was no consensus on the latter point. Hague Conference Proceedings, *supra* note 30, at 326.

252. See Clive, *supra* note 86, at 177.

253. It could also be argued that since return is no longer mandatory if the child has settled in his new environment, the second abductor has gone beyond simply carrying out the dictates of the Abduction Convention.

(b) *The Case Law*

However, the courts' approach to re-abduction cases under the Abduction Convention is not consistent with the preceding analysis. In the English case of *Re R (Wardship: Child Abduction)*(No. 2), the court refused to order return of a child who had been removed from Canada by her father (the "re-abductor") in breach of a Canadian court decision.²⁵⁴ In the court's view, the child had not acquired habitual residence in Canada, even though she had lived there for eleven months.²⁵⁵ The reason for this was that for ten of those months, the mother (the "first abductor") had been under a duty to return the child to England to attend a wardship hearing.²⁵⁶ While the court based this ruling on the effect of an English court order on the nature of the residence (i.e. that it could not be settled), its main motivation seems to have been to ensure that the first abductor was not rewarded. Thus, the court says expressly that it would be wrong to allow the mother to rely on the provisions of the Hague Convention "to overcome her own disobedience to the order of this Court."²⁵⁷ No account seems to have been taken of the need to protect the child from re-abduction or the question of the *forum conveniens*. The decision seems to be particularly harsh since the mother's application to discharge the wardship summons had been granted and the father's appeal therefrom only allowed four days before the Canadian court decision (three weeks before the re-abduction). Furthermore, the original relocation to Canada was not an abduction, since at the time that she moved to Canada not only had the father consented, but she had exclusive custody rights to the child. It was only the subsequent wardship order that turned the mother into a "quasi-abductor." If the policy of not rewarding abductors had such a decisive influence in these circumstances,²⁵⁸ *a fortiori* it would do so in a "real" re-abduction case.²⁵⁹ Indeed, this is the attitude that we find in the U.S. re-abduction cases.

254. [1993] 1 F.L.R. 249, 256 (Fam.) (Eng.).

255. *Id.* at 255.

256. *Id.*

257. *Id.*

258. The court was clearly concerned that the decision of the English court should take precedence. *See id.* However, such a "national" factor should not be relevant in determining habitual residence. The Second Special Commission, *supra* note 6, specifically stated that habitual residence should be interpreted internationally.

259. But compare dicta to the effect that in "extreme" cases where the child had spent virtually his whole life in the country to which he had been abducted, "it would be an

In the case of *Cohen v. Cohen*²⁶⁰ a New York court accepted a mother's evidence that the purpose of the father's trip to Israel with the children was to vacation and not relocate.²⁶¹ Thus, the children did not acquire a habitual residence in Israel and the Convention did not apply to the mother's removal of them back to New York, which remained the place of their habitual residence. The judgment deals essentially with the disputed evidence of the parties. It seems to be taken for granted that the father cannot change the habitual residence of the children, without the mother's permission.²⁶² In this case, the children were only in Israel for five months.²⁶³

In the similar, but more extreme, case of *Isaacs v. Rice*,²⁶⁴ the child had been living in Israel for eleven years²⁶⁵ before the re-abduction. However, the court still found that the child's habitual residence had not changed because his mother never intended for him to be in Israel and because the Convention would be rendered meaningless if habitual residence could be altered by removal without the knowledge or consent of the other parent.²⁶⁶ Thus, since the child was "abducted" to his place of habitual residence, the Convention was not applicable.

With respect, this decision gives too much weight to the policy of not rewarding the first abductor and fails to take into account the policies of protecting the child from re-abduction and of litigation in the *forum conveniens*. Furthermore, the decision renders "habitual residence" an artificial connecting factor with no relationship to reality. It is particularly surprising that the court made such an absurd finding when the same result of not returning the child was easily achieved by applying the child objection exception.

affront to common sense" to hold that he was not habitually resident in that country. *Re B (Abduction: Children's Objections)*, [1998] 1 F.L.R. 667, 671 (Fam.) (Eng.).

260. 602 N.Y.S.2d 994, 999 (N.Y. Sup. Ct. 1993).

261. *Id.*

262. However, the equation of the rules for change of habitual residence with those for change of domicile must reduce the precedent value of the case.

263. See also *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991), where the father re-abducted the child from England back to Arizona after nearly five months. With regard to the original abductor, the Court said, "[i]t would be inequitable and unjust to allow such conduct to create habitual residence." *Id.* at 1435. Similarly, in the Israeli case of *Illel v. Illel*, M.A. 1403/94, the Beersheba District Court, held that the child was still habitually resident in Israel when he was re-abducted back to Israel after five months in the United States, seems to have assumed that because the child had been removed unlawfully from Israel, he could not have acquired a new habitual residence in the U.S.

264. 1998 U.S. Dist. Lexis 12602.

265. The mother claimed that she did not know the whereabouts of the child. See *id.* at *3.

266. *Id.*

VI. CONCLUSION

The exact level and effect of the influence of policy considerations on a court is impossible to prove, unless those considerations and their impacts are discussed openly. However, it is submitted that the analysis and the authorities in this paper do establish that, whether or not determinations of habitual residence of a child are questions of fact, courts are influenced by policy considerations in borderline cases. Similarly, while it is not possible to give an exhaustive list of all of the relevant policy considerations, it is possible to identify a number of such considerations and to assess their scope.

Furthermore, analysis of case law in borderline situations shows that in most cases, the result can be explained by either a quantitative or qualitative approach to balancing the considerations. However, lack of express reference to the various relevant policy considerations means that there is a danger that too much importance is attached to some considerations and insufficient or no importance to others. This is evident particularly in the re-abduction cases where the policy of not rewarding abductors has been applied to the exclusion of all else.²⁶⁷

The concept of determining habitual residence by balancing policy considerations, which take into account the legislative context, may justifiably be attacked as leading to uncertainty and lack of uniformity.²⁶⁸ A number of answers can be given to this accusation. First, the only method of substantially removing the uncertainty inherent in determining habitual residence in borderline cases is to introduce fixed rigid rules, in which the period of time spent in the particular country has decisive or, at least, presumptive weight.²⁶⁹ Such a broad-brush approach is

267. In this respect, courts may simply be reflecting governmental policy. Thus, for example, in the discussions leading to the acceptance of the Protection Convention, the United States delegation insisted that a wrongful removal should never, as a point of principle, lead to a change in habitual residence. Hague Conference Proceedings, *supra* note 30, at 227, Working Paper No. 6. When it was clear that this view was not unanimous, the compromise adopted in Article 7, effectively let each state apply its own approach to this question, subject to the overall restriction that jurisdiction would not be acquired by the new state unless the provisions of that article were satisfied. *Id.* art. 7.

268. Lack of uniformity is caused by the possibility that a person's habitual residence may be different for different purposes. Furthermore, despite the universal nature of the policies mentioned, different weight may be given to different policies in different countries. This can be seen in the different views expressed by the various delegations about the correct approach to re-abduction cases in the Protection Convention. See *supra* note 267.

269. If the time period is conclusive, it would be necessary to provide a list of exceptions similar to that suggested by the United States in their Working Document No.

likely to frustrate the main objectives of the Conventions in question in a significant number of cases and so has quite rightly been rejected by the drafters.²⁷⁰

Secondly, while it is clearly desirable that a person's habitual residence should be in the same place for all purposes, this desire for harmony should not override the need to give effect to the purpose of the legislation in question.

Finally, since we cannot prevent judges from being influenced by unexpressed policy considerations, enumeration of the relevant policy considerations and use of rational methods to balance conflicting considerations will in fact inject certainty into the determination of habitual residence.²⁷¹

It is hoped that the analysis offered in this paper will provide helpful guidance to judges determining habitual residence in borderline cases and thereby contribute to ensuring that these decisions which can have such a critical effect on the lives of children will be the best possible.

VII. POSTSCRIPT

After this article had been written and accepted for publication, the 9th Circuit Court of Appeal handed down its decision allowing the appeal in the *Mozes* case.²⁷² Given the importance of the case, it was thought appropriate to append a postscript providing a brief discussion of the aspects of the judgment which are directly relevant to this article.

After a brief recital of the facts, the judgment of the court, delivered by Judge Kozinski, discusses the nature of the determination of habitual residence in order to identify its role as an appellate court. The court's conclusion that the correct classification is as a question of mixed fact and law is based on the realization that habitual residence is "the central – often

6. Hague Conference Proceedings, *supra* note 30, at 226-27. In suggesting a guideline figure of six months, Beaumont and McEleavy seem to be envisioning a presumption that habitual residence will not be acquired until the child has been resident for six months in the country in question. BEAUMONT & MCELEAVY, *supra* note 36, at 112. It is not clear if this guideline is also intended to create a presumption that after six months residence a new habitual residence will be acquired.

270. The fixed time approach is less problematic when used in domestic legislation, partly because it only purports to determine whether or not a specific court has jurisdiction and does not have any bearing on whether a court in any other country has jurisdiction.

271. Furthermore, provided that the considerations mentioned are indeed relevant and the exercise of the balance reasonable there will be no scope for interference by an appellate court.

272. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

outcome-determinative – concept on which the entire system is founded”²⁷³ and that: “[w]ithout intelligibility and consistency in its application, parents are deprived of crucial information they need to make decisions and children are more likely to suffer the harms the Convention seeks to prevent.”²⁷⁴

The Court clarifies that the standard of review is mixed and thus:

[t]o the extent that the question is essentially factual we review the district court’s determination only for clear error.... Where, however, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.²⁷⁵

This approach supports the author’s view that since we are concerned with interpretation of a legal term, there is room for open reference to policy considerations.²⁷⁶

The appellate court’s review of the legal basis of the district court’s decision revealed that the determination of habitual residence was based on “an understanding of that term that gives insufficient weight to the importance of shared parental intent under the Convention.”²⁷⁷ Thus, the court asked the question whether the children were sufficiently settled in the USA rather than whether “the United States had supplanted Israel as the locus of the children’s family and social development.”²⁷⁸ The case was therefore remanded back to the district court to allow it to ask the correct question. This supports the author’s conclusion that the first instance decision was wrongly decided because it is inconsistent with the conflicting policy considerations which ought to inform determinations of habitual residence in borderline cases.²⁷⁹

273. *Id.* at 1071. For a detailed analysis of the role of habitual residence, see *supra* Part III.

274. *Mozes*, 239 F.3d at 1072.

275. *Id.* at 1073 (quoting *U.S. v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc)).

276. See *supra* Part I.B.3.

277. *Mozes*, 239 F.3d at 1084.

278. *Id.*

279. See *supra* Part V.B.3.b.

Furthermore, a number of the policy considerations enumerated in Part IV of the article can be identified in the Court's reasoning. Firstly, the court refers expressly to academic exchanges by children and states that if it was not expected that the children would resume residence in their own countries at the completion of the year "few parents [would be] willing to let their children have these valuable experiences."²⁸⁰ In other words, the court sees such exchanges as "beneficial foreign travel" which would be discouraged if they were to lead to a change in the habitual residence of the child.²⁸¹

More importantly, the court's reassertion of the relevance of the shared intention of the parents to the determination of habitual residence²⁸² is based largely on the need to protect children from abduction at all times.²⁸³ The reasoning is that if habitual residence may be shifted without the consent of both parents on the basis of the child's contacts with the new country, then there is a greater incentive for a would-be abductor to try to change the child's habitual residence during an agreed temporary visit. If he succeeds then the child is no longer protected from a subsequent retention in that country. In addition, the renewed emphasis on the shared intentions of the parents promotes the policy of honoring agreements.²⁸⁴

However, the court appears to recognize that there are limits to these policies. Accordingly, it states that a child's habitual residence may change irrespective of the parents' intentions where "we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social environment in which its life has developed."²⁸⁵

In other words, in these circumstances the policy of protecting the child from abduction is either inapplicable or is weak.²⁸⁶

280. *Mozes*, 239 F.3d at 1083.

281. See *supra* Part IV.C, although the author did not think that the *Mozes* case came within the category of "beneficial foreign travel."

282. The Court disapproved of judicial pronouncements (for example the much quoted dictum in *Friederich v. Friederich*, 983 F. Supp. 2d 1396) which stated that parental intentions were not relevant.

283. See *supra* Part IV.A.

284. See *supra* Part IV.E.

285. *Mozes*, 239 F.3d at 1081 (quoting Perez-Vera Report, *supra* note 23, ¶ 11).

286. It might be pointed out that the change in the "child's relative attachments" is likely to mean that the new country would be the *forum conveniens*. Accordingly, the policy of adjudication in the *forum conveniens* would require a finding of a change of habitual residence, see *supra* Part IV.F.

Thus, the court's reasoning appears to support the hypothesis of this article that in determining habitual residence of a child in borderline cases, the court is influenced by the relative strength and weaknesses of the conflicting policy considerations.

THE EVOLUTION OF CODIFICATION IN THE CIVIL
LAW LEGAL SYSTEMS: TOWARDS DECODIFICATION
AND RECODIFICATION

MARIA LUISA MURILLO*

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I. INTRODUCTION

The objective of this article is to consider the fundamental transformation that has been taking place in the civil law tradition¹ due to the influence of the decodification and recodification processes during the 20th century and their perspective on the future. The article makes special reference to the Latin American civil codes.

Codification of the 19th century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as, *ius-naturalism*, rationalism and the Enlightenment. However, by the

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1. The civil law and the common law traditions are the most highly influential legal traditions in the contemporary world, and have been exported with greater or less effect to other parts of the world. See JOHN MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 3 (1994).

turn of the 19th century, the “classical” Codification had been subjected to new forces that gradually changed the legal and social order with crucial consequences on the civil law tradition. The dynamics of the legal change were symbolized by many factors. Two of the more relevant being the decodification and the recodification processes. The former relates to special legislation away from the civil codes that causes fissures in their unit body, and the latter refers to the partial and global reform to avoid civil codes obsolescence.

In Latin America, the 19th century Codification in Central and South America had some particular characteristics. The codification began after the independence process from Spain and Portugal in order to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes. In fact, drafting civil codes and constitutions was the primary interest of jurists and legislators in the Latin American new independent republics. Moreover, the French Civil Code² was used as a “model” by several 19th century Latin American civil codes. Subsequently, new legal approaches and doctrines were used, such as Germanic³ and Italian civil legislation,⁴ among other legal sources. Throughout the 20th century, the tendency towards decodification and recodification in Latin America had substantially transformed the content and structure of the civil codes.⁵ Regardless of the dramatic impact of the decodification process in the civil legal systems, however, the recodification process seemed to have substantial momentum in Europe and

2. For a discussion of the influence of the French Civil Code, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 44-64 (1994); MERRYMAN ET AL., *supra* note 1, at 1149-62; JOSE CASTAN TOBEÑAS, I-1 DERECHO CIVIL ESPAÑOL COMUN Y FORAL 217-21 (Editorial Reus ed. 1988); LUIS DIEZ PICAZO & ANTONIO GULLON, *SISTEMA DE DERECHO CIVIL* 49 (7th ed. 1990).

3. For a discussion of the influence of the German Civil Code, see, e.g., MERRYMAN ET AL., *supra* note 1, at 1163-73; Paolo Becchi, *La Codificación Posible Hegel entre Thibaut e Savigny*, ANUARIO DE DERECHO CIVIL, Jan.-Mar. 1995, at 195-217; JOHN MERRYMAN, LA TRADICIÓN JURÍDICA-ROMANO CANÓNICA 59-71 (Fondo de Cultura Económica ed. 1989) [hereinafter MERRYMAN II].

4. For a discussion of the influence of the Italian Civil Code, see Sandro Schipani, *Notta Introduttiva*, in V STUDI SASSARESI (DIRITTO ROMANO, CODIFICAZIONI E UNITÀ DEL SISTEMA GIURIDICO LATINOAMERICANO XIII-XIV (Giuffrè et al. ed. 1981); LUIS DIEZ-PICAZO Y PONCE DE LEÓN, *Codificación, Descodificación y Recodificación*, ANUARIO DE DERECHO CIVIL, Apr.-Jun. 1992, at 473-84 [hereinafter DIEZ-PICAZO].

5. For a historical perspective of Codification after the independence process in Latin America, see, e.g., JORGE BASADRE, *HISTORIA DEL DERECHO PERUANO* 323 (4th ed., Librería Studium 1988 (1937)); FERNANDO DE TRAZEGNIES, *LA IDEA DE DERECHO EN EL PERÚ REPUBLICANO DEL SIGLO XIX* 151 (Fondo Editorial Pontificia Universidad Católica del Perú 1980).

Latin America, indicating that it would influence the development of the civil law tradition in the foreseeable future.

In summary, after an Introduction in Part I, this Article includes in Part II a brief discussion of the Codification in the 19th century, with special references to Latin American civil codes. In addition, Part III and Part IV contain an approach of the decodification and recodification processes. In both cases, the discussion focuses on the impact of this phenomenon in the classical Codification and its development in the 20th century. Specifically, the last part includes a comment about the recodification process in Latin America.

II. THE CODIFICATION

A. *The Development of the Codification Process*

As many commentators have pointed out, the Codification was a unique socio-historical phenomenon⁶ developed in the civil law tradition during the 19th century. The Codes drafted during this process differed radically from the compilations of the Roman, Canonic law, or other codes.⁷ The root of the Codification was the “intellectual revolution” that took place in Europe in the 18th century with its principles and doctrines based on the Enlightenment, *Ius* rationalism, secular Natural Law, Bourgeois liberalism, and Nationalism. These ideas produced a new way of thinking about society, law, economy, and state with decisive consequences for the civil and common law tradition.⁸ This

6. ANTONIO HERNANDEZ GIL, FORMALISMO, ANTIFORMALISMO Y CODIFICACION, 23 (1970); see also Manuel de la Puente y Lavalle, *La Codificación*, 30 THEMIS 29, 36 (1994); CASTAN TOBEÑAS, *supra* note 2, at 214; Carlos Lasarte Alvarez, *El Derecho Civil en la Epoca Codificadora y Vicisitudes Posteriores*, in II CENTENARIO DEL CÓDIGO CIVIL; 1105, 1106-62 (Editorial Centro de Estudios Ramon Areces ed. 1990); MERRYMAN II, *supra* note 3, at 59-71; Picazo, *supra* note 4 at 474-477; Angel M. Lopez y Lopez, *Constitución, Código y Leyes Especiales, Reflexiones sobre la Llamada Descodificación*, in II CENTENARIO DEL CÓDIGO CIVIL 1163, 1164-76 (Editorial Centro de Estudios Ramon Areces ed., 1990); Juan Roca Guillamon, *Codificación y Crisis del Derecho civil*, in II CENTENARIO DEL CÓDIGO CIVIL 1755, 1756-75 (Editorial Centro de Estudios Ramon Areces ed. 1990).

7. There are substantial differences between Code and Compilation. The Digest of Justinian, the Canonic codes, The 7 Partidas, and The Fueros do not have the characteristics of the modern Codes produced as a result of the Codification process of the 19th century. See CASTAN TOBEÑAS, *supra* note 2, at 211.

8. MERRYMAN ET AL., *supra* note 1, at 441-51; Guillamon, *supra* note 6, at 1755; ERIC J. HOBBSBAWN, *LAS REVOLUCIONES BURGUESAS* 77-129 (Ediciones Guadarrama ed. 1964); MOLTOR-SCHOLOSSER, *PERFILES DE LA NUEVA HISTORIA DEL DERECHO PRIVADO* 61 (trans. Martinez Sarrión 1980). For the development of naturalism in connection with the relationship between justice and law which also applies to the question of the relationship between justice and international economic law, see Frank Garcia, *Trade*

development deeply influenced western nations, producing dramatic events, specifically, the American and French Revolution, the Italian Risorgimento, the wars of independence in Central and South America, and the unification of Germany, among others.

In reference to civil law tradition countries, this philosophical and political phenomenon had a significant effect in the development of public and private law. In particular, Wieacker explained that: “the Codification was not focused on gathering, compiling, improving or reforming the existent scientific or pre-scientific law - as the former German reforms or Roman and Spanish compilations-, but planning a better society by means of new systematic and creative law.”⁹ In fact, the relation Civil Code/Constitution, with the primacy of the private law, supported the legal framework of the 19th century bourgeois liberal society.¹⁰ According to John Merryman, one of the most important aims of the French Revolution was to unify private law, and as a result, “the spirit of the intellectual revolution led the French to promulgate five codes: *Les Cinq Codes*. These include – after the famous *Code Civil des Français* (1804) – *Le Code de Procédure Civile* (1806), *Le Code de Commerce* (1807), *Le Code Pénal* (1810) and *Le Code d’Instruction Criminelle* (1810).”¹¹ Of the five codes, the *Code Civil* is traditionally well known for its fundamental role in consolidating the modern Codification and its vast influence around the world. The French Civil Code’s legal sources include, among others, the *coutumes* of Paris, the Roman Law studies elaborated by French jurists Domat and Pothier, and the law of the Revolution.¹²

Since the ideology of the French Codification reflected the influence of the French Revolution, one of its principal objectives was to repeal entirely the old legal system. In fact, the

and Justice: Linking the Trade Linkage Debates, 19 U. PA. J. INT’L BUS. L. 391, 404-11 (1998).

9. F. WIEACKER, *HISTORIA DEL DERECHO PRIVADO DE LA EDAD MODERNA* 292 (Francisco Fernández Jardón trans., Aguilar 1957 (1908)). See JOSE LUIS DE LOS MOZOS, *Prologue to I EL CODIGO CIVIL DEL SIGLO XXI* 11, 25 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Alvarez, *supra* note 6, at 1106.

10. The relation between Civil Code/Constitution under the bourgeois-liberal revolution in the 19th century was the framework of the legal system. In the words of Lopez y Lopez: “*En una visión de conjunto, el Estado Liberal confiaba el andamiaje jurídico de la sociedad civil al Derecho privado, en rigor a los Códigos civiles. No tenía necesidad de rigidizar los valores profundos, que estaba llamado a representar, en las Cartas Constitucionales, por entenderlos suficientemente amparados por los Códigos.*” Lopez y Lopez, *supra* note 6, at 1165.

11. MERRYMAN ET AL., *supra* note 1, at 453.

12. CASTAN TOBEÑAS, *supra* note 2, at 211.

institutions of the *Ancien Régime*,¹³ absolute monarchy, interlocking powers of the King, nobility, feudalism, territorial division, courts system and others, were eliminated. In its place, by means of the Codes, a new legal system was institutionalized. The legal system was based on principles of the French Revolution and the Enlightened Society. The primacy of the statute law incorporated the equality under the law, individual freedom, private property, liberty of contract and separation of powers to prevent intrusion of the judiciary into areas reserved to the legislative and executive.¹⁴

According to the principles of *ius* rationalism, the Codification focused on systematizing and simplifying the legal system while avoiding the complex *ius commune* framework.¹⁵ As a consequence, it was necessary to draft codes without gaps and with coherent, clear, and complete legal rules. Thus, as far as accessibility to the people was concerned, the French Civil Code represented the model of coherence and simplicity.¹⁶ Jean-Etienne-Marie Portalis, one of the most influential drafters of the French Civil Code, in his *Discours Préliminaire*, remarked that the provisions of the Civil Code were elaborated as principles or maxims to be developed and applied by judges or jurists, although during the post-evolutionary period, the tendency was to deny the judiciary lawmaking power.¹⁷

In addition to France, in the beginning of the 19th century, the tendency towards Codification caused a widespread interest in Germany and others parts of Europe and Latin America. In 1814, Thibaut, the eminent German law professor, proposed that Germany adopt the Codification to unify the entire legal system, thus mirroring the simplicity and coherence of the French civil code, which was the best model to follow.¹⁸ However, Savigny and

13. About the *Ancien Régime* and other social and economic aspects before the revolution, see HOBBSAWN, *supra* note 8, at 25-45.

14. See JEAN-ÉTIENNE MARIE PORTALIS, DISCURSO PRELIMINAR DEL PROYECTO DE CODIGO CIVIL FRANCÉS 27-113 (Manuel de Rivacoba y Rivacoba trans., Edeval ed. 1978); Lopez y Lopez, *supra* note 6, at 1163-64; Díez-Picazo, *supra* note 4, at 474-78.

15. MERRYMAN ET AL., *supra* note 1, at 449-51.

16. See Díez-Picazo, *supra* note 4, at 478; MERRYMAN ET AL., *supra* note 1, at 450 (stating that in some aspects – rationalist ideals of completeness, simplicity, non-technical – the Civil Code of France became a “revolutionary utopia” facing the new contemporary social and economic changes).

17. PORTALIS, *supra* note 14, at 36.

18. See, e.g., Becchi, *supra* note 3, at 195; DE LOS MOZOS, DERECHO CIVIL, METODO, SISTEMAS Y CATEGORÍAS JURÍDICAS 116-17 (Editorial Civitas eds., 1st ed. 1988); De Los Mozos, *La “Cultura Jurídica” del Código Civil: Una Aproximación a Su Estudio*, in I CENTENARIO DEL CÓDIGO CIVIL 663, 673 (Editorial Centro de Estudios Ramon Areces ed. 1990).

the Historical school opposed the Thibaut proposal on the basis of the historical dimension of the law as an expression of “the common consciousness of the people”.¹⁹ The Codification was postponed by several decades. After the German political unification in 1871 several German codes were enacted. The German civil code of 1896 (effective in 1900) had a profound impact on modern Codification.²⁰ The differences between French and German civil codes are relevant. The former is based on the principles of rationalism and *ius-naturalism*, whereas the latter is scientific, technical, and heavily influenced by the Pandectist system.²¹

There is no doubt that the traditional image of the “classical” 19th century codification has changed in contemporary civil law countries. It has become clear in the 20th century that new social, economic, and political developments demanded a shift in emphasis from private law to both public and regulatory law. According to Glendon, “the dynamics of the legal change have worked primarily through a movement away from the civil codes (via special legislation and judicial construction), and through code revision, constitutional law, harmonization of law within the European Community, and the acceptance through treaties and conventions of a variety of supranational legal norms.”²² In general terms, civil law and common law comparativist scholars²³ have asserted that a fundamental transformation has taken place in the civil law tradition which is symbolized by the tendencies toward the “decodification,”²⁴ “constitutionalization,”²⁵ “supranational legislation,”²⁶ and “re-codification.”²⁷

19. Merryman explained the Savigny proposal regarding the codification process in Germany in the following terms:

Savigny’s principal argument against Codification was that his own age lacked the ability necessary to do it properly. In his view, a proper code had to be an organic system based on the true fundamental principles of the law as they had developed over time. A thorough understanding of these principles was an indispensable prerequisite to codification. Savigny found such mastery of principles lacking among his contemporaries and feared that a codification in his time would therefore do more harm than good to perpetuating misunderstandings. Thus, he urged his contemporaries to study the historical evolution of the basic principles first and to turn to codification- if at all- later.

MERRYMAN ET AL., *supra* note 1, at 476.

20. CASTAN TOBEÑAS, *supra* note 2, at 224-28.

21. See DIEZ-PICAZO & GULLON, *supra* note 2, at 51.

22. GLENDON ET AL., *supra* note 2, at 62.

23. *Id.*; MERRYMAN ET AL., *supra* note 1, at 1241.

24. Since the Italian scholar Natalino Irti published his article *L’età della decodificazione* (1978), the theory of decodification had a significant influence in the civil

In dealing with a comparativist legal analysis, it is possible to find that traditional uncodified legal systems have codified particular legal issues. On the other hand, codified systems used to have uncodified legal subjects. According to Schlesinger, there is no highly developed legal system in existence today that is either wholly codified or wholly uncodified.²⁸

A few examples might help clarify this issue. In France, the evolution of the law of torts is an example of judge-made law in

law tradition. See e.g., Natalino Irti, *L'età della decodificazione*, in DIRITTO E SOCIETÀ 613 (1978); NATALINO IRTI, *LA EDAD DE LA DESCODIFICACION* (Editorial Bosh ed., 1992); Adriano De Cupis, *A Proposito di Codice e di Decodificazione*, 25 RIVISTA DE DIRITTO CIVILE 2, 47 (Guifrè ed. 1979); Rodolfo Sacco, *Codificare: Modo Superato de Legifere?*, 29 RIVISTA DI DIRITTO CIVILE 2, 117 (1983).

25. According to Merryman, the movement towards “constitutionalism” in civil law tradition displays a number of common features, which include:

the new constitutionalism has prominently sought to guarantee and to expand individual rights: rights to civil and criminal due process of law; to equality; to freedom of association, movement, expression, and belief; and to education, work, health care, and economic security. The “old” individual rights that were an objective of the revolution and that received their ‘constitutional’ protection in the civil codes- rights of personality, property, and liberty of contract- have to a large extent been achieved and solidified in the work of ordinary courts quietly applying the traditional sources and methods of law. The constitutions are the sites of the new individual rights, and the clash of constitutional litigation is the medium of their definition and enforcement. The rise of constitutionalism is in this sense an additional form of decodification: the civil codes no longer serve a constitutional function.

MERRYMAN, *supra* note 1, at 1245. In the same vein, see Lopez y Lopez, *supra* note 6, at 1170.

26. For some examples of the influence of the European Union (EU) in the state members’ national legislation, see RALPH H. FOLSON ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 1324 (West Group ed. 1999). As to Latin America regional and sub-regional integration, see, e.g., Frank J. Garcia, “Americas Agreements” - *An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT’L L. 63, 65-68 (1997); G. POPE ATKINS, *LATIN AMERICAN INTEGRATION* 169-87 (1995); INTER-AMERICAN DEVELOPMENT BANK, *THE LATIN AMERICAN INTEGRATION PROCESS IN 1988, 1989, 1990*, 3-12 (1992); Julio J. Noguez & Rosalinda Quintanilla, *Latin America’s Integration and the Multilateral Trading System*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 28-31 (Jaime De Melo & Arvind Panagariya eds. 1993).

27. See, e.g., DIEZ-PICAZO, *supra* note 4, at 474-77; DE LOS MOZOS, *supra* note 9, at 11-25.

28. See *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 51 (Rudolf B. Schlesinger ed., 1968); MERRYMAN II, *supra* note 3, at 60-61; Dale Beck Furnish, *Fuentes del Derecho en Los Estados Unidos: La Muerte del Derecho Consuetudinario, Las Fuentes Escritas en la Edad del Derecho Positivo, y el Papel y Efecto de los Restatements of the Law*, 13 IUS ET VERITAS 143, 161 (1996).

the civil law tradition.²⁹ Thus, the issue of formation of contracts in French law is composed entirely of case law since the Civil Code does not have any provisions to solve offer and acceptance problems.³⁰ Conversely, the United States, despite its common law tradition, has a substantial segment of its law of contracts that is currently regulated under the provisions of the Uniform Commercial Code (U.C.C.). American contract law has been greatly influenced by the provisions of the U.C.C. According to Llewellyn, its principal original drafter, Article 2 of the U.C.C. contains not only rules applying specifically to goods transactions (such rules governing shipment, inspection, and the risk of loss), but also provisions susceptible to broader application, such as the Code's definition of "good faith" or its prescription of "unconscionability."³¹ However, civil and common law comparativist scholars pointed out that there are substantial differences between the role and function of the codes under civil or common law tradition including legal systems, ideology, authorities, and enforcement.³²

B. Codification in Latin America in the 19th Century

The most persuasive reasons offered by scholars to explain the 19th century codification in Latin America have been the need to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes.³³ In fact, after the independence, drafting civil codes and constitutions was the primary interest of jurists and legislators in the Latin American new independent republics.³⁴

29. See Parviz Owsia, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 TUL. L. REV. 871 (1992); MERRYMAN ET AL., *supra* note 1, at 1242.

30. *Id.*

31. See E. ALLAN FARNSWORTH, *CONTRACTS* 29-32 (2d ed., 1990); NEW YORK UNIVERSITY SCHOOL OF LAW, *FUNDAMENTALS OF AMERICAN LAW* 201-10 (Alan B. Morrison ed. 1996).

32. See MERRYMAN, *supra* note 1, at 60-62; Furnish, *supra* note 28, at 160-61.

33. J.M. Castán Vázquez, *La Influencia de la Literatura Jurídica Española en las Codificaciones Americanas*, Address before the Real Academia de Jurisprudencia y Legislación (Jan. 23, 1984) (Spain) [hereinafter Vázquez Address]; J.M. Castán Vázquez, *El Sistema de Derecho Privado Iberoamericano*, in *IV Estudios de Derecho Civil en Honor del Profesor CASTAN TOBENAS* 157-88 (Ediciones Universidad de Navarra ed., 1969) [hereinafter *Derecho Privado*].

34. P. Catalano, *Sistema Jurídico, Sistema Jurídico Latino-Americano y Derecho Romano*, REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA, Sept. 1982; Alejandro Guzmán Brito, *Puntos de Orientación para el Estudio Histórico de la Fijación y Codificación del Derecho en Iberoamérica*, REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA (1983); J.L. De Los Mozos, *Perspectivas y Método para la Comparación*

The French Civil Code enacted in 1804 was the “model” to draft Latin American civil codes in the early 19th century.³⁵ Since it had Roman law influence, its adoption did not require an entire break from the preexisting Spanish and Portuguese colonial legal structure. Moreover, the 19th century codification served to consolidate the Roman law introduced in Latin America by Spanish and Portuguese colonial legislation.³⁶ In general, the language and concepts of the French codes were clear and familiar for Latin American countries because of their affinities with the legal institutions that were introduced in Latin America during the colonial period.³⁷

In the 19th century, the most relevant and influential Latin American civil codes were drafted by conspicuous drafters: Andres Bello (Chilean Civil Code),³⁸ Velez Sarsfield (Argentinian Civil Code)³⁹ and Teixeira de Freitas (draft of Brazilian Civil Code).⁴⁰ As an illustration, the Chilean civil code drafted by Andres Bello was adopted virtually in its entirety in Ecuador (Civil Code of 1860) and Colombia (Civil Code of 1873), while Argentina, Paraguay, Uruguay, Honduras, Venezuela, El Salvador and Nicaragua adopted specific provisions in their own civil codes.⁴¹

Although highly influenced by the French Civil Code, most Latin American civil codes enacted in the 19th century adopted a variety of other legal sources. From this perspective, the sources most frequently cited as contributing to the formation of the Civil Codes in Latin America are the following:

Jurídica en Relación con el Derecho Privado Iberoamericano, 60 REVISTA DE DERECHO PRIVADO 777 (1976) [hereinafter *Perspectivas*].

35. The early 19th century Latin American civil codes were adopted as follows: Haiti (1825), Oaxaca (México) (1827-1828), Bolivia (1831), Dominican Republic (1844), Perú (1852) and Chile (1855). CASTAN TOBEÑAS, *supra* note 2, at 221.

36. Vázquez Address, *supra* note 33, at 100-10.

37. *Id.*

38. See A. GUZMAN BRITO, I ANDRES BELLO CODIFICADOR: HISTORIA DE LA FIJACION Y CODIFICACION DEL DERECHO CIVIL EN CHILE 115 (Ediciones Universidad de Chile ed., 1982); J.M. Castán Vázquez, *El Humanismo de Andrés Bello y su Proyección en el Derecho Civil Iberoamericano*, 5 CENTENARIO REVISTA CRITICA DE DERECHO INMOBILIARIO 653, 666 (1992); FERNANDO MURILLO RUBIERA, ANDRES BELLO: HISTORIA DE UNA VIDA Y DE UNA OBRA 189-437 (La Casa de Bello ed., 1986).

39. See CASTAN TOBEÑAS, *supra* note 2, at 223.

40. Sandro S. Schipani, *Dal Diritto Romano alle Codificazioni Latino-ameriamicane: L'opera di A. Teixeira de Freitas*, in V STUDI SASSERSI (DIRITTO ROMANO, CODIFICAZIONI E UNITA DEL SISTEMA GIURIDICO LATINOAMERICANO XIII-XIV (Giuffrè et al. ed., 1981); CASTAN TOBEÑAS, *supra* note 2, at 230.

41. GUZMAN BRITO, *supra* note 38, at 463.

Roman Law which is the fundamental source of all the “Roman-Germanic family” or civil law tradition.⁴²

Spanish and Portuguese laws enforced in Latin America before civil codes were drafted. Among these were the “Novísima Recopilación,” “Las Siete Partidas,” and the “Fuero Real.”⁴³

The French Civil Code of 1804, known as the Napoleonic Code.⁴⁴

Additionally, other civil codes enforced at the time of civil codes drafting in Latin America include the Civil Codes of Germany, Spain, Switzerland, Sardinia, Austria, Prussia and the two Sicilies influenced the formation of the Civil Codes in Latin America.⁴⁵ For instance, the Brazil Civil Code of 1917 had a remarkable influence of the German Civil Code, and Cuba adopted almost entirely the Spanish Civil Code of 1889.⁴⁶ Civil law treaties and studies written by prestigious French, German and Spanish scholars in the 19th century: Pothier, Domat, Troplon, Zacharie, Demolombe, Merlin, Escriche, Molina, Garcia Goyena and Savigny, among others also contributed to some extent.⁴⁷

Over the 20th century, the obsolescence in various degrees of the early 19th century codes motivated a tendency towards legislative reforms in Latin America. This phenomenon follows the general tendency in civil law systems toward the partial or global reforms of codes to adapt socio-economic and legislative changes.

III. THE THEORY OF DECODIFICATION

Since the Italian scholar Natalio Irti published his article *L'età della decodificazione* (1978), several commentators have analyzed the process of decodification under different perspectives

42. MERRYMAN ET AL., *supra* note 1, at 473.

43. Vázquez Address, *supra* note 33, at 100-10.

44. CASTAN TOBEÑAS, *supra* note 2, at 217-24.

45. MERRYMAN ET AL., *supra* note 1, at 473.

46. CASTAN TOBEÑAS, *supra* note 2, at 230-32.

47. See MERRYMAN ET AL., *supra* note 1, at 472-73; Vázquez Address, *supra* note 33, at 100-10.

with specific references to the civil codes.⁴⁸ According to Diez Picazo “decodification is the proliferation of special legislation outside the codes that causes important fissures in the unit body of the civil codes.”⁴⁹ It is clear that during the 20th century, in response to social and economic changes, civil codes faced decodification when special legislation removed large areas of law from the coverage of the civil codes creating new areas of law or “microsystems”⁵⁰ that differed ideologically and methodologically from the original structure of the civil codes.⁵¹ Consequently, areas of heterogeneous statutory law have increased on a variety of civil code topics such as, employment law, urban and agrarian leases, intellectual property, insurance, contracts of carriage, competition, monopoly, and consumer protection law. These laws are not merely a supplement to the code to complete or clarify its provisions, but rather, they break up the original unity of the civil system creating a plurality of microsystems with different principles.

In addition, the growth of judge-made law has produced another kind of decodification.⁵² Civil law courts have created “doctrines” and “the applicable law” by interpreting or by developing new judge-made rules in order to adapt the codes to new conditions, to fill gaps, to clarify ambiguities, and to deal with incompleteness.⁵³ In fact, prominent examples of judge-made law in the civil law tradition include: the law of torts under the French and Spanish courts,⁵⁴ the doctrines of “abuse of law,” “good faith,” “*clause rebus sic sanctibus*,” “*venire contra factum proprium*,”⁵⁵ “the general doctrine of precontract”⁵⁶ created by the Spanish courts since the early 20th century, and the application of “*rebus sic stantibus doctrine*” under the general clause section

48. See Irti, *supra* note 24, at 613; MERRYMAN ET AL., *supra* note 1, at 1241; DIEZ-PICAZO, *supra* note 4, at 473; Lopez y Lopez, *supra* note 6, at 1163-64. For a discussion about decodification in Latin America see, e.g., Alejandro Guzmán Brito, *Codificación, Descodificación y Recodificación del Derecho Civil Chileno*, 2 REVISTA DE DERECHO Y JURISPRUDENCIA 39, 41 (1993); Jorge Mosset Iturraspe, *La Codificación en Latinoamérica*, in II COMISION DE REFORMA DE CODIGOS 653, 655 (Comisión de Reforma de Códigos del Perú ed., 1999).

49. DIEZ-PICAZO, *supra* note 4, at 478.

50. MERRYMAN ET AL., *supra* note 1, at 1241.

51. GLENDON ET AL., *supra* note 2, at 64.

52. *Id.* at 63; MERRYMAN ET AL., *supra* note 1, at 1242; DIEZ-PICAZO, *supra* note 4, at 478-79.

53. DIEZ-PICAZO, *supra* note 4, at 478-79.

54. MERRYMAN ET AL., *supra* note 1, at 1242.

55. DIEZ-PICAZO, *supra* note 4, at 479.

56. For a discussion about the Spanish judge-made law in the general theory of precontract, see MARIA LUISA MURILLO, *FORMA Y NULIDAD DEL PRECONTRATO* 50, 53 (1993) (Spain).

242 B.G.B. developed in German courts.⁵⁷ Moreover, Merryman emphasizes the growth of the public administration that interprets laws, issues, rules, and makes decisions that affect citizens more directly than legislation or litigation.⁵⁸

The growth of constitutionalism is an additional form of decodification. As Merryman noted, “the civil codes no longer serve a constitutional function” as they had in the past under the bourgeois liberal Constitutions.⁵⁹ In addition, after World War II, new Constitutions of “rigid character” were enacted in civil law countries providing mechanisms to challenge the constitutionality of legislation. In Spain, before the Family Civil Law Reform of 1981, civil codes were made void through means of a judicial process that determined their constitutionality.⁶⁰ The new European constitutions provided the establishment of special tribunals with the power of judicial review (i.e., the Austrian, German and Italian Constitutional Courts, the Spanish Constitutional Tribunal, and the French Constitutional Council).⁶¹

The development of supranational legislation, such as the European Union (“EU”) Directives,⁶² the regional or sub-regional integration agreements⁶³ and international commercial legislation such as the Convention on Contracts for the International Sale of

57. See Klang-Byklinsky, A.B.G.B. Kommentar (1976); MERRYMAN ET AL., *supra* note 1, at 1163.

58. MERRYMAN ET AL., *supra* note 1, at 1244.

59. See *id.* at 1245. In the same perspective, see Lopez y Lopez, *supra* note 6, at 1170; DIEZ-PICAZO, *supra* note 4, at 473-84.

60. DIEZ-PICAZO, *supra* note 4, at 473-84.

61. *Id.*

62. Of significance is the tendency towards the unification of European Contract Law caused by the commercial expansion of the European Union (EU) and the “Common Market”. Among this efforts: the *Principles of European Contract Law* (1995-1998) drafted by the Commission on European Contract Law (PECL) (Chairman, Prof. Ole Lando). The main purpose of the PECL is to serve as a first draft of a part of a European Civil Code. However before they are enacted, the PECL may also be applied as part of the *lex mercatoria*. Other initiatives, the *Contract Code* (1972), drafted by Harvey McGregor on behalf of the English Law Commission and the *European Code of Contracts Draft* (1995-1997) elaborated by the Academia of European Private Lawyers, based on the proposal of Professor Giuseppe Gandolfi during the first Congress of Pavia, Italy (1990). See, e.g., Lando & Beale (eds.), *Principles of European Contract Law, Parts I & II, combined and revised, the Hague/London/ Boston, 1999*; HARVEY MCGREGOR, *CONTRACT CODE: PROYECTO REDACTADO POR ENCARGO DE LA LAW COMMISSION INGLESA* (José M. Bosch ed., trans. Jose María de la Cuesta Saenz & Carlos Vattier Fuenzalda (1997)); G. Gandolfi, *Pour Un Code Européen Des Contracts*, in *REVUE INTERNATIONALE DE DROIT CIVIL* 707, 708 (1992).

63. See FOLSON ET AL., *supra* note 26, at 90. Regarding Latin American regional and sub-regional integration, see *supra* authorities cited in note 26.

Goods (“CISG”),⁶⁴ set aside national laws with crucial consequences for contemporary civil and common legal traditions.⁶⁵

IV. THE RECODIFICATION PROCESS

A. Preliminary considerations

Generally, over the 20th century, the obsolescence in various degrees of the early 19th-century codification has triggered a tendency towards partial or global reform to adapt civil codes to the fundamental transformations taking place in the civil law tradition.⁶⁶ In fact, the civil legal system in the 19th century was characterized by its strong individualism, legislative supremacy, rigorous separation of the judiciary from the legislative and administrative powers, limited judicial role, denial of *stare decisis*, primacy of the civil code, development of conceptual structure, preoccupation with certainty, systematization and completeness of the codes.⁶⁷ This 19th-century “model” has been subjected to profound transformation caused by several forces, such as socio-economic changes, social and economic diversity in society, globalization, international trade, industrial and post-industrial revolution, technological development, legal changes, decodification, recodification, supranational legislation, regional and sub-regional integration, unification of commercial and civil law, “socialization” of the law, impact of constitutionalism, etc.⁶⁸

From this perspective, civil law countries concerned about the obsolescence that affects the civil codes decided to adapt the codes to reflect the changes by means of different legal techniques, including filling gaps through special legislation and judicial-lawmaking.⁶⁹ However, the proliferation of special legislation moving away from the codes caused confusion and uncertainty about the applicable law. This phenomenon reinforced the revision of the codes incorporating special legislation and the

64. John A. Spanogle & Peter Winship, *International Sales Law: A Problem-Oriented Coursebook* 51 (West Group ed. 2000); Folson et al., *supra* note 26, at 90.

65. **FIRST NAME** ZIMMERMAN, *ESTUDIOS DE DERECHO PRIVADO EUROPEO* 111, 112-159 (Civitas ed., trans. Antoni Vaquer Aloy (2000)).

66. See MERRYMAN ET AL., *supra* note 1, at 1241.

67. *Id.*

68. See GLENDON ET AL., *supra* note 2, at 63-64; DIEZ-PICAZO, *supra* note 4, at 478-79; Iturraspe, *supra* note 48, at 660.

69. DIEZ-PICAZO, *supra* note 4, at 482-84.

substitution of the entire code for a new one, commonly known as “recodification.”⁷⁰

The concept of recodification is neither simple nor uncontroversial. According to De los Mozos, by means of recodification, the special legislation is incorporated on the current code system.⁷¹ However, depending on the particular circumstances, the entire system can be substituted for a new codification.⁷² Civil and common law commentators asserted that the recodification process brought new vitality to civil law tradition.⁷³ As an illustration, France, Germany, Belgium, Italy, Swiss and Spain have revised and reformed partially their ancient civil codes covering major civil areas as family Law, property Law, individual rights, etc.⁷⁴ On the other hand, several civil law countries pursued global reforms drafting a second and a third generation of new codes that repealed the old ones.⁷⁵ They differ substantially from the earlier “classical” first generation of codes adopted in the 19th century.

70. See DE LOS MOZOS, *supra* note 9, at 11, 25.

71. *Id.*

72. De Los Mozos asserted that the Codification of *lege lata* is not a recodification in strict legal sense:

No es propiamente recodificación lo que entienden algunos, acudiendo al subterfugio de distinguir entre codificación de lege lata y codificación de lege ferenda, porque la primera no es más que una preparación de la verdadera y propia Codificación. En Francia, donde no ha existido ni existe una Comisión General de Codificación al estilo español aparecen Comisiones de Codificación a partir de 1948 y que fundamentalmente, tienen la finalidad de la codificación de lege lata y que por ello se limita a determinar los preceptos implícitamente derogados a aclarar las contradicciones y a introducir modificaciones formales.

Id. at 11-21.

73. See DIEZ-PICAZO, *supra* note 4, at 474, 484.

74. See DE LOS MOZOS, *supra* note 9, at 21. Concerning the reforms in the French Civil Code of 1804 and German Civil Code of 1900, see MERRYMAN ET AL., *supra* note 1, at 1153-73; CASTAN TOBENAS, *supra* note 2, at 215-30. As to the Spanish Civil Code of 1886, the “Título Preliminar,” and the Family Law section were reformed in 1974 and 1981, respectively. (All made significant transformations to the Spanish civil law). See also ACADEMIA MATRITENSE DE NOTARIADO, ESTUDIOS SOBRE EL TITULO PRELIMINAR DEL CÓDIGO CIVIL I-II (Edersa ed. 1977); CASTAN TOBENAS, *supra* note 2, at 276; Sandro Schipani, *Il Codice Civile Spagnolo come Ponte fra Sistema Latinoamericano e Codice Europei*, REVISTA DE DIRITTO CIVILE, May–Apr. 1994, at 359, 360-97. In reference to the Swiss Civil Code of 1907, see CASTAN TOBENAS, *supra* note 2, at 228.

75. See, e.g., Civil Code (Italy) (1942), Civil Code (Portugal) (1966), Civil Code (Guatemala) (1963), Civil Code (Bolivia) (1975), Civil Code (Venezuela) (1982), Civil Code (Perú) (1984), Civil Code (Paraguay) (1987), Civil Code (Netherlands) (1990), Civil Code (Québec) (1994). See Luis F.P. Leiva Fernandez, *La Legística y la Reforma de los Códigos Civiles*, in II EL CODIGO CIVIL DEL SIGLO XXI, 1449, 1472 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000).

From this perspective, the Italian Civil Code of 1942 has remarkably influenced the second generation of civil codes in Europe, such as the Portuguese Civil Code of 1966-67 and the Netherlands Civil Code, which went into effect in 1992.⁷⁶ In Latin America, its influence is significant in the civil codes of Perú (1984) Venezuela (1982), and Paraguay (1987), among others.⁷⁷

Considering the characteristics of the 20th century recodification and code revision,⁷⁸ however, they differ substantially from the “classical” codification. The recodification tends to be marked by more eclecticism. This takes the form of using comparative law to investigate approaches and solutions to common problems. For example, to draft the Civil Code of the Netherlands (1990), which went into effect in 1992, and the Civil Code of Québec (1994), the draftspersons drew not only on a variety of continental European models, but on the common law and international conventions.⁷⁹ From this perspective, the exchange of ideas among common law, civil law, and Nordic systems would be reinforced through the European Union or other supranational organizations.⁸⁰

In addition, the diversity in society is considered a decisive element to take into account during the recodification process. Modern lawmakers are more pragmatic than the drafters of the Enlightenment codes or the highly abstract German Civil Code. In fact, today’s private law reform is often preceded by significant fact and opinion research in comparative law and sociology. Finally, contemporary civil law shows an awareness of the limits of law, avoiding excessive casuistry and introducing general clauses of good faith and equity in the civil codes. This flexible rule increases the participation of judicial role.⁸¹

B. The Re-codification Process in Latin America

In Latin America, the tendency towards partial or global reform to avoid the obsolescence of codification has been developed with success not only in civil codes, but in commercial,

76. DIEZ-PICAZO, *supra* note 4, at 474-83.

77. *Id.*

78. See GLENDON ET AL., *supra* note 2, at 64; DIEZ-PICAZO, *supra* note 4, at 482.

79. *Id.*

80. For further information on the development of European Union’s supranational legislation, see *supra* note 62.

81. See GLENDON ET AL., *supra* note 2 at 64; Iturraspe, *supra* note 48, at 653, 655; Martha Figueroa Torres, *Criterios Orientadores para la Revisión y Reforma del Código Civil de Puerto Rico*, in II EL CÓDIGO CIVIL DEL SIGLO XXI, 1449, 1472 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed., 2000).

administrative and criminal codes as well. The growth of “commissions to reform civil codes” has given a strong impulse to the recodification process in Central and South America, including in Argentina, Brasil, Bolivia, Perú and Puerto Rico.⁸² Moreover, new civil codes have been drafted in Guatemala (1963), Bolivia (1975), Venezuela (1982), Perú (1984), Paraguay (1987).⁸³ In addition, revision and partial reforms have been introduced in the civil codes of Ecuador, Colombia and Argentina, among others.⁸⁴

82. The “commissions to reform civil codes” have reinforced the recodification process, including the “*Comisión especial encargada de elaborar el Anteproyecto de Ley de Reforma del Código civil de Perú*” created by Law No. 26394 (Nov. 22, 1994); the “Comisión de Reforma del Código civil argentino” created in 1995; the “Comisión conjunta permanente para la revisión y reforma del Código civil de Puerto Rico” created by Law No. 85 (Aug. 16, 1998); the “Comisión de revisión y actualización del Código civil boliviano” (1994). See Atilio Anibal Alterini & Carlos Alberto Soto, *Preface to I EL CÓDIGO CIVIL DEL SIGLO XXI* 27, 48 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Jorge Muniz Zichez, *15 Años del Código Civil y Su Proceso de Reforma*, in *I EL CÓDIGO CIVIL DEL SIGLO XXI* 27, 48 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Hector Alegría, *Reforma del Código Civil Argentino: Proyecto Unificado de 1998*, in *II EL CÓDIGO CIVIL DEL SIGLO XXI*, 945, 970 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Juan Antonio Chachín Lupo, *Construcción del Nuevo Orden Jurídico para Bolivia*, in *II EL CÓDIGO CIVIL DEL SIGLO XXI* 1473, 1482 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Figueroa Torres, *supra* note 81, at 1483, 1523.

83. CASTAN TOBENAS, *supra* note 2, at 221; Leiva Fernandez, *supra* note 75, at 1457-59; Código Civil del Perú, Edición Oficial (Ministerio de Justicia del Perú ed. 1984); Chachín Lupo, *supra* note 82, at 1476-82; Figueroa Torres, *supra* note 81, at 1485-1523.

84. As illustrated, the recodification has had different degrees of influence, with the most significant being in the Latin American civil codes drafted in the 19th century: the Civil Code of Argentina (1871) – drafted by Velez Sarsfield – the Civil Code of Chile – drafted by Andres Bello – and the Civil Code of Brasil (1916).

The Civil Code of Argentina was revised and only partially reformed in 1968. Thus, in 1995, the Argentinian executive power decided to designate a “commission of jurists” to draft a new civil code. The final version of the civil code, elaborated upon by the commission mentioned below, is still pending until receipt of official final approval. See Guillermo Borda, *El Problema de la Reforma de los Códigos Civiles*, in *II COMISION DE REFORMA DE CODIGOS* 649, 660 (Comisión de Reforma de Códigos del Perú ed. 1999).

The Civil Code of Chile (1855) has not been partially or globally reformed to date. Chilean commentators noted that the decodification process has created a vast bulk of legislation, outside the Civil Code originally drafted by Bello, which must be adapted to the transformations of the civil law. See Guzmán Brito, *supra* note 34, at 41-62; FERNANDO FUEYO LANERI, *INSTITUCIONES DE DERECHO CIVIL MODERNO* 571 (Editorial Jurídica de Chile ed. 1990). As to the new tendencies in contracting under the Chilean civil legal system, see HERNÁN CORRAL TALCIANI, *Nuevas Formas de Contratación y Sistema de Derecho Privado (con Especial Referencia al Derecho Chileno)*, in *INSTITUCIONES DE DERECHO PRIVADO-CONTRATACION CONTEMPORANEA* 547, 548-66 (Palestra ed. 2000). In 1975, Brazil decided upon the drafting of a new civil code taking into account the obsolescence in certain areas of the Brazilian Civil Code of 1916. The final project of civil code, elaborated by a special commission of jurists, is pending on official final approval. See Figueroa Torres, *supra* note 81, at 1502; CASTAN TOBENAS, *supra* note 2, at 230.

An approach to the recodification in Argentina and Peru would be useful to illustrate this process. The civil code of Argentina (1871), which was drafted by the eminent jurist Dalmacio Velez Sarsfield, is one of the most influential civil codes of the 19th century in Latin America.⁸⁵ The Argentinian commentators pointed out that the partial reform of its ancient civil code was necessary for several reasons, which included obsolescence in major areas, socio-economic changes, growth of special legislation outside of the civil code, and decodification.⁸⁶

After several unsuccessful projects of reform, the Law of Reforms No.17.711, which was enacted in 1968, introduced structural and ideological changes in the civil code covering major areas like family law, contracts, property, and individual rights.⁸⁷ The Velez Sarsfield Code, being drafted in the 19th century, was a rational, liberal and individualistic approach.⁸⁸ However, this reform shifts it towards social values introducing provisions about the theory of abuse of law, the *rebus sic sanctibus* clause and the principle of good faith and equity.⁸⁹ In Argentina, the judge-made law had a decisive influence in developing the law of torts and consumer protection.⁹⁰ In 1995, the executive power decided that “the drafting of a new civil code of Argentina” would integrate into the legal system relevant provisions, such as the constitutional reforms of 1994, the international treaties that affect commercial and civil areas and the unification of the private law.⁹¹ The “Comisión Honoraria” consisting of distinguished jurists, drafted the project of the new Argentinian Civil Code, which is pending official approval by the Congress.⁹²

When considering the Peruvian Codification, commentators noted that the principal goal of the Peruvian civil code of 1852 was to consolidate the independence process.⁹³ Its principal legal source was the French Civil Code.⁹⁴ In 1922, after a long debate, the Congress of Perú decided to achieve a global reform of the civil

85. *Derecho Privado*, *supra* note 33, 174-75.

86. See Guillermo Borda, *La Reforma de 1968 al Código Civil Argentino*, in II EL CODIGO CIVIL DEL SIGLO XXI 1473-482 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000).

87. *Id.*

88. Borda, *supra* note 84, at 650-60.

89. *Id.*

90. *Id.*

91. See Alterini & Soto, *supra* note 82, at 37-47; Alegría, *supra* note 82, at 945-70.

92. *Id.*

93. León Barandiarán, *Estudio Comparado del Código Civil de 1852 y el Código Napoleónico*, 2 III REVISTA JURÍDICA DEL PERÚ 71, 72 (1952).

94. *Id.*; *Perspectivas*, *supra* note 34, at 79.

code.⁹⁵ As a result, a new Peruvian civil code was enacted in 1936.⁹⁶ Its purpose was to introduce modern legal institutions that were under the influences of the German, Argentinian and Brazilian civil codes, which were among other socio-economic changes of the early 20th century.⁹⁷ However, commentators pointed out that several factors gradually influenced the revision and global reform of the civil code of 1936, such as accelerated socio-economic changes, progressive obsolescence in different areas, scientific and technological developments, decodification, and constitutional transformations introduced by the new Constitution of 1979.⁹⁸

As a result, the current Peruvian Civil Code was enacted in 1984.⁹⁹ It had a significant influence on the Italian Civil Code (1942) in major areas such as contract law, introducing new institutions like “la lesión”, “excesiva onerosidad de la prestación,” “contrato por persona a nombrar,” “contrato en favor de tercero,” and “contrato de suministro.”¹⁰⁰ In addition, it is the process of a partial reform of the Peruvian Civil Code of 1984 that focused on specific areas including the unification of the civil and commercial law and the adjustment to the new Constitution of 1993.¹⁰¹ The appropriate approach when determining whether a global or partial reform is needed in dealing with socio-economic changes and avoiding the obsolescence of the civil codes depends on the particular circumstances and necessities of each society and its legal system.¹⁰²

95. Comisión Reformadora del Código Civil Peruano, *Actas de las sesiones de la Comisión reformadora del Código civil peruano de 1852, creada por Supremo Decreto de 26 de agosto de 1922* (C.A. Castrillón ed. 1928); Sandro S. Schipani, *El Código Civil Peruano de 1984 y El Sistema Jurídico Latinoamericano*, in *EL CÓDIGO CIVIL PERUANO Y EL SISTEMA JURIDICO LATINOAMERICANO* 41, 43-69 (Cultural Cuzco ed. 1986).

96. F. GUZMÁN FERRER, *CÓDIGO CIVIL PERUANO DE 1936* (Cultural Cuzco ed. 1982).

97. Schipani, *supra* note 95, at 43-69.

98. PROYECTOS Y ANTEPROYECTOS DE LA REFORMA DEL CODIGO CIVIL I-II (Fondo Editorial, Pontificia Universidad Católica del Perú ed. 1980) [hereinafter PROYECTOS].

99. *Código Civil del Perú, Edición Oficial* (Ministerio de Justicia del Perú ed. 1984).

100. Jorge Muñoz Ziches, *Reformas al Código Civil de 1984*, in II COMISION DE REFORMA DE CODIGOS 382, 383-408 (Comisión de Reforma de Códigos del Perú ed. 1999); MANUEL DE LA PUENTE Y LAVALLE, *EL CONTRATO EN GENERAL XI*, 1st part, XV, 2nd part (Fondo Editorial Pontificia Universidad Católica del Perú ed. 1993); PROYECTOS, *supra* note 98.

101. See Carlos Alberto Soto, *La Reforma del Código Civil de 1984*, in I EL CÓDIGO CIVIL DEL SIGLO XXI 85, 86-126 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Ziches, *supra* note 82, at 385; Juan José Ballén et al., *¿Hasta dónde Llegamos? En busca del Código Civil Perfecto: Conversación con Jorge Avendaño, Manuel de la Puente y Lavalle y Felipe Osterling*, 14 IUS ET VERITAS 145, 155 (1997).

102. See DE LOS MOZOS, *supra* note 9, at 19.

From this perspective, Diez-Picazo suggested that partial reforms of the civil codes were more likely to be successful in legal systems with an efficient judicial role to prevent conflicts and fill gaps by means of judge-made law and application of general clauses.¹⁰³ For example, Spain, German and France have ancient civil codes, but partial reforms and flexible judge-made law have adapted them to new necessities.¹⁰⁴ However, in the absence of such a change, a global reform that substitutes the entirely legal system would be appropriate. As an example, a second and third generation of civil codes have been enacted in Europe, Latin America, and North America, including the civil codes of Italy (1942), Netherlands (1992), Perú (1984) and Québec (1994).¹⁰⁵

Finally, the majority of contemporary commentators have emphasized the importance of adaptation of the civil codes to the constitutional reforms.¹⁰⁶ As mentioned above, partial and global reforms in the 20th century have been pursued to introduce constitutional transformations in the civil codes to guarantee the rights of human beings in economic, social, cultural and spiritual projections. According to De Los Mozos, this tendency has reinforced the significant role of the civil code, which focused on the development of the human being's rights from a personal and social dimension.¹⁰⁷

V. CONCLUSIONS

A fundamental transformation has taken place in civil legal systems due to the impulse of new forces in Society and Law. The dynamics of legal change are symbolized by many factors, with the decodification and the recodification processes being two of the more relevant.

Recodificar, pues, no es más que 'racionalizar' el Derecho reconduciendo las normas a ese parámetro de racionalidad. Unas veces habrá que reconducir las leyes especiales al sistema del código porque haya pasado su oportunidad bien porque carecía por completo de ella. Pero, otras veces, el cambio de circunstancias o la aparición de hechos nuevos debidamente ponderados, deberán impulsar la propia reforma del sistema.

Id.

103. See DIEZ-PICAZO, *supra* note 4, at 482-83.

104. *Id.*

105. See, among others, MERRYMAN ET AL., *supra* note 1, at 1241-46; Guillamon, *supra* note 6, at 1755-75; DIEZ-PICAZO, *supra* note 4, 482-83.

106. See, among others, Guillamon, *supra* note 6, at 1755-75; Lopez y Lopez, *supra* note 6, at 1163-76.

107. DE LOS MOZOS, *supra* note 9, at 11-25.

From this perspective, adapting civil codes to the changes and new necessities has been the principal concern of civil law countries. As a result, the application of different legal techniques to fill the gaps produced by the growth of special legislation around the codes created large bodies of legal provisions to complete and clarified elucidated matters governed by the civil code. However, the decodification emerged when this special legislation removed large areas from the coverage of the civil codes and created new areas of law or “microsystems” that differed ideologically and methodologically from the original structure of the civil code. For example, employment law, urban and agrarian leases or consumer protection law, and intellectual property, to name just a few. In addition, new forms of decodification have proliferated by means of judge-made law, the rise of constitutionalism and the supranational legislation.

Regardless of the dramatic impact of the decodification in the civil legal systems, the recodification process brought new vitality to the civil law tradition by means of partial and global reforms to avoid gradual obsolescence in the civil codes. Furthermore, the global reforms have promoted the drafting of new civil codes that differ substantially from the “classical” 19th century codification. The method of recodification takes into account new criteria to draft civil codes including the use of comparative law to investigate approaches and solutions to common social problems, taking into account the diversity of society for determining how to regulate legal institutions, awareness about the limits of the law prevents excessive casuistry, the reinforcement of judicial role, and the tendency to general clauses, etc.

By the turn of the 20th century, it has become clear that the recodification process has had substantial momentum in Europe and Latin America, indicating that it will influence the development of the civil law tradition in the foreseeable future.

RECENT DEVELOPMENTS IN INTERNATIONAL
LAW: ANTI-TERRORISM LEGISLATION – PART
ONE: AN OVERVIEW

JOSHUA D. ZELMAN*

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I. INTRODUCTION

The effects of terrorism and the risk of future attacks have been the topic of discussion and research for many years.¹ However, at no time in recent history has there been such a perceived need to enact legislation that addresses methods for eradicating terrorism as there is today. The events of September 11th have served as a springboard for radical and far-reaching legislation intended to enable countries to better detect, prevent, prosecute, and, ultimately, put an end to terrorism. With the United States of America playing the role of a powerful lobbyist, many countries have either passed legislation,² or are in the

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1. See, e.g., Barry Kelman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417 (2001); Joginder S. Dhillon & Robert I. Smith, *Defensive Information Operations and Domestic Law: Limitation on Government Investigative Techniques*, 50 A.F.L. REV. 135 (2001).

2. For example, legislative acts that have passed in the United States include: The Intelligence Authorization Act for Fiscal Year 2002, H.R. 2883, 107th Cong. (enacted 2001); Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. (enacted 2001); USA PATRIOT Act of 2001, H.R. 3162, 107th Cong. (enacted 2001); National Defense Authorization Act for Fiscal Year 2002, S. 1438, 107th Cong. (enacted 2001); Aviation and Transportation Security Act, S. 1447, 107th Cong. (enacted 2001); and

process of passing legislation,³ that are intended to combat terrorism.

This article is part one in a two-part series on the anti-terror legislative wildfire that has engulfed governmental bodies the world over. Part I of the series is intended to briefly summarize the formal legislation that has been enacted by countries and international organizations that support the United States in its “War Against Terrorism.” Part II of the series will focus on the effects of legislation passed by the United States Congress, especially the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), and analyze the legality of such legislation.⁴

II. THE ALLIED RESPONSE

In a bold move that would set the stage for his political agenda, President George W. Bush addressed a joint session of Congress on September 20, 2001. In this address, the President told the world that the United States of America would not rest until she had caught each and every person responsible for the

Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (enacted 2001). Acts in the United Kingdom include: Anti-terrorism, Crime and Security Bill, 2001, c. 24 (Eng.); and Criminal Justice and Police Act of 2001, c. 16 (Eng.). Acts in Canada include: The Anti-Terrorism Act, ch. 41, 2001-2002 S.C. __ (Can.).

3. Legislative proposals in the United States include: Displaced Workers Relief Act of 2001, H.R. 2946, 107th Cong. (2001); True American Heroes Act, H.R. 3054, 107th Cong. (2001); Terrorism Risk Protection Act, H.R. 3210, 107th Cong. (2001); Anthrax Victims Compensation Act, H.R. 3228, 107th Cong. (2001); Public Health Security and Bioterrorism Response Act of 2001, H.R. 3448, 107th Cong. (2001); Airport and Seaport Terrorism Prevention Act, S. 1429, 107th Cong. (2001); Post Terrorism Mental Health Improvement Act, S. 1729, 107th Cong. (2001); and Economic Security and Recovery Act of 2001, S. 1791, 107th Cong. (2001). Proposals in Canada include: Public Safety Act, H.C. Bill C-42, 37th Parl. (2001).

4. Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation – Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. & POL'Y __ (forthcoming Spring 2001).

In the second part of this series, the author will examine issues, such as whether the provisions of the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 are constitutional, especially in light of the U.S. Supreme Court's recent decision in *Zadvydas v. G. Davis*, 533 U.S. __, 121 S.Ct. 2491 (2001). In *Zadvydas*, the issue before the Court was whether the Attorney General was authorized “to detain a removable alien indefinitely beyond the [90-day] removal period or only for a period reasonably necessary to secure the alien's removal.” *Id.* at 2495 (emphasis in original).

In deciding that an alien may be held beyond the initial 6-month period, the Court held that any such detention beyond that initial period must be supported by evidence that there is a “significant likelihood of removal in the reasonably foreseeable future.” *Id.* at 2505. One of the questions that will be examined in the second part of this series is whether section 412 of the USA PATRIOT Act violates the reasonableness requirement promulgated by the Court.

atrocities that transpired on September 11th.⁵ He drew a hypothetical “line in the sand,” essentially stating that, “You are either with us, or against us.” President Bush made a promise to the world that evening, that any country that harbored terrorists would find itself a target of the coalition that had now been formed.

Since that day, the government of the United States has appealed to the governments of almost every other country in the world asking for support in the “War on Terrorism.” Additionally, the United Nations has urged its members to freeze the assets of known terrorist organizations, to deny safe haven to terrorists and to those who support terrorists.⁶ In most cases, those countries have reacted to these requests with some action, whether through their respective legislative bodies or through their military or police forces, in order to rid their countries of terrorists.

A. *United States*

1. *Legislation*

Before the smoke from the fallen twin towers had fully dissipated, the legislative wildfire began in the United States Congress almost immediately.⁷ Senate Joint Resolution 23, the Military Force Authorization (“MFA”) bill, was enacted on September 18, 2001.⁸ The MFA authorizes the President to use all necessary force against any organization or State found to have been involved in planning or committing the terrorist attacks on the United States. Additionally, such force can be utilized against any country that is found to have been a safe haven for such terrorist organizations.⁹

5. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Jan. 15, 2002) [hereinafter Address].

6. S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001).

7. Within one week of the terrorist attacks on September 11, 2001, Congress had enacted S.J. Res. 22 & 23, and H.R. 2882. S.J. Res. 22 (a joint resolution expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001) and H.R. 2882 (Public Safety Officer Benefits bill) are both beyond the scope of this article, even though they were enacted in response to the attacks. Even more significant, however, are the overwhelming number of bills proposed in response to the attacks. A complete list of the proposed legislation is available online at <http://thomas.loc.gov/home/terrorleg.htm>. Unfortunately, supplying a summary for every piece of legislation would prove too burdensome. Thus, this article is limited to those pieces of legislation believed by the author to be most significant.

8. Pub. L. No. 107-40 [hereinafter the MFA].

9. *Id.* § 102.

On November 19, 2001, President Bush signed S. 1447, the Aviation and Transportation Security Act (“ASA”), into law.¹⁰ The ASA establishes the Transportation Security Administration,¹¹ which is responsible for all domestic transportation, including security screening at all airports.¹² The Under Secretary is given the authority to place Federal air marshals on every passenger flight and requires that the Under Secretary place an air marshal on every long-distance flight that is determined to present high security risks.¹³ Furthermore, 100% of baggage checked in any U.S. airport must be screened by all airlines and the screeners, who will be subject to a background check along with all other airline workers,¹⁴ must all be U.S. citizens.¹⁵ Most significantly, however, the ASA not only directs the National Institute of Justice to determine the range of less-than-lethal weaponry available to flight deck personnel,¹⁶ it allows pilots to carry firearms.¹⁷

The single most noteworthy law enacted in response to September 11th has been the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“the Act”).¹⁸ The Act makes available the use of military assistance in the enforcement of civil law by giving specific statutory authority to do so as required under the Posse Comitatus Act,¹⁹ by amending section 2332(e) to include emergencies involving other weapons of mass destruction.²⁰ The Act also authorizes the President to seize the property and funds of foreign nationals suspected of being involved in plotting an attack against the United States.²¹

One of the most important measures provided by the Act is located in Title II. Section 201 adds several terrorism-related offenses to the list of offenses for which expanded interception of wire, oral and electronic communication can be obtained pursuant to the Omnibus Crime Control and Safe Streets Act of 1968.²²

10. Pub. L. No. 107-71 [hereinafter the ASA].

11. *Id.* § 101; Transportation Security Administration [hereinafter TSA].

12. *Id.*

13. *Id.* § 105.

14. *Id.* § 138.

15. *Id.* § 106.

16. *Id.* § 126.

17. *Id.* § 128.

18. Pub. L. No. 107-56 [hereinafter the Act].

19. 18 U.S.C. 1385, 10 U.S.C. 375 (this amendment affects 18 U.S.C. 2332(e)).

20. The Act, *supra* note 18, § 104.

21. *Id.* § 106.

22. 18 U.S.C. 2510 *et seq.* The Act adds the following offenses to those that qualify as serious crimes: chemical weapons offenses, use of weapons of mass destruction, violent

Additionally, the Act allows the issuance of a roving wiretap, trap and trace devices, and pen registers when seeking to collect information during a foreign intelligence investigation.²³ Furthermore, the Act, in effect, trumps Federal Rule of Criminal Procedure 6(e), regarding the secrecy of grand jury proceedings, when matters of national security arise.²⁴

U.S. banks and financial institutions are also affected by the Act. The Act prohibits the maintenance of correspondent accounts for foreign banks that have no physical presence in any country.²⁵ The Act also requires that banks and financial institutions report all suspicious activity and the disclosure of banks records of those under investigation for financial crimes related to terrorism.²⁶ Similar provisions are made for obtaining confidential communication transaction records, financial reports and credit information,²⁷ when a federal official certifies that such information is relevant to an authorized foreign counterintelligence investigation.²⁸

The Northern Border of the United States will also be strengthened as a result of the Act. The Act provides for a significant increase in funding for the INS, Border Patrol and Customs Service to triple the number of personnel in each state located on the Canadian border.²⁹ Section 403 also authorizes background checks, through the National Criminal Information Files database, of all persons who meet certain identifying characteristics who apply for Visas.³⁰

Under the Act, the Attorney General and the Secretary of State are also authorized to pay rewards to persons who provide information, leading to the arrest and conviction of terrorists.³¹

acts of terrorism, financial transactions with countries that sponsor terrorism, and support of terrorists and terrorist organizations. Additionally, the Act expands the definition of "terrorism" to include almost any crime that "involves acts dangerous to human life." The Act, *supra* note 18, § 802.

23. The Act, *supra* note 18, §§ 206-220. This roving warrant applies to e-mail, voicemail, telephone conversations, and obtaining the addresses of Internet sites visited by those under investigation.

24. *Id.* § 203.

25. *Id.* § 313.

26. *Id.* §§ 351-366. Title III incorporated the provisions proposed in H.R. 3004, the Financial Anti-Terrorism Act of 2001, into the Act.

27. *Id.* § 505.

28. H. Rept. 107-236, at 61-62 (2001). Congress has also limited the issuance of Hazmat licenses to those who have passed a criminal background check through the Attorney General, INS, and Interpol. The Act, *supra* note 18, § 1012.

29. The Act, *supra* note 18, §§ 401-405.

30. *Id.* § 403. The section, however, does not specify what those identifying characteristics are.

31. *Id.* tit. 5.

The Attorney General is given the power to pay rewards in the amount of \$250,000 or more to prevent, investigate, or prosecute terrorism.³² Section 502 expands the limit on rewards payable by the Secretary of State to any amount for information that leads to the arrest of terrorist leaders or that assists in the dissolution of terrorist organizations.³³

2. Executive Orders

September 14, 2001 marked the day that President Bush issued his initial Executive Order in response to the terrorist attacks on September 11th.³⁴ In Order I, the President called up all ready reserve in the armed forces,³⁵ including the Coast Guard.³⁶ With the execution of Order I, President Bush turned to the most obvious means of retaliating against the attackers through sheer military force. On September 24th, President Bush issued his next Executive Order.³⁷ With Order II, the President recognized that the most significant weapon in any terrorist organization's arsenal is money. Thus, Order II prohibits all financial transactions with any person or entity who has committed, or even supported those who have committed, any acts of terrorism³⁸ within the United States, or that threaten the security of United States citizens, residents, or economy.³⁹ Order II criminalizes any act intended to circumvent the prohibitions therein and any conspiracy to circumvent such prohibitions.⁴⁰

32. *Id.* § 501.

33. This removes the \$5 million limit previously in place under 22 U.S.C. 2708.

34. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001) (Ordering the Ready Reserve of the Armed Forces to Active Duty) [hereinafter Order I].

35. *Id.* §§ 1-2.

36. *Id.* § 3.

37. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 24, 2001) (on Terrorist Financing: Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism) [hereinafter Order II].

38. Order II defines "terrorism" as:

[A]n activity that—

- (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and
- (ii) appears to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Id. § 3(d).

39. *Id.* § 1.

40. *Id.* § 2.

Furthermore, Order II confers upon the Secretary of State the authority to enter into agreements, both formal and informal, with other countries in order to achieve a freeze of all relevant accounts worldwide.⁴¹

Shortly thereafter, the President issued the Executive Order Establishing the Office of Homeland Security and the Homeland Security Council.⁴² President Bush announced this action during his September 20th speech.⁴³ The purpose of the Office of Homeland Security is to “develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.”⁴⁴ The Director of the Office of Homeland Security is directed to coordinate such efforts with all local, state, and national agencies.⁴⁵ The aforementioned “comprehensive national strategy” is to include provisions to detect, prepare for, prevent, protect against, respond to, and recover from any terrorist attack within the United States.⁴⁶ Additionally, Order III provides for the establishment of the Homeland Security Council.⁴⁷ This Council, made up of the heads of almost every major executive department,⁴⁸ is directed to serve as a liaison between the Office of Homeland Security and the President. Essentially, the Council will serve as an adviser to the President on matters of homeland security.

Recognizing the desire of the average citizen to want to do something to help the United States and concern with over how citizens prepare for future attacks, President Bush established the Presidential Task Force on Citizen Preparedness in the War on Terrorism (“Task Force”).⁴⁹ The Task Force, co-chaired by the Director of the Office of Homeland Security and the head of the Domestic Policy Council, was given the mission of identifying how Americans can help.⁵⁰ Additionally, the Task Force was given the responsibility for determining what steps the average American could take to prepare for any future terrorist attacks.⁵¹ The recommendations made by the Task Force were to be forwarded to

41. *Id.* § 6.

42. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001) [hereinafter Order III].

43. Address, *supra* note 5.

44. Order II, *supra* note 37, § 2.

45. *Id.* §§ 3(b-f).

46. Order III, *supra* note 42.

47. *Id.* § 5.

48. *Id.* § 5(b).

49. Exec. Order No. 13,234, 66 Fed. Reg. 57,355 (Nov. 9, 2001) [hereinafter Order IV].

50. *Id.* § 3.

51. *Id.*

the President by December 19, 2001,⁵² and the Task Force was to dissolve by January 18, 2001.⁵³

In what is probably one of his most controversial orders, President Bush then issued a Military Order on November 13, 2001.⁵⁴ Order V authorizes the Department of Defense to detain any “individual subject to this order.”⁵⁵ Order V provides that such individuals are to be treated humanely and given adequate food, water, and shelter, and be allowed the free exercise of religion.⁵⁶ Furthermore, Order V authorizes the trial of such individuals to be conducted by military commissions.⁵⁷ The Secretary of Defense is directed to issue rules necessary for the management and completion of such trials.⁵⁸ The order provides that these rules should provide for a full and fair hearing,⁵⁹ admission of evidence that possesses probative value,⁶⁰ and conviction and sentencing upon a vote of two-thirds of the commission members.⁶¹ The one provision that may prove most troublesome, found in section 7, part b, is the prohibition on appeals placed on individuals prosecuted under this order.⁶²

52. *Id.* § 4. The recommendations have not yet been made public; however, preparedness tips are available at <http://www.fema.gov/library/terrorf.htm>.

53. *Id.* § 5.

54. Detention, Treatment, and Trial of Certain non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Order V].

55. *Id.* § 3. Such person is defined as:

[A]ny individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of . . . al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore . . .

(iii) has knowingly harbored one or more individuals described [above] . . . and

(2) it is in the interest of the United States that such individuals be subject to this order.

Id. § 2(a).

56. *Id.* § 3.

57. *Id.* § 4.

58. *Id.* (Order V states that the rules should include, but are not limited, to “rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys . . .”).

59. *Id.* § 4(c)(2).

60. *Id.* § 4(c)(3).

61. *Id.* §§ 4(c)(6) & (7).

62. *Id.* § 7(b). Order V states that “military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and the individual shall not be privileged to seek any remedy or maintain any proceeding . . . in (i) any court of the United States, (ii) any court of any foreign nation, or (iii) any international tribunal.” *Id.*

3. Regulations

The Department of Justice caused a great uproar among civil liberties groups in December of 2001,⁶³ when the Attorney General issued Order no. 2529-2001.⁶⁴ The rule permits the monitoring of attorney-client communications made between an inmate in the custody of the Department of Justice and their attorney.⁶⁵ Such monitoring is authorized when the head of a United States intelligence agency certifies to the Attorney General that there may be “substantial reason to believe that certain inmates who have been involved in terrorist activities will pass messages through their attorneys to individuals on the outside for the purpose of continuing terrorist activities.”⁶⁶ The rule requires that both the inmate and attorney be notified when monitoring will occur.⁶⁷ In an attempt to maintain the appearance of protecting inmates’ Constitutional rights, the rule provides for the protection of confidential information obtained from inmate-attorney communications, including judicial review of information that the Department seeks to disclose.⁶⁸

63. American Civil Liberties Union, Broad Coalition Calls on Attorney General to Rescind “Unprecedented Frontal Assault” on Attorney-Client Confidentiality (Dec. 20, 2001), *available at* <http://www.aclu.org/news/2001/n122001a.html>; American Civil Liberties Union, Regarding Eavesdropping on Confidential Attorney-Client Communications (Dec. 20, 2001), *available at* http://www.aclu.org/safeandfree/122001_comments.pdf; National Association of Criminal Defense Lawyers, Comments of the National Association of Criminal Defense Lawyers on the Attorney General’s Order Regarding Monitoring of Confidential Attorney-Client Communications (Dec. 20, 2001), *available at* <http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument>.

64. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062-01 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500-01) This rule skirted the normal methods by which rules are enacted, stating that:

[T]he immediate implementation of this interim rule without public comment is necessary to ensure that the Department is able to respond to current intelligence and law enforcement concerns relating to threats to the national security or risks of terrorism or violent crimes that may arise through the ability of particular inmates to communicate with other persons.

Id.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* For cases that the Department of Justice relies in support of this scheme, see *Clark v. United States*, 289 U.S. 1, 15 (1933); *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975); *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986); *In re Grand Jury Proceedings*, 87 F.3d 377, 382 (9th Cir. 1996); *cf. Massiah v. United States*, 377 U.S. 201, 207 (1964).

Contrary to the Department’s “efforts” to protect an inmate’s Constitutional rights, the rule allows disclosure of confidential information to investigators and prosecutors, when approved by a federal judge. The rule does not, however, provide the standard by which such disclosures would be authorized.

B. *European Union*⁶⁹

1. *Community Legislation*

Since September 11th, the European Union has adopted numerous pieces of legislation concerning terrorism and the actions being taken in participating in the “War on Terrorism.” To assist the reader in understanding the legitimacy of actions taken by the EU, the following is a list of the different types of legislation that can be passed by the EU. There are three types of legislation relevant to our discussion: Regulations, Directives, and Decisions. Regulations are binding on Member States without the need for any national implementing legislation.⁷⁰ Directives, including Common Positions, are binding on Member States as to their objectives and time limits, but leave the form and means to the relevant national authority.⁷¹ Decisions are binding only on those Member States to which they expressly apply.⁷²

a. *Regulations*

Under the auspice of combating terrorism, Council Regulation 2580/2001, on specific restrictive measures directed against

69. In an effort to be brief, a summary of the legislation of the European Union [hereinafter EU] has been supplied, in lieu of summarizing legislation enacted or being considered by each, independent Member State. Member States of the EU are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The following countries have also applied for membership: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey.

In *Costa v. ENEL*, 1964 E.C.R. 585, the European Court of Justice held that:

The transfer by the states from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty [of Rome] carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

For analysis of the EU's Supremacy Doctrine see KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); Christopher Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT'L L.J. 153 (2001); *contra* THE CONSTITUTION OF EUROPE: DO THE CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION (J.H.H. Weiler ed., 1999). See also Mark Killian Brewer, *The European Union and Legitimacy: Time For a European Constitution*, 34 CORNELL INT'L L.J. 555 (2001) (arguing that the legitimacy of the European Court of Justice's authority remains contingent on the respect of Member States).

70. EU law—Definitions: Secondary Legislation, available at http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html.

71. *Id.*

72. *Id.*

certain persons and entities with a view to combating terrorism, was passed on December 27, 2001 by the Council of the European Union.⁷³ The regulation provides for the freezing of the funds of all persons who participate, knowingly and intentionally, in acts of terrorism or in preparation thereof.⁷⁴ The adoption of this regulation recognized the Council Common Position on the application of specific measures to combat terrorism, by defining the term “terrorist act.”⁷⁵ According to this Council Position, the definition of “terrorist act” encompasses everything from intimidating a population to the commission of acts that cause death or harm to “the fundamental political, constitutional, economic, or social structures of a country...”⁷⁶

Article 1 defines the terms relevant to the remainder of the regulation. A significant portion of the article is dedicated to defining the term “financial services,” which covers everything commonly referred to as such.⁷⁷ The regulation makes it illegal to provide financial services to anyone who meets the criteria provided.⁷⁸ This provision also mandates that the Council establish a list, containing the names of people or groups who commit or assist in the commission of acts of terrorism, any entity owned by any such people or groups, and anyone acting on behalf of such persons or groups.⁷⁹ Additionally, any attempt to disrupt governmental actions provided for in Article 2 is criminalized.⁸⁰ The regulation directs all financial institutions in Member States to provide information about the accounts of those who are on the

73. 2001 O.J. (L 344) 70 [hereinafter Regulation].

74. *Id.*

75. 2001 O.J. (L 344) 93 [hereinafter Common Position I].

76. *Id.* arts. 1 & 3(iii).

77. Regulation, *supra* note 73, art. 1.

78. *Id.* art. 2.

79. *Id.* art. 2(3). In part, this provision states:

The Council, acting by unanimity, shall establish . . . such list [that] shall consist of:

- (i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
- (ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of acts of terrorism;
- (iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to [above].

Id. at 72.

80. *Id.* art. 3.

list provided for in Article 2.⁸¹ In an attempt to be humane, the regulation also allows Member States to authorize specific amounts of money from frozen accounts to be unfrozen in order to support basic human needs of account holders and their families.⁸²

b. Directives

The Council Common Position on combating terrorism furthermore, criminalizes any act that is found to assist a terrorist or terrorist group was adopted on December 27, 2001.⁸³ This includes provisions for freezing the funds of persons and entities that commit or assist others in committing terrorist acts.⁸⁴ Common Position II mandates that all Member States take measures to suppress any form of support of terrorism and prevent those who support terrorism from remaining within the borders of Member States.⁸⁵ Other mandates contained in Common Position II are that Member States are to assist each other in measures taken to comply with this Position,⁸⁶ Member States are to assist third parties in combating terrorism,⁸⁷ Member States are to become parties to international conventions and treaties relating to terrorism,⁸⁸ and that they are to fully implement the conventions related to terrorism and the United

81. *Id.* art. 4.

82. *Id.* arts. 5 & 6.

83. 2001 (L 344) 90 [hereinafter Common Position II].

84. *Id.* arts. 2 & 3.

85. *Id.* arts. 4-8.

86. *Id.* art. 9.

87. *Id.* art. 12.

88. *Id.* art. 14. This provision requires that Member States become signatories of the following international convention and protocols: Convention on Offenses and Certain Other Offenses Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention on the Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel, Dec. 14, 1973, 1035 U.N.T.S. 167; European Convention for the Suppression of Terrorism, Jan. 27, 1977, 90 E.T.S. 3; Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials, Mar. 3, 1980, 1456 U.N.T.S. 101 (codified in the United States at 18 U.S.C. § 831 and 22 U.S.C. § 4831); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention of September 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685; Convention on the Making of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721; UN Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, U.N. Doc. A/RES/52/164 (1998); UN Convention for the Suppression of Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/54/109 (1999).

Nations Security Council Resolutions 1269 (1999) and 1368(2001).⁸⁹

c. Decisions

Council Decision 2001/927/EC, establishes the list of persons, groups and entities to which Regulation 2580/2001 applies.⁹⁰ The authority under which this Decision is decided is Article 2(3) of Regulation 2580/2001.⁹¹ The list includes such notorious groups as Hamas-Izz al-Din al-Qassem, a known terrorist wing of Hamas, and the Palestinian Islamic Jihad.⁹²

2. Proposed Legislation

The proposal for Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation was presented to the European Parliament on October 10, 2001.⁹³ This proposal recognizes the risk that terrorism presents to countries due to the freedom of travel enjoyed by most of the civilized world. The explanatory memorandum, which precedes the proposal, highlights the following areas of concern: control of access to sensitive areas of airports and aircraft, control of passengers and the hand luggage, control and monitoring of hold luggage, control of cargo and mail, training of ground staff, and classification of weapons that should be prohibited from being brought into sensitive areas, including on board aircraft.⁹⁴ The proposal also provides for the establishment of a staff of multinational experts to test the measures implemented by the Member States.⁹⁵ Such task force will, according to the drafters' estimates, be able to audit 70 to 80 airports annually, making up approximately 20% of the EU airports.⁹⁶ The purpose for this regulation would be for the establishment and enforcement of common standards for security measures and the technical equipment used in airports.⁹⁷ The text of the regulation itself is

89. Common Position II, *supra* note 83, art. 15.

90. 2001 (L 344) 83 [hereinafter Decision].

91. Common Position II, *supra* note 83, art. 2.

92. Decision, *supra* note 90, art. 1.

93. EUR. PARL. DOC. (COM 2001) 575. Information on other steps being taken by the EU to protect itself is available in the Communication from the Commission to the Council and the European Parliament: Civil Protection—State of Preventive Alert Against Possible Emergencies, (COM 2001) 707.

94. *Id.* ¶ 21.

95. *Id.* ¶¶ 24-26.

96. *Id.* ¶ 25.

97. 2001/0234(COD) art. 1.

merely a guide to the Annex attached. The Annex contains the express requirements of measures to be taken by Member States.⁹⁸ Furthermore, the regulation would provide for routine monitoring by each Member State and the multinational task force mentioned above.⁹⁹

C. United Nations

1. General Assembly

On September 12, 2001, the United Nations' General Assembly adopted Resolution 56/1, condemning the attacks against the United States.¹⁰⁰ The resolution urges for international cooperation to bring to justice those who were involved in the attacks.¹⁰¹ Additionally, the resolution encourages international cooperation in holding accountable anyone who harbors those responsible for the attacks.¹⁰²

In an attempt to open up international dialogue on the topic of terrorism, the United Nations held a debate from October 1st through October 5th at its headquarters in New York City.¹⁰³ The purpose of this debate was to discuss a comprehensive convention on international terrorism.¹⁰⁴ Furthermore, the debate was a forum in which all Member States were encouraged to ratify, and act upon, any convention or protocol pertaining to international terrorism to which any Member had not yet become a party.¹⁰⁵

98. *Id.* art. 4. The regulation, however, also expressly states that Member States are to use the security measures provided as a minimum and, at each States' discretion, may apply more stringent standards. *Id.* art. 6.

99. *Id.* arts. 5 & 7-8.

100. Condemnation of Terrorist Attacks in the United States of America, G.A. Res. 1, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/L.1 (2001).

101. *Id.*

102. *Id.*

103. General Assembly: Debate on Measures to Eliminate International Terrorism, U.N. GAOR, 56th Sess., 12th mtg., U.N. Doc. A/56/PV.12 – 22d mtg., U.N. Doc. A/56/PV.22 (2001). Transcripts of prepared statements are available at <http://www.un.org/terrorism/list011001.html>.

104. *Id.* In 1996, the General Assembly adopted the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 210, U.N. GAOR, 51st Sess., 88th mtg., U.N. Doc. A/RES/51/210 (1996). In this declaration, the General Assembly established an Ad Hoc Committee whose mission was to address ways in which to further the United Nations' efforts to eliminate international terrorism. Since that time, the Ad Hoc Committee has met to develop such comprehensive convention and the debate, *supra* note 103, was a forum for that Committee to ascertain the opinions of the various Member States, especially in the aftermath of the September 11th attacks.

105. *Id.* For a list of the conventions and protocols to which this applies, see Common Position II, *supra* note 83, at annex.

2. Security Council

The U.N. Security Council accompanied the General Assembly in issuing a condemnation of the attacks perpetrated on the United States.¹⁰⁶ The Security Council also called upon the Member States to implement relevant anti-terrorist conventions.¹⁰⁷ Most importantly, however, was the Council's recognition of a State's inherent right to collective and individual self-defense.¹⁰⁸

Shortly thereafter, the Security Council adopted measures commanding Member States to respond according to its resolution.¹⁰⁹ The resolution requires that Members freeze all assets of terrorists and terrorist organization.¹¹⁰ Additionally, it forbids Members from sponsoring or supporting any individual or group involved in terrorist acts.¹¹¹ Furthermore, all Members are instructed to do everything within their collective powers to bring those responsible for terrorist acts to justice.¹¹² Lastly, the resolution establishes a Committee of the Security Council, whose job is to ensure implementation of this resolution.¹¹³

D. NATO

The North Atlantic Treaty Organization ("NATO") was formed in 1949 to provide for the collective safety and support of the Allied States.¹¹⁴ On September 11, 2001, the North Atlantic Council met and issued a statement.¹¹⁵ In no uncertain terms, the Council, and the NATO nations, condemned the barbaric acts committed against a member state.¹¹⁶ The Council also joined so

106. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001).

107. *Id.* (the resolution took particular note of Resolution 1269 (1999) which requests that Member States cooperate with each other in order to prevent and protect against terrorist attacks).

108. *Id.* Such right is provided in U.N. CHARTER ch. 7, which allows the use of military force in maintaining and restoring "international peace and security". *Id.*

109. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

110. *Id.* ¶ 1.

111. *Id.* ¶ 2.

112. *Id.*

113. *Id.* ¶ 6. The mission of the Counter-Terrorism Committee has been expanded in Resolution 1377 (2001). The Committee is now responsible for the preparation of model laws for Member States and to explore the available technological, financial, legislative, and/or regulatory assistance programs; the purpose of which is to assist Members, especially those who may not have the necessary resources, in implementing Resolution 1373.

114. The North Atlantic Treaty ("Treaty of Washington") (1949) [hereinafter the Treaty of Washington].

115. Council Statement, N. Atlantic Council, NATO Doc. No. PR/CP 122 (Sept. 11, 2001), available at <http://www.nato.int/docu/pr/2001/p01-122e.htm>.

116. *Id.*

many others and pledged its support and assistance to the United States.¹¹⁷ Lastly, the Council gave a warning to those who committed the attacks, stating that, “[o]ur message to those who perpetrated these unspeakable crimes is equally clear: you will not get away with it.”¹¹⁸

The following day, the North Atlantic Council met again and issued a second statement.¹¹⁹ In this historic announcement, the Council revealed that if it was determined that the attack was committed from abroad against the United States, then they would invoke Article 5 of the Washington Treaty.¹²⁰ Prior to this statement, Article 5 has never been invoked.¹²¹ Article 5 provides, in relevant part, that:

The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all and . . . each of them...will assist the Party or Parties so attacked by . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.¹²²

After being provided with evidence gathered by the United States government, the Council formally confirmed its invocation of Article 5 on October 2, 2001.¹²³

Shortly thereafter, on October 4, 2001, the Council issued a statement outlining the action that would be taken to operationalize the powers granted under Article 5.¹²⁴ In this statement, Lord Robertson announced that eight measures would be taken to assist in the campaign against terrorism.¹²⁵ More specifically, these measures were:

117. *Id.*

118. *Id.*

119. Council Statement, N. Atlantic Council, NATO Doc. No. PR 124 (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

120. *Id.* Article 5 of the Washington Treaty provides for the right of collective self-defense upon any attack from abroad committed against a member state. *Id.*

121. *Id.*

122. Treaty of Washington, *supra* note 114, art. V (a description of what an invocation of article 5 means is available at <http://www.nato.int/terrorism/five/htm>).

123. Security General Lord Robertson, Invocation of Article 5 Confirmed (Oct. 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

124. Statement to the Press by Secretary General Lord Robertson (Oct. 4, 2001), available at <http://www.nato.int/docu/speech/2001/s011004b.htm>.

125. *Id.*

1. Enhance intelligence sharing and co-operation (sic), both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it;
2. provide, individually or collectively, as appropriate and according to their capabilities, assistance to Allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism;
3. take necessary measures to provide increased security for facilities of the United States and other Allies on their territory;
4. backfill selected Allied assets in NATO's area of responsibility that are required to directly support operations against terrorism;
5. provide blanket overflight clearance for the United States and other Allies' aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operations against terrorism;
6. provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including refuelling (sic), in accordance with national procedures;
7. that the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; and
8. that the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning force to support operations against terrorism.¹²⁶

III. CONCLUSION

Governments worldwide have been enacting legislation, seemingly in reaction to the events of September 11th. For the most part, governments are given broad powers to fight terrorism. The incidental effects of these laws on average citizens are still not certain. However, should we question if the only objectives of

126. *Id.* NATO has issued numerous press releases detailing its commitment to the operation against terrorism. Two of these statements are available at <http://www.nato.int/docu/pr/2001/p01-159e.htm> and <http://www.nato.int/docu/pr/2001/p01-173e.htm>.

these laws are aimed at terrorism? Are these laws also intended to erode civil liberties, the very essence of democratic societies? Will the new laws, especially those in the United States, be utilized by law enforcement in investigations other than those concerning terrorism? Will the United States use the Act¹²⁷ to violate rights of citizens, and non-citizens, guaranteed by the Constitution?

127. The Act, *supra* note 18.