

THE HUMAN RIGHTS OF THE SAN (BUSHMEN) OF BOTSWANA – THE CLASH OF THE RIGHTS OF INDIGENOUS COMMUNITIES AND THEIR ACCESS TO WATER WITH THE RIGHTS OF THE STATE TO ENVIRONMENTAL CONSERVATION AND MINERAL RESOURCE EXPLOITATION

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INTRODUCTION

In July 2010, the High Court of Botswana ruled against the San,¹ often called pejoratively “Bushmen” or Basarwa,² denying their right to access water on their ancestral lands inside the Central Kalahari Game Reserve (CKGR).³ During the June 9, 2010 hearing, the San requested that either the existing borehole on their land be reopened or that they be given permission to drill another borehole at their own expense.⁴ This court’s decision represented another step in the ongoing and protracted legal dispute

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1. *Outrage as Botswana Bushmen Denied Access to Water*, THE BOTSWANA GAZETTE, (July 24, 2010), http://www.gazettebw.com/index.php?option=com_content&view=article&id=7112:outrage-as-botswana-bushmen-denied-access-to-water&catid=18:headlines&Itemid=2.

2. Considered derogatory by many San, this term means “those who not rear cattle” in Setswana. *Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination*, DITSHWANELO, THE BOTSWANA CENTRE FOR HUMAN RIGHTS, 6 (Mar. 3, 2006), available at [http://www.ditshwanelo.org/bw/images/CERD Shadow Report 2006.pdf](http://www.ditshwanelo.org/bw/images/CERD%20Shadow%20Report%202006.pdf) [hereinafter *Shadow Report*].

3. *Outrage as Botswana Bushmen Denied Access to Water*, *supra* note 1.

4. *See id.*

between the Government of Botswana (GOB) and a group of San peoples formerly living inside the CKGR. Since 1996, when the GOB began its forced-removal campaign against the San living within the CKGR, the San have been fighting to regain access to their land. At the same time, the GOB has granted diamond-mining licenses in the Reserve on the condition that any water borehole “be utilized strictly to provide water for the mine.”⁵ The San contend that this condition specifically aims to deny them access to water from the mine.⁶

The water issue must be seen in the context of the San’s struggle to live and pursue their livelihoods on their land, butting heads with the GOB’s desire to allow diamond mining in the Reserve. While the GOB has argued that the San’s presence in the CKGR impedes conservation efforts, the United Nations (UN) Special Rapporteur on Indigenous Rights stated in a 2010 report that the GOB’s position is “inconsistent with its decision to permit Gem Diamonds/Gope Exploration Company (Pty) Ltd. to conduct mining activities within the reserve, an operation that is planned to last several decades and could involve an influx of 500-1,200 people to the site, according to the mining company.”⁷ Without access to water, the San are unable to live on their land, which has been the case since the GOB sealed and capped the San’s borehole in 2002.⁸ Recently, the GOB has permitted the drilling of new boreholes for wildlife and has permitted the opening of a wildlife lodge, with a swimming pool, in the Reserve.⁹

At the same time, the right to water as an internationally recognized human right has gained increasing support. On July 28, 2010, the UN General Assembly adopted a resolution recognizing access to clean water and sanitation as a human right.¹⁰ The resolution called on “[s]tates and international organizations to provide financial resources, build capacity[] and transfer technology, particularly to developing countries, in scaling up efforts to provide safe, clean, accessible, and affordable drinking water and sanita-

5. *Controversial Diamond Mine on Bushman Land Back on Track*, SURVIVAL INTERNATIONAL (July 12, 2010), <http://www.survivalinternational.org/news/6205>.

6. *See id.*

7. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *The Situation of Indigenous Peoples in Botswana*, Human Rights Council, ¶ 73 U.N. Doc., A/HRC/15/37/Add.2 (June 2, 2010) (by James Anaya) [hereinafter *The Situation*].

8. *Bushmen Face Agonizing Wait for Right to Water*, SURVIVAL INTERNATIONAL (June 9, 2010), <http://www.survivalinternational.org/news/6068>.

9. *Id.*

10. Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, U.N. Press Release GA/10967 (July 28, 2010).

tion for all.”¹¹ One hundred twenty-two states voted in favor of the resolution and none voted against it, while forty-one states, including Botswana, abstained.¹²

For many decades, the Republic of Botswana has been well known across the globe for its post-colonial achievements, including political stability and economic growth unknown to many African countries.¹³ In fact, many consider Botswana to be one of Africa’s success stories.¹⁴ Its course of action since independence in 1966 exemplifies the possibilities for economic prosperity,¹⁵ sustained growth,¹⁶ absence of conflict, and free and fair elections.¹⁷ As a result, it is often referred to as the “African Miracle.”¹⁸ Despite these monumental achievements, human rights in Botswana—particularly social and cultural rights and especially those of minority groups—have regrettably evolved slowly.¹⁹ More recent analyses²⁰ have brought many of these issues, which pose a significant threat to Botswana’s international image, to light. The tense relationship between the San and the ruling Tswana in Botswana and the case of the San’s eviction from the CKGR illustrate many of these issues.

11. *Id.*

12. *Id.*

13. Stephen R. Lewis Jr., *Explaining Botswana’s Success*, in DEVELOPING CULTURES: CASE STUDIES 3, 3 (Lawrence E. Harrison & Peter L. Berger eds., 2006).

14. See Anne Dissez, *Botswana’s Good Reputation*, 13 AFR. GEOPOLITICS 213, 213 (2004).

15. J. CLARK LEITH, WHY BOTSWANA PROSPERED 3–14 (McGill-Queen’s University Press 2005).

16. See Glenn-Marie Lange & Matthew Wright, *Sustainable Development in Mineral Economies: the Example of Botswana*, 9 ENV’T & DEV. ECON. 485, 485 (2004); see also Ellen Hillbom, *Diamonds or Development? A Structural Assessment of Botswana’s Forty Years of Success*, 46 J. MODERN AFR. STUD. 191, 191 (2008).

17. For an article disputing the fairness of Botswana’s elections, see generally Bertha Z. Osei-Hwedie & David Sebudubudu, *Botswana’s 2004 Elections: Free and Fair?*, 4 J. AFR. ELECTIONS 27 (2005). See also Daron Acemoglu et al., *An African Success Story: Botswana*, CEPR DISCUSSION PAPERS 2 (2001), available at <http://econ-www.mit.edu/files/284>.

18. See generally ABDI ISMAIL SAMATAR, AN AFRICAN MIRACLE: STATE AND CLASS LEADERSHIP AND COLONIAL LEGACY IN BOTSWANA DEVELOPMENT (Heinemann 1999); Amelia Cook & Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 453 (2010).

19. KENNETH GOOD, BUSHMEN AND DIAMONDS: (UN)CIVIL SOCIETY IN BOTSWANA 6-8 (Nordiska Afrikainstitutet, Uppsala 2003). This occasional paper reviews the limitations of Botswana’s liberal democracy, violations against the rights of the San, and issues of inequality and an undiversified economy.

20. See, e.g., Bugalo Maripe, *Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana*, 3 AFR. HUM. RTS. L.J. 52 (2003); Scott Pegg, *Presidential Succession and Academic Freedom: Botswana Departs Leading Political Scientist Kenneth Good*, 38 POL. SCI. & POL. 829 (2005); Ian Taylor, *As Good As It Gets? Botswana’s ‘Democratic Development’*, 21 J. CONTEMP. AFR. STUD. 215 (2003); GOOD, *supra* note 19; Monageng Mogalawe, *Botswana: Exploding the Myth of Exceptionality*, 38 AFR. INSIGHT 105 (2008).

In 2004, former residents of the CKGR brought a lawsuit against the GOB in the High Court of Botswana.²¹ The San were reacting to government-supported evictions from the CKGR forcing many San off of their homelands.²² Roy Sesana led this case. He has been active in defending the indigenous rights of the San since 1991, long before the GOB evicted him and his family from the Reserve in 2002.²³ In 2000, Sesana's brother died after allegedly being tortured by wildlife officials.²⁴

In the first case brought before the courts in 2002, the High Court ruled against the San on technical grounds. However, the Court of Appeal then sent the case back to the High Court in 2004.²⁵ What followed turned out to be the longest and most expensive case in the court's history, running 134 days in court over the course of two years, with thousands of pages of legal documents and 19,000 pages of witness transcripts.²⁶

The case dealt with the following issues:

- The legality of the GOB's decision to cease provision of basic services to the inhabitants of the CKGR;
- Whether these services ought to be reinstated;
- Whether the San rightfully owned the land and were therefore wrongfully dispossessed of it; and
- Whether it was unconstitutional, and unlawful, for the GOB to deny inhabitants of the Reserve special game licenses to hunt and to refuse entrance to the Reserve to them.²⁷

This case and the hostile relationship that has developed between the San and the GOB challenge the perception of Botswana as the miracle of Africa.²⁸ The debate over indigenous land rights and the court cases that have ensued have garnered significant international attention due to the contradiction they pose to Botswana's popular image as a successful democracy and to the im-

21. Sidsel Saugestad, *Notes on the Outcome of the Ruling in the Central Kalahari Game Reserve Case, Botswana*, 4 BEFORE FARMING 10 (2007), available at http://www.waspjournals.com/journals/beforefarming/journal_20064/news/2006_4_10.pdf.

22. See *Central Issues in Botswana*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS <http://www.iwgia.org/sw9942.asp> (last visited Dec. 20, 2010) [hereinafter IWGIA].

23. See *Media Kit: Bushmen Court Case—Biography of Bushman Roy Sesana*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Oct. 24, 2010) [hereinafter *Media Kit-Biography*].

24. *Id.*

25. *Shadow Report*, *supra* note 2, at 7.

26. Saugestad, *supra* note 21, at 1.

27. *Id.* at 1-2.

28. See generally Ian Taylor & Gladys Mokhawa, *Not Forever: Botswana, Conflict Diamonds and the Bushmen*, 102 AFR. AFF. 261 (2003), available at <http://afraf.oxfordjournals.org/cgi/reprint/102/407/261> (discussing the relationship between diamonds and the removal of the San from their homes).

pact they could have on similar cases of disputed land rights for indigenous groups around the world.²⁹

While the San officially won the case,³⁰ the GOB has not been cooperative in implementing the ruling,³¹ raising many questions about the democratic process in Botswana. In fact, the U.S. Department of State, in its 2009 Human Rights Report on Botswana, criticized “[t]he government’s continued narrow interpretation” of the 2006 decision.³² Further, the San’s “victory” has not led to significant changes to their position in society.³³

This Article begins by reviewing the historical relations between the ruling Tswana ethnic group and the San from the time that the Tswana settled in Botswana roughly 700-800 years ago to the present day, in which the Tswana and their allies continue to dominate the political sphere. The history of the CKGR, which is central to the current debate of land and water rights for the San there today, also is reviewed. Before introducing the court case in which the San protested their eviction from the CKGR before the High Court of Botswana, the legal system in Botswana is discussed. The Article reviews and analyzes the findings of the High Court then discusses the GOB’s failure to comply with many aspects of the 2006 ruling and what this will mean for the San. It further explores the issue of human rights violations with respect to the San people of the Kalahari. It also discusses the implications this case—and the legal battle it gave rise to—have for other indigenous land rights cases and the protection of indigenous rights across Africa.³⁴

While this Article focuses specifically on the plight of the San inhabitants of the Central Kalahari, the G/wi and G//ana, it is crucial to note that all San groups in Botswana, who are represented by many distinct linguistic and cultural groups, suffer marginalization and discrimination to varying degrees at the hands of the GOB and Botswana society. They “are widely recognized as the

29. See Julie J. Taylor, *Celebrating San Victory Too Soon?*, 23 ANTHROPOLOGY TODAY 5, 4 (2007), available at http://www.chr.up.ac.za/chr_old/indigenous/documents/Botswana/Cases/Celebrating%20too%20soon%20CKGR%20Case.pdf.

30. *Botswana Bushmen Win Land Ruling*, BBC NEWS, Dec. 13, 2006, <http://news.bbc.co.uk/2/hi/africa/6174709.stm>.

31. See Lucia Van der Post, *Bushwhacked*, TIMES ONLINE (United Kingdom), Sept. 19, 2007, <http://www.timesonline.co.uk/tol/news/world/africa/article2482706.ece>.

32. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2009 HUMAN RIGHTS REPORT: BOTSWANA (2010), available at <http://www.state.gov/drl/rls/hrrpt/2009/af/135939.htm> [hereinafter BOTSWANA REPORT].

33. See *Bushmen of the Kalahari*, AM. CHRON. (Feb. 28, 2009), <http://www.americanchronicle.com/articles/view/92720>.

34. For a discussion of indigenous rights in general, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 129-84 (2d. ed. 2004).

most impoverished, disempowered, and stigmatized ethnic group in southern Africa.”³⁵

The Article discusses the implications of the current status of the San in Botswana. It analyzes the need for the GOB to address the general situation of the San and makes recommendations regarding how Botswana can protect and promote the unique value of the San in such a way that will complement its image, help drive its economy, and assist its goals of environmental protection, while at the same time improving the San’s vulnerable position in its society. The Article concludes that the current state of affairs of the San will not benefit Botswana in the long run, and that at the same time, it poses a legitimate and potentially detrimental threat to the country’s international image.

I. HISTORICAL RELATIONS AND LAND USE PATTERNS BETWEEN THE SAN AND THE TSWANA

There are roughly 100,000 San living in Botswana, Namibia, South Africa, and Angola today.³⁶ The greatest proportion, somewhere between 45,000 and 60,000, live in Botswana.³⁷ The San, consisting of more than thirteen different language groups across Southern Africa,³⁸ are distinguishable in part by their “rich knowledge of biodiversity and by their complex languages that include a range of click sounds.”³⁹ As hunter-gatherers, the San have resided in the southern African region for over 20,000 years, according to rock art and archaeological findings.⁴⁰ Geneticists have found that “the aboriginal San and their related herding neighbours, the Khoekhoe (also Khoikhoi), carry the genetic material which indicates that their ancestors are the ancestors of all living human beings.”⁴¹

The Tswana peoples originally stem from the Sotho peoples of southern Africa and are traditionally a cattle-herding culture. They arrived in the region 700-800 years ago from present-day

35. Renée Sylvain, “*Land, Water, and Truth*”: *San Identity and Global Indigenism*, 104 AM. ANTHROPOLOGIST 1074, 1074 (2002).

36. *Tribes and Campaigns*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/tribes/bushmen> (last visited Dec. 20, 2010) [hereinafter *Tribes*].

37. Nicholas Olmstead, *Indigenous Rights in Botswana: Development, Democracy and Dispossession*, 3 WASH. U. GLOBAL STUD. L. REV. 799, 810 (2004).

38. *Who are the San?* WORKING GROUP OF INDIGENOUS MINORITIES IN SOUTHERN AFRICA (WIMSA), <http://www.wimsanet.org/about-the-san/who-are-the-san> (last visited Dec. 21, 2010).

39. IPACC—*Southern Africa Region*, INDIGENOUS PEOPLES OF AFRICA CO-ORDINATING COMMITTEE (IPACC), http://www.ipacc.org.za/eng/regional_southernafrica.asp (last visited Dec. 21, 2010) [hereinafter IPACC].

40. *Id.*

41. *Id.*

Zambia and Zimbabwe, and between the seventeenth and nineteenth centuries, developed several major Tswana kingdoms.⁴² These kingdoms were ruled through a hierarchical structure headed by the *kgosi*, or chief.⁴³ Historically, the possession of cattle, central to Tswana livelihood, determined the power of the *kgosi*.⁴⁴ As a result, cattle herds grew, especially among the elite.⁴⁵ Tswana domination in the region intensified in the late 1800s as the group seized land and dominated the political process through their chieftainship system.⁴⁶

During this pre-colonial era, Tswana chiefs forbade the San from participating in local politics.⁴⁷ As a result, the San had no means of political representation, nor could they acquire land in such a way that would be recognized by the Tswana.⁴⁸ As the growth of the cattle industry introduced the need for a larger workforce, the Tswana elite began to take the San as serfs and slaves.⁴⁹ Because the San were organized in small and disparate community units, they were often helpless to contest this practice. Although the British Protectorate, established in 1885,⁵⁰ officially ended the practice of serfdom, it continued unofficially into the 1950s.⁵¹ Many would argue that the legacy of serfdom lives on to this day “in the form of low wage labor, exclusion from the *kgotla*, and lack of recognition of San land and resource rights.”⁵²

The position of the San in society did not change significantly during the colonial era, from 1885 to 1966.⁵³ The British recognized the Tswana, not the San or any other group, as the negotiating party in their colonial endeavors, for it appeared to them when they arrived in the region that the Tswana were already in charge.⁵⁴ When Britain parceled the land of the Protectorate into “Native Reserves” and “Crown lands,” no provision was made for the San; the Tswana tribes controlled the Native Reserves almost

42. Olmstead, *supra* note 37, at 812-13.

43. *Id.* at 813.

44. See Kenneth Good, *The State and Extreme Poverty in Botswana: The San and Destitutes*, 37 J. MODERN AFR. STUD. 185, 187 (1999).

45. *Id.* at 188.

46. See Olmstead, *supra* note 37, at 813.

47. *Id.* at 815.

48. *Id.*

49. Kenneth Good, *At the Ends of the Ladder: Radical Inequalities in Botswana*, 31 J. MODERN AFR. STUD. 203, 209-10 (1993).

50. Olmstead, *supra* note 37, at 817.

51. *Id.* at 832.

52. *Id.*, *supra* note 37, at 816. The Kgotla is an institution of the Tswana chieftaincy system in which the chief and community discuss issues of concern to the community. QUETT JONI KETUMILE MASIRE, VERY BRAVE OR VERY FOOLISH?: MEMOIRS OF AN AFRICAN DEMOCRAT 62-63 (Stephen R. Lewis, Jr. ed., 2006).

53. See AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE, 290-92 (Kwame Anthony Appiah & Henry Louis Gates, Jr., eds., 1999).

54. See *Shadow Report*, *supra* note 2, at 6.

entirely.⁵⁵ San communities that found themselves living inside these Native Reserves were suddenly subject to Tswana authority, and those who lived on Crown Lands were essentially “tenants at will” and subject to the authority of the Crown.⁵⁶

The evolution of the cattle industry played a significant role in the marginalization of the San. The rise of large-scale cattle ownership heralded a new era in which formerly communal lands were privatized.⁵⁷ For example, by the 1930s, a prominent Tswana chief, Tshekedi, had amassed a herd of nearly 50,000 cattle in addition to extensive grazing lands.⁵⁸ Elite Tswana cattlemen seized land where they sunk boreholes to provide secure water sources for their herds. New technology allowed the boreholes to tap into water sources in bedrock aquifers beneath the sand cover, allowing access to water previously inaccessible.⁵⁹ Smaller herds were marginalized by these private boreholes and often had to travel long distances in search of communal sources of water.⁶⁰ This new land-use strategy was extremely problematic for small-scale herders and hunter-gatherer communities like the San who lost access to large swaths of land they depended on for their livelihoods.

As a result of the power structures reinforced during the Protectorate, independent political power shifted directly from the British to the Tswana.⁶¹ In 1966, President Seretse Khama took office. President Khama pursued a policy of “non-racialism,” which allowed the GOB to sideline the individual concerns of Botswana’s many ethnic groups in the name of nationalism.⁶² Many would argue that a Tswana-based nationalism developed at this time, which has remained dominant to this day, despite the existence and participation of other ethnic groups in government.⁶³

In 1975, the GOB created the Tribal Grazing Lands Policy (TGLP), which exacerbated the land use issue by allowing commercial ranchers, who now had a major market in South Africa

55. Olmstead, *supra* note 37, at 825.

56. *Id.* at 862.

57. See Good, *supra* note 49, at 209.

58. GOOD, *supra* note 19, at 14.

59. H.J. Cooke, *The Kalahari Today: A Case of Conflict over Resource Use*, 151 GEOGRAPHIC J. 75, 80 (1985).

60. SAMATAR, *supra* note 18, at 111.

61. See Zibani Maundeni, *State Culture and Development in Botswana and Zimbabwe*, 40 J. MODERN AFR. STUD. 105, 125 (2001).

62. “Non-racialism” refers to the GOB’s policy of portraying Botswana as a non-racial, culturally homogenous state, based—as it argues—on the dominance of a single ethnic group, the Tswana. This has led to a lack of recognition for other, unique ethnic groups, like the San. See SIDSEL SAUGESTAD, *THE INCONVENIENT INDIGENOUS: REMOTE AREA DEVELOPMENT IN BOTSWANA, DONOR ASSISTANCE, AND THE FIRST PEOPLE OF THE KALAHARI* 28, 71-72 (2001).

63. Jacqueline S. Solway, *Navigating the ‘Neutral’ State: ‘Minority’ Rights in Botswana*, 28 J. S. AFR. STUD. 711, 715 (2002).

and abroad, to legally purchase and use grazing land.⁶⁴ Although the TGLP was purportedly intended to reduce inequality in rural areas and decrease overgrazing, in fact, huge tracts of land used by the San were given to commercial ranchers⁶⁵ and very few tracts of “reserved” land intended, according to the policy, to assist the poorer sectors of society actually materialized when the new policy went into effect.⁶⁶ Major sections of San homelands were parceled off to private ranchers who converted the land for grazing.⁶⁷ The TGLP allowed only limited communal lands to remain, in very small tracts, and those who owned private land also were free to graze their cattle on the remaining communal lands.⁶⁸ Over time, the cattle industry completely marginalized both small-scale herders and hunter-gatherer communities like the San.⁶⁹

This expansion of grazing cattle herds and the privatization of land did not bode well for the San, who tend not to own livestock in great numbers and historically did not believe in taking land as private holdings.⁷⁰ Unfortunately, over time, the GOB has used the San’s perceived nomadic nature as an excuse to validate denying them ownership over any land or natural resources. In a 1978 legal opinion, the GOB proclaimed that the San’s “nomadic status” indicates that, “they have ‘no rights of any kind’ deriving from customary practices, and in particular no land rights.”⁷¹ As noted at the Working Group of Indigenous Minorities in Southern Africa conference in 1997, “stereotypes of nomadism have been used to justify the exclusion of the San from their rights to land, natural resources, and development.”⁷² In reality, while the San do travel distances in search of food, they live in small communities and are very familiar with the tracts of land around those communities. They typically do not own herds, as nomads do, but they have actually engaged in agricultural and pastoral activities at times, creating “clusters of adaptive strategies” that help meet their needs.⁷³

64. Larry A. Swatuk, *From “Project” to “Context”: Community Based Natural Resource Management in Botswana*, 5 GLOBAL ENVTL. POL. 95, 111 (2005).

65. Ironically, San are today forbidden from maintaining livestock on their lands in the CKGR, due to conflict with wildlife preservation, while much of their historic land was taken away for the purpose of raising cattle. See Olmstead, *supra* note 37, at 840.

66. *Id.*

67. See Robert K. Hitchcock, *Tradition, Social Justice and Land Reform in Central Botswana*, 24 J. AFR. L. 1, 14 (1980).

68. Swatuk, *supra* note 64, at 111.

69. See Jack Parson, *Cattle, Class and the State in Rural Botswana*, 7 J. S. AFR. STUD. 236, 253 (1981).

70. *Shadow Report*, *supra* note 2, at 6.

71. Olmstead, *supra* note 37, at 810 (quoting Good, *supra* note 49, at 210).

72. *Id.* (quoting Mathambo Ngakaeaja, et al., *A San Position: Research, the San and San Organizations*, in PROCEEDINGS OF THE KHOISAN IDENTITIES AND CULTURAL HERITAGE CONFERENCE 30, 30 (Andrew Bank ed., 1998)).

73. *Id.* at 811.

Beef exports in the second half of the 20th century to South Africa, and more recently to the EU, required that companies prove that herds were protected from disease, such as foot-and-mouth disease.⁷⁴ Because it was unclear at the time whether wild game were carriers of foot-and-mouth disease, the GOB constructed large-scale veterinary fencing to protect cattle from wild game in order to secure export contracts.⁷⁵ The fences had a disastrous effect on the wildlife that migrates seasonally in pursuit of water sources as well as on the San who depend on the game for food.⁷⁶ For example, during a severe drought in 1983, 65,000 wildebeest died at the base of a veterinary fence along the eastern edge of the CKGR.⁷⁷ Today, there are a staggering three million cattle in Botswana, half as great as the country's population.⁷⁸ The strain cattle place on Botswana's environmental resources, especially land and water, is immense. The resource conflict between cattle and wildlife creates a constant struggle.⁷⁹

The power struggles between the San and the Tswana continue to unfold in the present-day political and economic context. The Tswana, primary occupants of positions of leadership in Botswana today, continue to marginalize and disempower minority groups.⁸⁰ No minority group has been large enough to threaten the Tswana's hold on power, which may account, in part, for the historical lack of ethnic strife in Botswana. The San, perhaps most acutely, suffer economic inequality and discrimination,⁸¹ as well as threats to their land. "Belonging to a marginalised, often stigmatised, indigenious minority," Sidsel Saugestad notes, "almost invariably includes a state of abject poverty."⁸² The San are no exception.

One particular problem afflicting the San is the GOB's denial of applications for title deeds for property, even in areas the San have traditionally inhabited.⁸³ Instead, the homes of tens of thousands of San people are lost as the GOB allocates the land to others for "productive use."⁸⁴ This flies in the face of Botswana's own

74. Graciela Flores, *Good Fences, Good Neighbors?*, 115 NAT. HIST. 48, 50 (2006).

75. *Id.*

76. Swatuk, *supra* note 64, at 115.

77. Flores, *supra* note 74, at 50.

78. Swatuk, *supra* note 64, at 110.

79. *See* Flores, *supra* note 74, at 50.

80. *See* Press Release, DITSHWANELO: Botswana Centre for Human Rights, Press Statement Following a Workshop on Rights of Minority Groups (Feb. 15, 2006), available at <http://www.ditshwanelo.org.bw/feb15press.html>.

81. *See* BOTSWANA REPORT, *supra* note 32. The report also criticized "[t]he government's continued narrow interpretation" of the 2006 High Court.

82. SAUGESTAD, *supra* note 62, at 31.

83. IPACC, *supra* note 39.

84. *Id.*

constitution, which recognizes that all citizens have land rights,⁸⁵ rights that are reiterated in the 1975 TGLP, which claims, “all Batswana have the right to sufficient land to meet one’s needs.”⁸⁶ The constitution protects citizens from deprivation of property and entitles those who are deprived to compensation.⁸⁷ Interestingly, where the constitution protects freedom of movement, it allows “for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen,” implying commitment to protect the lands used by the San.⁸⁸ Yet the forced removals of the San from the CKGR directly contradict this commitment. This contradiction appears to be a result of a change in heart by the government when the “well-being of Bushmen”⁸⁹ came into conflict with other interests.

The GOB also has limited the ability of the San to find other land. While the San can apply to the Land Boards for small parcels of land, this land cannot be used for hunting and gathering, but rather only for residential, commercial, pastoral, or agricultural purposes.⁹⁰ Even if the San wanted to apply for land under these restrictions, many do not have access to information regarding this complicated process,⁹¹ language skills with which to negotiate, or the funds necessary to proceed. These types of obstacles essentially force the San to shun their traditional lifestyle and shift toward livelihoods more generally accepted by the Tswana, such as farming or commercial enterprises. Such policies do not reflect the GOB’s claim that it treats all of its citizens equally.

In general, the plight of the San illustrates that “in Botswana, democratic rights and access to the fruits of the ‘African Miracle’ are available to some more than others.”⁹² No group symbolizes the limits of Botswana’s democracy better than the San. The complex and strained relationship between the ruling Tswana and the San is poignantly brought to light by the San’s eviction from the CKGR.

85. IWGIA, *supra* note 22.

86. *Id.*

87. BOTSWANA CONST. Ch. II, § 8(1)(b)(i), available at <http://www.parliament.gov.bw/docs/documents/constitution.pdf>.

88. *Id.* at § 14(3)(c).

89. *Id.*

90. IWGIA, *supra* note 22.

91. *See id.*

92. Taylor, *supra* note 20, at 226.

II. THE CENTRAL KALAHARI GAME RESERVE ISSUE

Lying in the middle of the Kalahari Desert, the CKGR covers roughly 52,800 square kilometers.⁹³ It “is the second largest game reserve on the . . . continent,”⁹⁴ and is one of the most desolate and arid sections of Botswana, rarely accessed by outsiders. In 1961, the British Protectorate established the Reserve to protect the traditional territory of the roughly 4000-strong hunter-gatherer communities of the Central Kalahari and the game on which the communities depended.⁹⁵ However, following the discovery of diamonds on this land in the early 1980s, the GOB coerced and then forced virtually all of the Bushmen to leave the Reserve in three major clearances in 1997, 2002, and 2005.⁹⁶ These San “now live in resettlement camps outside the reserve,”⁹⁷ where alcohol, depression, and disease are rampant, and they are dependent on GOB handouts.⁹⁸

The British created the CKGR to serve as a permanent home for the San as well as a wildlife reserve.⁹⁹ While Protectorate administrative officer George Silberbauer recommended the creation of the Reserve specifically for the protection of the San, the title “game reserve” was used because of the absence of legislation permitting the establishment of a “people’s reserve.”¹⁰⁰ The administration ultimately ignored many of the recommendations Silberbauer made regarding the need to provide land for the San and instead emphasized the role of the Reserve for wildlife conservation.¹⁰¹ Silberbauer would later testify, in the CKGR case reviewed by the High Court of Botswana, that the Reserve was originally created as a refuge for traditional hunters and gatherers and the animals on which they relied.¹⁰² Then Resident Commissioner of Mafeking also confirmed this claiming that

93. *Central Kalahari National Park, Botswana Game Reserve*, UYAPHI.COM, <http://www.uyaphi.com/botswana/game-Reserves/central-kalahari-park.htm>. (last visited Dec. 21, 2010).

94. Robert K. Hitchcock, *We are the First People: Land, Natural Resources and Identity in the Central Kalahari, Botswana*, 28 J. OF S. AFR. STUD. 797, 804 (2002).

95. See Sidsel Saugestad, *Improving Their Lives: State Policies and San Resistance in Botswana*, 4 BEFORE FARMING 1, 2 (2005), available at http://www.galdu.org/govat/doc/2005_4_12.pdf.

96. *Tribes*, *supra* note 36.

97. *Id.*

98. *Id.*

99. Sandy Gall, *The Bushmen of the Kalahari*, ECOLOGIST, Sept. 2003, at 29.

100. Hitchcock, *supra* note 94, at 804.

101. Olmstead, *supra* note 37, at 829-30.

102. *Media Kit: Bushmen Court Case—The Witnesses for the Bushmen*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Oct. 24, 2010) [hereinafter *Media Kit-Witnesses*].

[T]he object of the Reserve is to protect the food supplies of the existing Bushmen population in this area . . . from the activities of the European farming community at Ghanzi and visitors to the Territory, who are entering this area in increasingly large numbers either to poach game for biltong or to shoot predatory animals such as lion[s] and leopard[s] for their skins.¹⁰³

The establishment of the Reserve offered those indigenous groups whose traditional home was the Central Kalahari, the G/wi, G//ana, and Bakgalagadi,¹⁰⁴ a place to hunt, gather, and live indefinitely, where outsiders could not.¹⁰⁵

The CKGR remained intact through the transition at independence. However, in the 1980s, the GOB conducted a study of the Reserve to examine its purpose.¹⁰⁶ Although the GOB intended to prove its conviction that the protection of wildlife and the protection of livelihoods are incompatible objectives, the report concluded that the Reserve was indeed originally created to protect wildlife *and* provide enough land for the Bushmen.¹⁰⁷ Nonetheless, the GOB has since emphasized only the Reserve's role in preserving wildlife and the danger posed by the San who hunt it.

In 1986, the GOB announced that the settlements of its "Remote Area Dweller" (RAD) program, which provided services to the San, among others, would from that point forward be established only outside of the CKGR.¹⁰⁸ The GOB justified this decision based on the expense of providing services to the remote areas of the Reserve, the threat posed by settlements inside the Reserve to wildlife, and the greater ease with which development assistance could be provided to San communities if they were closer to transportation networks.¹⁰⁹ The San had the ability to travel relatively short distances in search of water and food¹¹⁰ and establishment of RAD settlements outside the Reserve would affect this ability. Such actions threatened the traditional system of coexistence between the San, who maintain critical knowledge of the land directly sur-

103. DITSHWANELO, The Botswana Centre for Human Rights, *Supplementary Report for the Committee on the Elimination of Discrimination*, Aug. 2002, at 4 [hereinafter *Supplementary Report*].

104. See SAUGESTAD, *supra* note 62, at 223.

105. Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 17 (1994).

106. See *Supplementary Report*, *supra* note 103, at 4.

107. *Id.*

108. Olmstead, *supra* note 37, at 803.

109. *Id.* at 804.

110. See Gall, *supra* note 99, at 30.

rounding their communities, allowing them to survive in this formidable climate, and the Kalahari environment.¹¹¹

The termination of RAD services inside the Reserve did not successfully encourage all San to exit the Reserve, as the GOB may have hoped. In 1996, the GOB began its eviction campaign by removing San residents from the village of Xade in the Reserve.¹¹² The GOB established two resettlement camps, New Xade and Kaudwane, for the relocated San along the outskirts of the Reserve, in the desolate and remote southwestern part of the reserve.¹¹³ In the beginning, the GOB offered homes in the resettlement camps, modest financial compensation, and cattle to encourage the San to move.¹¹⁴ Yet many still did not relocate; those who did often claimed the GOB did not follow through on its promises of compensation and other benefits.¹¹⁵ The GOB compelled the more resistant San residents to leave by establishing roadblocks to prevent them from moving in and out of the Reserve and by confiscating their vehicles.¹¹⁶

By 2001 there were roughly 700 individuals left in the Reserve out of the 2500 to 3000 thought to have lived there before the campaign began.¹¹⁷ To expedite the removal of the remaining San, on January 31, 2002, the GOB ceased provision of all basic services to the Reserve, including drinking water, borehole access, food rations (as allocated to registered “destitutes”), transport for children to and from school, and healthcare by means of mobile clinics and ambulance services.¹¹⁸ For those who remained still, the GOB discouraged them further. In 2005, the GOB discontinued the renewal of radio licenses, previously given to the First People of the Kalahari (FPK), an NGO working on behalf of San living in the Reserve, claiming that poachers were using vehicle-mounted and hand-held radios to avoid wildlife patrols.¹¹⁹ The FPK maintains that, in fact, the radios were vital to ensuring “the safety of widely scattered families living in the reserve.”¹²⁰ The GOB also removed water tanks from settlements inside the Reserve and then forbade the use of donkeys, which had become necessary to transport water

111. See *Shadow Report*, *supra* note 2, at 6.

112. IWGIA, *supra* note 22.

113. *Id.*

114. Van der Post, *supra* note 31.

115. Olmstead, *supra* note 37, at 804.

116. *Id.* at 805.

117. IWGIA, *supra* note 22.

118. *Sesana v. Att’y Gen.*, (52/2002) [2006] BWHC 1, 2 (Botswana), available at <http://test.saflii.org/bw/cases/BWHC/2006/1.html>.

119. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2006 UNITED STATES HUMAN RIGHTS REPORT: BOTSWANA (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78720.htm>.

120. *Id.*

from further away, claiming that livestock, as potential carriers of disease, threatened the wildlife.¹²¹ In the end, roughly 2000 San relocated to the resettlement communities where many remain to this day.¹²² In the settlement camps, the San are not able to pursue their traditional livelihoods. Relocation to unfamiliar areas has resulted in their inability to survive off the land. Most await GOB handouts.¹²³ The Economist already reported in 2006 that their “communities are fragmented, poor and marginalized.”¹²⁴ Most San maintain that they would prefer to return to the Reserve rather than remain in the settlements.¹²⁵

The forced relocations and the status of those San living in the resettlement camps have led to an extensive battle between the San and the GOB. The San demanded the right to return to the Reserve based on their claim to the land, which is grounded in customary law.¹²⁶ The San’s understanding of their land rights runs far deeper than laws created under the Protectorate or at independence. For them, the Kalahari is inextricably tied to San culture and the pursuit of traditional livelihoods. As many San simply put it, the graves of their ancestors are buried there.¹²⁷

In response to the conflict that has arisen, the GOB has done everything from denying that the removals were related to diamond mining altogether to claiming that all relocations were entirely voluntary.¹²⁸ However, when pressed, the GOB has given two main reasons for its actions. First, the GOB claims that removing the San is critical to protecting the wildlife and ecology of the Reserve because the San way of life, specifically hunting, “interfer[e] with conservation.”¹²⁹ Second, the GOB fervently argues that the San must “develop” themselves, something that they cannot do if left to their traditional lifestyles within the Reserve.¹³⁰ The San have been referred to as “stone age creature[s]” who are doomed to “die out like the dodo” if they do not develop themselves.¹³¹ Through either defense, the GOB presents its position as one of

121. *Botswana: The San Can Return Home Now*, IRIN NEWS, Dec. 13, 2006, <http://www.irinnews.org/Report.aspx?ReportId=62504>.

122. *See The Row about the Bushmen*, ECONOMIST, Feb. 18, 2006, <http://globalagenda.co.uk/node/5524597>.

123. *See id.*

124. *See id.*

125. *See* Van der Post, *supra* note 31.

126. *See Media Kit: Bushmen Court Case—Legal Precedents*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Dec. 20, 2010) [hereinafter *Media Kit—Legal Precedents*].

127. *Supplementary Report*, *supra* note 103, at 15.

128. *Botswana Denies Diamonds Forced Bushmen off Reserve*, ENV’T NEWS SERVICE, Nov. 11, 2002, <http://www.ens-newswire.com/ens/nov2002/2002-11-11-03.asp>.

129. *Botswana Bushmen Win Land Ruling*, *supra* note 30.

130. *See* IWGIA, *supra* note 22.

131. GOOD, *supra* note 19, at 16.

compassion toward the welfare of the San and the protection of Botswana's environment.

The GOB's treatment of similar land use issues in other parts of the country may illuminate its intentions in the case of the San in the CKGR. In Northern Botswana, the GOB has pursued a sophisticated management regime in order to protect the ecology and environment of the Okavango Delta, where several indigenous communities have lived for millennia. Pushed to action by the signing of the Convention on Wetlands of International Importance (the "Ramsar Convention"), the GOB created the Okavango Delta Management Plan, "to integrate resource management for the Okavango Delta that will ensure its long-term conservation and that will provide benefits for the present and future well being of people, through sustainable use of its natural resources."¹³² What is interesting about this mission statement is that it clearly reconciles the protection of the environment with the protection of livelihoods. On the other hand, the GOB has consistently referred to the incompatibility of wildlife conservation and local communities in the Central Kalahari to defend its forced removals.

Three key factors may have led to the contradiction in the GOB's stance. First, the Okavango Delta does not provide lucrative diamond resources, as the CKGR might. Second, because of *tsetse* fly outbreaks near the Delta, cattle are not well suited for the region either.¹³³ Third, the protection of the most valuable resource offered by the Delta, water, relies specifically on proper conservation. On the other hand, the Central Kalahari's most lucrative resource may be its diamonds; it has no surface water to protect. Another possibility is that the GOB simply does not recognize the real ecological and economic benefits of protecting the Kalahari because of its apparent arid and empty nature, while the value of preservation is so much more clear in a place like the Okavango Delta, which as a major scientific and tourist destination is home to 650 bird species, 208 aquatic and semiaquatic plants, and 675 herbs and grasses.¹³⁴ Currently, the state does not depend upon the CKGR as a major source of revenue for the tourism industry.¹³⁵

Despite the GOB's claims that it undertook the forced removals to protect the environment inside the Reserve and develop its people outside the Reserve, many would argue that the real reason for

132. Ruud Jansen, *The Okavango Delta Management Plan Project – Application of an Ecosystem-Based Planning Approach*, SEVENTEENTH GLOBAL BIODIVERSITY FORUM (2002).

133. *See id.*

134. *Id.*

135. *See generally* Naomi Moswete & Felix T. Mavondo, *Problems Facing the Tourism Industry of Botswana*, 35 BOTSWANA NOTES & REC. 69 (2003).

the relocations is intricately linked to the backbone of the Botswana economy.¹³⁶ When DeBeers geologists discovered diamonds in the Kalahari region in 1967, the course of modern history for Botswana changed dramatically.¹³⁷ Diamond mining is now the core of Botswana's economy. It contributes roughly 33% of GDP and two-thirds of GOB revenue.¹³⁸ Nearly all of Botswana's advancements in infrastructure, healthcare, and education are the result of diamond revenues.¹³⁹

Given the importance of diamonds to Botswana's economy,¹⁴⁰ there is little doubt that the GOB and the national diamond company, Debswana, continue to search for new sources of diamonds. The Central Kalahari is recognized as prime gem territory and has been a key target area for prospecting,¹⁴¹ especially near a former San community, Gope.¹⁴² Perhaps not coincidentally, the GOB undertook relocations one year after it conducted a formal evaluation of the mining potential at Gope.¹⁴³ Two companies, DeBeers and Falconbridge Exploration, prospected there in the early 80s, but it was not until 2000 that the GOB officially proclaimed that diamonds were found there.¹⁴⁴ At the time, the mining potential at Gope was declared "sub-economic" and the GOB abandoned plans to open a mine.¹⁴⁵ It is possible that the GOB delayed plans to mine at Gope because of the way in which the international community would interpret such action. After all, many San had just been evacuated from this area purportedly because their presence threatened the environment. According to Kenneth Good, significant diamond exploration has taken place in many of the areas from which the San have been removed.¹⁴⁶

Only two months following the closure of Xade, the Anglo-American Diamond Company conspicuously brought mining and

136. See GOOD, *supra* note 19, at 20 (noting that the "connection between the expulsion of the San and intensification of mining cannot be ignored").

137. See *Debswana – Carats by the Million*, AFR. BUS., Sept. 1999, at 23.

138. *Id.* at 24.

139. See LEITH, *supra* note 15, at 64 (noting that development of the mineral sector and mineral revenues was crucial for other types of development in Botswana).

140. See Kenneth Good, *Resource Dependency and Its Consequences: The Costs of Botswana's Shining Gems*, 23 J. CONTEMP. AFR. STUD. 27, 27 (2005) (describing Botswana's dependency on diamonds and the costs thereof).

141. See GOOD, *supra* note 19, at 18.

142. Kitsepile Nyathi, *Botswana; Bushmen Step Up Pressure on Botswana Over Desert Land*, NATION, Feb. 19, 2007, <http://allafrica.com/stories/printable/200702190039.html>.

143. *Bushmen Aren't Forever*, SURVIVAL INTERNATIONAL (Sept. 18, 2006), http://www.survivalinternational.org/files/related_material/11_513_969_diamonds_facts.pdf.

144. GOOD, *supra* note 19, at 16.

145. *Mining and Mineral Prospecting in Botswana*, GOVERNMENT OF BOTSWANA, http://www.gov.bw/index.php?option=com_content&task=view&id=51&Itemid=52 (pages accessed through <http://web.archive.org>).

146. GOOD, *supra* note 19, at 36-39. A series of maps depicts diamond concessions in the Kalahari Game Reserve before and after the Bushman evictions.

drilling equipment to this former San community that once contained a clinic, a school, a borehole, and an airstrip, as well as to other prospective mining locations in the Reserve.¹⁴⁷ The GOB also provided ninety prospecting licenses to the British company Kalahari Diamonds Limited, one third of which were for lands inside the Central Kalahari and Khutse Game Reserves.¹⁴⁸ According to a report by Survival International, an international NGO advocating on behalf of indigenous groups worldwide, “[a]lmost the entire CKGR is now being explored for both diamonds and precious metals.”¹⁴⁹

For a time, the GOB denied any intention of mining within the CKGR.¹⁵⁰ Yet, it made a point of publicly noting that mining rights in Botswana, according to the Constitution, belong to the State regardless of who owns the land.¹⁵¹ The 2009 U.S. Department of State Country Report notes that while the GOB has become slightly more tolerant of the views of human rights organizations working in Botswana, it is “considerably less open to the involvement of some international NGOs on the issue of the CKGR relocations.”¹⁵²

Fears regarding the GOB’s claim that diamond mining would never take place in the Reserve have been realized. On January 22, 2008, Survival International reported that Marsh Environmental Services, a consulting firm, conducted a twelve-day consultation regarding the establishment of a 2.2 billion dollar diamond mine inside the Reserve.¹⁵³ The mine would be located near Gope, despite previous claims by the GOB that the mining potential there was “sub-economic.” The San, represented by the FPK, fought back by requesting an independent mining expert who could apprise them of the impact of the mine, to little avail.¹⁵⁴ Although mining at Gope has yet to begin, the GOB has issued development permits.¹⁵⁵

Plans for mining within the Reserve directly contradict the GOB’s reasoning for eviction of the San. If the removal of the San from the CKGR was intended for the protection of the environment, diamond mining certainly obviates this justification. The specific variety of diamond mining used throughout most of South-

147. *Bushmen Aren’t Forever*, *supra* note 143.

148. Olmstead, *supra* note 37, at 806.

149. *Bushmen Aren’t Forever*, *supra* note 143.

150. *Botswana Denies Diamonds Forced Bushmen off Reserve*, *supra* note 114.

151. *Mining and Mineral Protection in Botswana*, *supra* note 145.

152. BOTSWANA REPORT *supra* note 32.

153. *Mine “Consultation” Process Fatally Flawed*, SURVIVAL INTERNATIONAL (Jan. 22, 2008), <http://www.survival-international.org/news/3044>.

154. *Id.*

155. Sarah Dickinson Deleon & Curtis Ventriss, *Diamonds, Land Use and Indigenous Peoples: The Dilemmas of Public Participation and Multi-National Diamond Corporations*, 15 PUB. ADMIN. & MGMT. 98, 99 (2010).

ern Africa is especially destructive to the environment. In the four major existing mines in Botswana—Jwaneng, Orapa, Letlhakane, and Damtshaa¹⁵⁶—primary deposit pipe mining is used, requiring the use of heavy equipment to dig deep into the earth, creating open-pit mines.¹⁵⁷ This type of mining is far more intrusive than diamond mining of alluvial, or secondary, deposits in riverbeds that takes place, for example, in Sierra Leone.¹⁵⁸ Prospecting for mines in a national reserve indicates that environmental protection is not of primary concern. This contradiction has led Survival International, a UK-based NGO working for indigenous rights, to refer to Botswana's diamonds as “diamonds of despair,” or “conflict diamonds” as has occurred in Liberia, Angola, and Sierra Leone, among other war-torn, diamond-rich regions.¹⁵⁹

Mining within the Reserve could have important legal implications. It seemingly provides motive for the GOB's forced relocation of the San and runs contrary to any statements claiming the removal of the San was undertaken for environmental purposes. The laws of Botswana, however, protect the GOB's actions in several ways. The Mines and Minerals Act of 1999 states that the GOB maintains all rights of ownership to minerals, regardless of who owns the land.¹⁶⁰ The Act also states that, “[w]here the President considers that any land is required to secure the development or utilization of the mineral resources of Botswana, he may compulsorily acquire such land.”¹⁶¹ Even the legal designation of a “reserve” does not offer much protection against taking land for mining purposes. The Wildlife Conservation and National Parks Act forbids prospecting or mining in national parks or reserves “except with the written permission of the Minister.”¹⁶² In theory, state ownership of mining rights reflects the state's policy to utilize the country's resources to the benefit of all of its citizens, not just individual landowners.¹⁶³ Yet, while the GOB has been successful in translating mineral wealth into development, it has not been suc-

156. *Debswana Diamond Mines, Botswana*, MINING-TECHNOLOGY.COM, <http://www.mining-technology.com/projects/debswana/> (last visited Dec. 22, 2010).

157. *Diamond Mining*, ENVTL. LITERACY COUNCIL, <http://www.enviroliteracy.org/article.php/1121.html> (last visited Dec. 22, 2010).

158. *Diamonds – Diamond Mines & Mining*, ALL ABOUT GEMSTONES, http://www.khulsey.com/jewelry/kh_jewelry_diamond_mining.html (last visited Dec. 22, 2010).

159. GOOD, *supra* note 19, at 6.

160. Wildlife Conservation and National Parks, Ch. 66:01, § 3, *available at* <http://www.laws.gov.bw/VOLUME%206/CHAPTER%2038-01%20WILDLIFE%20CONSERVATION%20AND%20NATIONAL%20PARKS.pdf>.

161. *Id.* § 64.

162. Mines and Minerals Act of 1999, Ch. 38:01, § 10, *available at* <http://www.laws.gov.bw/VOLUME%2014/CHAPTER%20%2066%2001%20MINES%20AND%20MINERALS.pdf>.

163. See Richard Werbner, *Introduction: Challenging Minorities, Difference and Tribal Citizenship in Botswana*, 28 J. S. AFR. STUD. 671, 676 (2002).

cessful at ensuring that this development benefits its citizens uniformly. The constitution of Botswana protects its citizens from dispossession of property, yet the GOB has managed to circumvent this obstacle by claiming that the San are not in possession of the land they inhabit due to their “nomadic” nature.¹⁶⁴

It would seem that the laws of Botswana provide the necessary justification for the GOB to seize land from the San if minerals were present, which would make the cover of environmentalism unnecessary. However, the evictions have taken place during a time when “conflict diamonds” have threatened the value of diamonds worldwide and mentioning the words “diamond” and “Africa” in the same sentence can evoke images of child soldiers and amputees. The GOB has gone to great lengths to prove to the international community that its diamonds are “clean.”¹⁶⁵ Therefore, any association between the eviction of an indigenous group from their land and the mining of diamonds would inhibit Botswana’s ability to market its diamonds as clean. By drawing attention to Botswana’s “clean” diamonds, Taylor and Mokhawa note, the GOB may have unwittingly drawn unwanted attention to the plight of the San.¹⁶⁶

Regardless of the justification for the removals, international law forbids forcibly removing people from their land, or requires compensation if the acquisition is unavoidable.¹⁶⁷ Article 9 of the UN Declaration on the Rights of Indigenous Peoples explicitly states that indigenous lands cannot be co-opted for any purpose without the free and informed consent of the indigenous peoples living there.¹⁶⁸ As a party to other, relevant international human rights agreements,¹⁶⁹ such as the International Covenant on Civil and Political Rights (ICCPR), Botswana is obligated to uphold the rights therein, presenting an opportunity for the San to contest the forced relocations.

III. THE LEGAL SYSTEM IN BOTSWANA

Part of Botswana’s reputation as a democratic success story in

164. Olmstead, *supra* note 37, at 810.

165. See Taylor & Mokhawa, *supra* note 28, at 262, 271.

166. *Id.* at 274.

167. *Forced Evictions*, CENTRE ON HOUSING RIGHTS AND EVICTIONS, <http://www.cohre.org/GFEP> (last visited Dec. 22, 2010).

168. Declaration on the Rights of Indigenous People, ¶ 10 G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.undemocracy.com/A-RES-61-295.pdf>.

169. *Ratification of International Human Rights Treaties – Botswana*, U. MINN. H.R. LIBR., <http://www1.umn.edu/humanrts/research/ratification-botswana.html> (last visited Oct. 27, 2010).

Africa includes recognition of its independent judiciary.¹⁷⁰ The Judicial Service Commission, an independent body, recommends judges to the President, who appoints them.¹⁷¹ The country continues to rely on magistrates and high courts, as well as traditional courts, which use customary law for dispute resolution at the local level.¹⁷² While courts are affected by long delays before trial, inadequate resources, and limited access to counsel,¹⁷³ in general, “Botswana has the reputation of a country in which the rule of law, assured by an independent court system,” Adamolekun and Morgan write, “is predictable.”¹⁷⁴

The GOB has traditionally respected this independence and often has been compliant with rulings against it, as demonstrated by the landmark 1992 case, *Dow v. Attorney-General (Botswana)*,¹⁷⁵ in which the Court of Appeal of Botswana determined that citizenship laws allowing only male citizens to pass on their citizenship to their children amounted to sexual discrimination.¹⁷⁶ In its ruling, the court poignantly noted, “Botswana seeks to avoid violating international law where possible.”¹⁷⁷ It expounded upon Botswana’s image as a liberal democracy and the country’s loyalty to the human rights agreements that it signed and ratified.¹⁷⁸

The *Unity Dow* case is remarkable for a couple of reasons. First, it marked a major step forward for women’s rights in Botswana. Second, in coming to a decision the Court referenced many sources outside the laws of Botswana, including the African Charter on Human and People’s Rights, the United Nations Declaration of Human Rights, the Convention on the Elimination of Discrimination Against Women (CEDAW), and the constitutions of five other countries.¹⁷⁹ The willingness of the courts in Botswana to reference international cases and norms of international law demonstrates that progress is possible through the courts to bring Botswana closer to reflecting in practice and in law the stipulations set forth in the agreements to which it is a party.

170. LEITH, *supra* note 15, at 59.

171. Ladipo Adamolekun & Philip Morgan, *Pragmatic Institutional Design in Botswana: Salient Features and an Assessment*, 12 INT’L J. PUB. SECTOR MGMT. 584, 588 (1999).

172. *Id.*

173. *Id.* at 591.

174. *Id.* at 590.

175. 03 I.L.R. 128 (Bots. Ct. App. 1992).

176. Gloria Somolekae, *Democracy, Civil Society and Governance in Africa: The Case of Botswana*, 18 (1998), available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN009287.pdf>.

177. Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 564 (2003).

178. *Id.* at 592-93.

179. Valerie Knobelsdorf, *Zimbabwe’s Magaya Decisions Revisited: Women’s Rights and Land Succession in the International Context*, 15 COLUM. J. GENDER & L. 749, 792 (2006).

Despite these positive assessments of the independence of Botswana's judiciary, evidence does exist of GOB influence within the courts. For example, when the GOB evoked its right to deport University of Botswana professor Kenneth Good from the country in 2005 as a "Prohibited Immigrant" (PI), the Court of Appeal threw out Good's appeal, citing the events of September 11, 2001 and the London bombings, because the President had claimed Good was a national security threat.¹⁸⁰ The Attorney General defended the right of the President to take unilateral action in this regard, claiming, "to declare one a PI by the President was a one-sided action which cannot be challenged in court."¹⁸¹

In a decision taken at its May 2010 session, the African Commission on Human and People's Rights ruled that Botswana had infringed on Professor Good's rights and that national security was not a legitimate justification by states for infringing on the right of individuals in their country to access the courts and that he ought to be compensated as a result. The Commission ruled that "a victim's right to have his cause heard" could not be limited in the interest of the public.¹⁸² On the GOB's justification for deporting Professor Good, the Commission ruled:

There is nothing in the article [written by Professor Good] that has the potential to cause instability, unrest or any kind of violence in the country. It is not defamatory, disparaging or inflammatory. The opinions and views expressed in the article are just critical comments that are expected from an academician of the field; but even if the government, for one reason or another, considers the comments to be offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals.¹⁸³

Foreign Affairs Minister Phandu Skelemani responded to the ruling: "We are not going to follow on the recommendation made by the commission; it does not give orders, and it is not a court. We are not going to listen to them."¹⁸⁴ This statement and the decision

180. Ian Taylor, *The Limits of the 'African Miracle': Academic Freedom in Botswana and the Deportation of Kenneth Good*, 24 J. CONTEMP. AFR. STUD. 101, 106 (2006).

181. *Id.*

182. EXEC. COUNCIL, AFRICAN COMM'N ON HUMAN RIGHTS AND PEOPLE'S RIGHTS (ACHPR), 28TH ACTIVITY REPORT OF THE ACHPR 95 (2010).

183. *Id.* at 100.

184. Simisani Chilisa, *Botswana Will Not Honour African Union Ruling on Prof Good*, SUNDAY STANDARD, Aug. 2, 2010, <http://www.sundaystandard.info/article.php?NewsID=8415&GroupID=1>.

not to comply with the ruling was seen to be “regrettable” by the chairman of the Law Society of Botswana, Tebogo Sebego.¹⁸⁵ He noted that: “Judicial bodies which are meant to keep international rulings are meant to be what they are, if we are part of AU then the issues of human rights must say something about our laws.”¹⁸⁶ Akanyang Magama, the General Secretary of a political party in Botswana, the Botswana National Front (BNF), commented: “If they are a government that believes in the rule of law, then why can’t they abide by that?”¹⁸⁷ Interestingly, Good wrote significantly about the San situation.¹⁸⁸

The CKGR case, *Sesana v. Attorney General*, shows that even when the courts rule against the GOB,¹⁸⁹ the GOB does not always adhere to court’s rulings. The courts played an especially crucial role in the CKGR case. Thus far, the High Court has been the only defender of the San’s rights capable of influencing GOB action toward them, although to a very limited extent. Two of the three judges, Justice U. Dow and Justice M. P. Phumaphi, ruled, for the most part, in the San’s favor.¹⁹⁰ They invoked international law in reaching their decisions, demonstrating once again the ability of the courts in Botswana to serve as a forum for progress towards better-respected human rights.

IV. THE HIGH COURT CASE: SESANA V. ATTORNEY GENERAL

The case, *Sesana v. Attorney General*, brought before the High Court of Botswana in Lobatse in 2004, comprised several complaints. First, the San argued that the GOB should be obliged to reinstate basic services to the Reserve terminated in January 2002 and to continue to provide such services.¹⁹¹ Second, the San asserted that the GOB unlawfully deprived them of their land and therefore must restore it to their lawful possession.¹⁹² Third, the San claimed that the GOB refused to issue Special Game Licenses to San living in the CKGR and prohibited them from entering the Reserve even with permits, which was unlawful and unconstitution-

185 *Id.*

186 *Id.*

187 *Id.*

188. *See generally* GOOD, *supra* note 19.

189 *See generally* *Sesana*, *supra* note 118.

190. Justice Dow dissented on several issues, including whether the applicants were deprived of their land by the GOB wrongly or without their consent, whether the GOB refusal to issue Special Game Licenses to the applicants was unconstitutional, and whether the GOB refusal to allow the applicants to enter the Reserve unless they were issued with permits was unlawful and unconstitutional. *See id.* at 121-22.

191. *Id.* at 2-3.

192. *Id.* at 3.

al.¹⁹³ Finally, the San alleged that the GOB should be responsible for covering the costs borne by the applicants of bringing the case before the High Court.¹⁹⁴

Over the two and a half years that the court addressed these issues, the San from the CKGR continued to live in limbo. Services to those who remained in the Reserve were suspended and relatives were not permitted to bring water to the remaining inhabitants.¹⁹⁵ The GOB continued to enforce the ban on hunting, leaving those who remained to rely solely on foraged food or risk being caught—and potentially harassed or even tortured—hunting illegally by wildlife officials or the police.¹⁹⁶ In September 2005, due to an outbreak of mange among some domestic animals inside the Reserve, the GOB ordered that all livestock be removed from the Reserve within fourteen days.¹⁹⁷ A group of San legally challenged these policies and the High Court ruled that while the larger case was still pending, the GOB's refusal to allow relatives to bring water to inhabitants of the Reserve and the forced removal of livestock was in fact unreasonable and unjustifiable. Yet the Court provided the GOB with significant leeway to continue to issue orders in the interests of "the proper management of the Reserve."¹⁹⁸

On December 13, 2006, the High Court finally reached its decision. By many accounts, the San won. The court ruled in their favor on every complaint except for the question of whether it was unlawful for the GOB to cease the provision of services to CKGR inhabitants.¹⁹⁹ In this case, the court claimed that the GOB's actions were not unlawful because the San were adequately informed that these services would be terminated before it occurred, and therefore the GOB was not obligated to reinstate them.²⁰⁰ One of the three judges confirmed that as a signatory to CERD the GOB must ensure that indigenous groups have rights equal to all others in Botswana and "that no decisions directly relating to their rights and interests are taken without their informed consent."²⁰¹

The San, who argued their case based on preexisting rights to the land under common law,²⁰² received affirmation from the court that they are in fact indigenous to the Reserve, an indication of

193. *Id.*

194. *Id.*

195. *Shadow Report*, *supra* note 2, at 7.

196. *Id.* at 8.

197. *Id.*

198. *Id.*

199. Saugestad, *supra* note 21, at 2.

200. See *Sesana*, *supra* note 118, at 322.

201. *Id.* at 202.

202. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 587-88 (2007).

their lawful possession of the land.²⁰³ In doing so, the court acknowledged “the common law principle that occupation is proof of possession.”²⁰⁴ This assessment should provide the San with leverage in future negotiations regarding the compatibility of their livelihoods with contemporary laws and regulations governing property and land-use rights in Botswana, for clearly this is not the only battle the San will have to fight. In recognizing that the San community was “legally in possession of its lands,” one of the judges on the High Court referenced cases from the High Court of Australia that referred to common law and Native Title Doctrine.²⁰⁵ National courts have increasingly acknowledged “that indigenous peoples’ land rights are grounded in their pre-existing customary laws which have survived colonization,” suggesting “the emergence of a unified jurisprudence on what could be labelled [sic] as a doctrine on ‘indigenous title.’”²⁰⁶ The High Court’s decision to reference international cases demonstrates growing international recognition of Native Title Doctrine and the willingness of courts to access cases from around the world to reach their verdicts. The ruling of the High Court of Botswana adds to this growing jurisprudence.

Despite these achievements, several outcomes of the case were problematic for the San. As previously stated, the court did not rule in favor of the applicants on the question of the provision of basic services;²⁰⁷ thus, the realistic ability of San to return to the Reserve is questionable. Without basic services, such as access to education, healthcare, and water, it is unlikely that the San can survive in the Reserve. The GOB’s refusal to provide these services, which the constitution states it should provide equally to all Botswana, violates many of the human rights treaties and declarations that the GOB has ratified. Furthermore, life for the San without these services begs the question of “what the GOB expects them to live on—or even if it wants them to live at all.”²⁰⁸

It is also problematic that the court did not take a stance on the issue of diamond prospecting in the Reserve. While the court acknowledged the matter, it asserted that diamond mining was not the issue before it.²⁰⁹ This is unfortunate for the San. While the GOB has not yet begun mining inside the Reserve, extensive prospecting and planning suggests that mining will take place in the

203. See Saugestad, *supra* note 21, at 2.

204. Gilbert, *supra* note 202, at 591.

205. *Id.* at 588.

206. *Id.* at 590.

207. Saugestad, *supra* note 21, at 2.

208. *G/wi Arrested for Hunting on Their Own Land*, PEACEFULSOCIETIES.ORG (July 19, 2007), <http://www.peacefulsocieties.org/NAR07/070719gwi.html>.

209. Sesana, *supra* note 118, at 194.

near future. Negotiations began in 2008 for the establishment of a 2.2 billion dollar mine inside the CKGR.²¹⁰ Mining inside the Reserve will inevitably interfere with the San way of life and the environment on which they depend.

If the San were to bring another case before the courts to address the mining issue, given the importance of diamonds to Botswana's economy, it is unlikely that such a case would be successful. A landmark case over land rights and diamond mining in the Richtersveld community in the Northern Cape Province of South Africa might offer precedence for the San, however. The South African Supreme Court of Appeal ruled that the Richtersveld people—an indigenous group whose presence in the region pre-dates Dutch colonization in the seventeenth century—were unlawfully deprived of their diamond-rich lands by the GOB, who gave the land over to mining contracts beginning in the 1920s.²¹¹ The court held “that the Richtersveld community had a ‘right in land’ through a customary-law interest and thus is entitled to restitution of the right to ‘exclusive beneficial occupation and use’ of the land, including all minerals and precious stones, based on their dispossession through racially discriminatory means.”²¹² Of particular importance in this case was a section of the ruling that stated that a failure to uphold indigenous land rights under customary indigenous laws amounts to racial discrimination.²¹³ Should the San return to court to demand fiscal restitution for their displacement once mining inside the Reserve occurs, the Richtersveld case may be a useful precedent.

The question of to whom the verdict applies is another major concern for the San. The GOB has asserted that the ruling applies only to the 189 original applicants who brought forth the case and not to all San formerly living in the Reserve.²¹⁴ At least one of the three High Court judges agreed. In Justice M. Dibotelo's statement he claimed, “[i]t is also important to identify who the [a]pplicants are so that the outcome in this action binds only those persons.”²¹⁵ The GOB removed more than 2500 San from the Reserve, many of whom want to return, but it appears that evicted San who are not

210. *Survival Launches Bushmen Water Campaign*, SURVIVAL INTERNATIONAL (Apr. 1, 2008), <http://www.survival-international.org/news/3177>.

211. Yvette Trahan, *The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a “Right in Land” Through a “Customary Law Interest” Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 566-67 (2004).

212. *Id.* at 567.

213. *Media Kit—Legal Precedents*, *supra* note 126.

214. Sesana, *supra* note 118, at 8.

215. *Id.*

among the 189 original applicants of this case may not be able to return.²¹⁶

After the longest and most expensive court case in Botswana's history, only a fraction of those affected by this conflict "won" back their land rights, and even they are having difficulty holding the GOB accountable to the ruling. Given the difficulty of bringing this case to the courts in the first place—due to costs, limited resources, language barriers, and other obstacles—the ability of another group appealing the scope of the ruling or bringing another case before the court is limited.

Despite the failures of the case in these regards, the fact that the San won at all, given the attitude of the GOB regarding the relocations, speaks to the independence of the judiciary in Botswana. If the judges were under the thumb of the GOB, it is highly unlikely that they would have ruled in the San's favor.

V. GOB COMPLIANCE WITH THE COURT'S DECISION

The decision in this case indicates that the High Court of Botswana offers a potential avenue for reform in Botswana's human rights arena. Through the case, the court has shown a willingness to take a stand against the GOB on issues of human rights, even especially sensitive ones. This same willingness, however limited, to confront the GOB was reflected in the *Unity Dow v. Attorney General of Botswana* case.²¹⁷ It is not, however, reflected in the San water case decided in July 2010.

The courts play a critical role in ensuring and enforcing adherence to international agreements. In the *Unity Dow* case, the court claimed that it would look at both ratified and non-ratified treaties in making its decision, noting the *Bird's Galore Ltd. v. A.G.* case from New Zealand in which the judge claimed that "[a]n international treaty, even one not acceded to by New Zealand, can be looked at by this court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty."²¹⁸ The Botswana Court of Appeal further noted, "international law represents a legitimate interpretive aid in construing domestic legislation,"²¹⁹ noting that courts "cannot afford to be immune from the progressive movements going

216. U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2007 COUNTRY REPORT: BOTSWANA (2008), available at <http://www.state.gov/gldrl/rls/hrrpt/2007/100467.htm>.

217. See Bahdi, *supra* note 177, at 564.

218. *Id.* at 580.

219. *Id.* at 585.

on.”²²⁰

While the support of the courts in upholding international norms is crucial, it is only part of the battle. For the courts to truly elicit change, the GOB will have to comply with their rulings. Thus far, the GOB has not indicated that it will comply willingly with the CKGR ruling. For example, the ruling specifically states that the 189 applicants of the case can return to the Reserve without permits so long as they have identification papers.²²¹ Yet two weeks following the ruling, when a group of San attempted to return home, park officials refused them entrance.²²² The GOB also has continued the water ban, which forbids inhabitants of the Reserve from using existing boreholes to pump water. Despite the ruling’s stipulations, the GOB has not issued a single hunting permit to the San since the close of the case.²²³ Reflections from the Peaceful Societies Web site conclude that the GOB “clearly is resisting the decision of the country’s supreme court.”²²⁴

Failed compliance also is apparent in the discrepancy between the ruling and the actions of wildlife officials in the Reserve, who are under GOB control. The history of violence toward the San, and their mistreatment in the Reserve, dates back more than a decade.²²⁵ One victim claimed to have been severely beaten and hung upside down by park officials after being accused of poaching.²²⁶ In October 2007, several San reported arrests and torture by wildlife officials for hunting, including a group of six San whom park officials arrested, accused of poaching, and allegedly beat.²²⁷ Since the ruling, at least fifty-three arrests have been made for hunting and abuses by wildlife officials and police have included beatings, deprivation of food and water, forced exercise in high temperature, and threats.²²⁸ Many of those arrested are not among the 189 applicants of the case, so the GOB defends the arrests by asserting that the decision applies only to that particular group.²²⁹

220. *Id.* at 589.

221. Gumisai Mutume, *Indigenous People Fight for Inclusion*, AFR. RENEWAL 3 (2007), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol21no1/ar-21no1.pdf>.

222. See Nyathi, *supra* note 142.

223. *Bushmen Freed as Government Clampdown Backfires*, SURVIVAL INTERNATIONAL (Aug. 5, 2009), <http://www.survivalinternational.org/news/4839>.

224. *G/wi Arrested for Hunting on Their Own Land*, *supra* note 208.

225. See Hitchcock, *supra* note 94, at 819.

226. *The Row about the Bushmen*, *supra* note 122.

227. *Torture of Bushmen—Shocking Details*, SURVIVAL INTERNATIONAL (Oct. 31, 2007), <http://www.survival-international.org/news/2572>.

228. *Id.*

229. See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development: The Situation of Indigenous Peoples in Botswana*, Human Rights Council, ¶ 72-77 U.N. Doc., A/HRC/9/9 Add.1 (Aug. 15, 2008) (by James Anaya) available at <http://www.international>

While the courts gave the San permission to return to the Reserve, it remains to be seen what kind of life they can return to. According to the Director of Survival International, Stephen Corry, the GOB's policy "couldn't be clearer—to terrorise the Bushmen so that they're too afraid to go home."²³⁰

Abuse and discrimination against the San are a societal problem that reaches beyond the scope of the Reserve. Such discrimination indicates that even if the GOB were to support the ruling, societal treatment of the San would still be a major issue. The outcome of the case and any minimal efforts by the GOB to uphold its verdict are not indicative of a greater understanding of the right of the San to live their way of life. This is evident in the GOB's firm opposition to allowing issues involving the San to infiltrate public discourse. In 2007, the GOB imposed additional visa requirements on seventeen journalists and academics, some of who write extensively on the San issue.²³¹ While the GOB may not publicly forbid open discourse on contentious issues like the San, it is clearly trying to dissuade it.

VI. THE SAN'S OPTIONS MOVING FORWARD

If GOB compliance with the ruling is limited, there are few options available to the San. Raising international awareness through meetings, demonstrations, increased press coverage, and the work of NGOs has thus far proven most effective. After all, it was coverage by NGOs like London-based Survival International that helped bring attention and resources to the CKGR case in the first place. In January 2010, Survival began their "Defying Logic" ad campaign in several major British publications to draw attention to the plight of San.²³² The FPK also has set up a Web site called "I Want 2 Go Home," which features the images and stories of some of the 1000 or so San hoping to return to the CKGR.²³³ Regardless of its feelings toward the San and their way of life, the GOB has a lot invested in its stable and democratic image, which draws levels of investment and prestige unknown to many African countries.²³⁴ Significant negative international attention could af-

displacement.org/8025708F004CE90B/(httpDocuments)/1DA16748507440CBC12575CC002F2C71/\$file/A+HRC+9+9+Add+1+special+rapporteur.pdf.

230. *Torture of Bushmen—Shocking Details*, *supra* note 227.

231. Thom McLachlan, *Botswana's 'Specialentry' Visas for Critics*, BUSINESS DAY (South Africa), Apr. 7, 2007.

232. *Bushmen Ad Campaign Attacks Botswana*, NAMIBIA ECON., (Jan. 15, 2010), <http://allafrica.com/stories/201001150917.html>.

233. *Home Page*, I WANT 2 GO HOME, <http://www.iwant2gohome.org> (last visited Dec. 22, 2010).

234. On investment in Botswana, see Anupam Basu & Krishna Srinivasan, *Foreign*

fect this image and is therefore likely to push the GOB to action.

Other channels through which future complainants might move would include the ICCPR, the African Commission, and the Office of the Ombudsman in Botswana. Unfortunately, while Botswana has ratified the ICCPR, it has not ratified its first optional protocol, which provides individuals with the right to bring issues before the Human Rights Committee.²³⁵ The African Commission, however, is capable of hearing complaints. The Commission sent a mission to Botswana in 2005, which criticized the GOB's treatment of the San and pressured the GOB to address human rights issues.²³⁶

The office of the Ombudsman in Botswana was established by the Ombudsman Act of 1995 as a public, extra-ministerial institution with the power to investigate "maladministration" and confer recommendations to the GOB.²³⁷ Thus far, the office has not been very active. Former Ombudsman Lethebe Maine reported to the African Commission in 2005 that he had received very few complaints to his office, other than a few grievances of human rights abuses brought by prisoners.²³⁸ The ombudsman, however, is appointed by the president, in consultation with the leader of the opposition party, and funded by the GOB.²³⁹ Questions of impartiality arise with a presidential appointee.

The San's January 2010 announcement that they intend to bring their case before the International Court of Justice (ICJ), following a stalemate in negotiations with President Ian Khama, is presumably aimed at drawing international attention.²⁴⁰ The ICJ only hears cases brought before it by states, not by individuals or other non-state actors.²⁴¹ Announcing such an intention, although not feasible in practice, is likely, however, to cast further light upon the plight of the San.

Finally, future petitioners could attempt to bring another case

Direct Investment in Africa: Some Case Studies 22 (Int'l Monetary Fund, Working Paper WP/02/61, 2002), available at <http://www.imf.org/external/pubs/ft/wp/2002/wp0261.pdf>.

235. Olmstead, *supra* note 37, at 846.

236. THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, MISSION REPORT TO THE REPUBLIC OF BOTSWANA (2005), available at http://www.achpr.org/english/Mission_reports/Botswana/mission%20report_Botswana.pdf.

237. *See id.*

238. *See id.*

239. *Ministry of State President*, GOVERNMENT OF BOTSWANA, http://www.gov.bw/index.php?option=com_content&task=view&id=23&Itemid=40#ombudsman (page accessed through <http://web.archive.org>).

240. David Manes, *Botswana Tribe to Bring Land Dispute with Government to ICJ*, JURIST: LEGAL NEWS AND RESEARCH (Jan. 10, 2010, 12:04 PM), <http://jurist.law.pitt.edu/paperchase/2010/01/botswana-tribe-to-bring-land-dispute.php>.

241. *Frequently Asked Questions*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/information/index.php?p1=7&p2=2&PHPSESSID=a0199c5b465fd4b5c9174d26c95b1892> (last visited Dec. 22, 2010).

before the Botswana courts. Considering the effort, time, and expense the first case entailed, this is exceedingly challenging. In 2007, the San threatened to pursue another case if the GOB continued to impede their return to the Reserve.²⁴²

More recently, the San pursued a case in the High Court regarding their right to access water inside the Reserve. In 2002, the GOB sealed a borehole in the CKGR to help drive the San out. Since then, the San have had to truck water in from the nearest public borehole, 300 miles away, to bring water back to their communities.²⁴³ The GOB refused to reopen the borehole, citing the verdict of *Sesana v. Attorney General*, which said that the GOB did not have to reinstate basic services. In response, in a hearing held on June 9, 2010 in the High Court at Lobatse, the San requested that either the existing borehole be reopened or that they be given permission to drill another borehole at their own cost.²⁴⁴ The High Court ruled against the San in its July 21, 2010 judgment. Justice Lakhvinder Walia stated that the San “have become victims of their own decision to settle an inconveniently long distance from the services and facilities provided by the government.”²⁴⁵ The San announced their intent to appeal the ruling,²⁴⁶ but for now it appears that even the courts are only willing to go so far to make the San’s return to the Reserve a reality.

Overall, future complainants have limited ability to combat the GOB should it chose not to comply with the ruling or with its obligations to protect the rights of the San under international law. Increased international pressure and awareness campaigns provide the most viable options. However, significant societal changes beyond the courts are necessary to actually alter the marginalized situation of the San in Botswana today.²⁴⁷

CONCLUSION

According to the Report of the Commonwealth of Nations Expert Group on Development and Democracy entitled “Making De-

242. *Bushmen—Back to Court?*, SURVIVAL INTERNATIONAL (Nov. 20, 2007), <http://www.survival-international.org/news/2683>.

243. Mark Tran, *Kalahari Bushmen to Appeal Against Court Ban on Well in Game Reserve*, GUARDIAN (United Kingdom), July 22, 2010, <http://www.guardian.co.uk/world/2010/jul/22/kalahari-bushmen-bostwana-well-court-appeal>.

244. See *Outrage as Botswana Bushmen Denied Access to Water*, *supra* note 1.

245. Tshireletso Motlogelwa, *Basarwa Lose Another One*, MMEGIONLINE (July 22, 2010), <http://www.mmegi.bw/index.php?sid=1&aid=3659&dir=2010/July/Thursday22>.

246. Tran, *supra* note 243.

247. The ruling of the High Court was reversed by the Court of Appeal on January 27, 2011. *Botswana Appeals Court Grants Water Rights to Bushmen*, JURIST (Jan. 27, 2011), <http://jurist.org/paperchase/2011/01/botswana-appeals-court-grants-water-rights-to-bushmen.php>.

mocracy Work for Pro-Poor Development,” prepared for the Commonwealth Heads of GOB in Abuja, “around half of the world’s 300 million indigenous peoples live in the Commonwealth,” and they regularly “suffer discrimination, intolerance and prejudice, and violation of their land rights.”²⁴⁸ The report specifically notes, among other things, that indigenous peoples suffer limits on their right to “own, develop, control and use their lands and territories.”²⁴⁹ Mukwiza Ndahinda writes: “indigenous peoples are frequently arbitrarily expelled—either at the hands of government officials or private actors—from lands on which their ancestors have been living.”²⁵⁰

In this context it was an important development for indigenous peoples everywhere when on December 13, 2006, the San in Botswana received judicial acknowledgement of their indigenous rights in the case over the CKGR. Locally, the ruling holds promise for the return of some San to their homelands in the Reserve. It also portends a future in which one of the world’s oldest indigenous groups may be able to carry on its unique culture. Also, it demonstrates judicial support for the existence of indigenous peoples in Botswana, which the GOB continues to deny.

Time will tell whether the GOB will come around and comply with the ruling. It has clearly shown hesitation thus far through its refusal to permit many San to return to the Reserve, its hesitation to issue special game licenses for hunting to the San, and the continued arrests and harassment of CKGR San by wildlife officials. GOB compliance would represent a crucial demonstration of support for the San, which may, over time, translate into lower levels of societal discrimination against them. Compliance would also demonstrate that Botswana does indeed take its international agreements seriously, even when adherence to them conflicts with other interests.

The case also provides a clear example of how well international pressure can work. A statement made by the Attorney General indicated that Botswana’s sudden engagement on this issue was due in major part to the involvement of the international community, supporting the theory that international pressure on GOBs who abuse human rights often elicits change. Such influence should not be underrated, especially when it concerns a country that benefits from its democratic image.

248. Helena Whall, Commonwealth Policy Studies Unit, Summary Report of the Indigenous Rights in the Commonwealth Project, 2001-2004, 13 (2004).

249. *Id.*

250. Felix Mukwiza Ndahinda, *Victimization of African Indigenous Peoples: Appraisal of Violations of Collective Rights under Victimological and International Law Lenses*, 14 INT’L J. ON MINORITY & GROUP RIGHTS 1, 9 (2007).

Although the San technically may have “won” this singular and exhaustive case, they continue to face a whole gamut of issues. The Second International San Conference in Palapye in 1993 expressed concern over issues such as poverty, lack of political representation, discrimination, exploitation as laborers, and limited cultural and social rights, issues that continue to affect the San to this day.²⁵¹ In addition, the inability of San to attend school taught in their own language threatens loss of a culture and inhibits the ability of San students to compete with others.

San still living inside the resettlement camps illustrate their dire situation. Few of those relocated have the means to return home.²⁵² Many are awaiting court dates for hunting violations, and others have neither the gas nor the transport with which to return. Although the GOB forcibly transferred the San to the settlements, they have offered no assistance for their return across great distances.²⁵³ Others have lost the skills they once had to hunt and survive in the wild and have become dependent on the rations, clinics, and boreholes that the GOB once provided in the Reserve and has now taken away. The introduction of diseases like AIDS has surpassed the ability of the San to cure illnesses with herbs and traditional medicine.²⁵⁴

The case also adds crucial precedence to Native Title Doctrine, which supports the use of customary indigenous laws to assist indigenous groups in reclaiming their homelands.²⁵⁵ There is a growing jurisprudence on indigenous rights in international law, and courts around the world will likely refer to the ruling of the High Court of Botswana in their rulings, just as the High Court referenced cases from Canada, Australia, and elsewhere.

While indigenous issues are gaining prominence in international law, as the signing of the UN Declaration on Indigenous Rights in September 2007 indicates, many questions regarding the definition of the term “indigenous” and the appropriate allocation of indigenous rights remain.²⁵⁶ This case adds to the growing jurisprudence of indigenous rights and offers insight into the questions the indigenous debate presents. The evolution of international law is an ongoing process that only can take place through implementation, exploration, and further discussion by the courts, states, civil society, indigenous groups, and the multilateral institutions

251. Hitchcock, *supra* note 94, at 811.

252. See Van der Post, *supra* note 31.

253. See *Bushmen—Back to Court?*, *supra* note 242.

254. See Van der Post, *supra* note 31.

255. See Gilbert, *supra* note 202.

256. See generally Amelia Cook & Jeremy Sarkin, *Who is Indigenous?: Indigenous Rights Globally, in Africa and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93 (2010) (discussing the extent to which indigenous communities remain marginalized).

that help create and maintain this framework. Botswana's role in this process should be to keep the discussion over indigenous rights alive. After all, confronting these issues is critical to the preservation of the country's image as a model of democracy in Africa.

A culture of nonconfrontation has perhaps discouraged Botswana from addressing the limits of human rights in society, just as a weak civil society has plagued progress among victims who claim their human rights are denied. The San have found support from outside sources, but true resolution of the thorny relationship between the GOB and the San only will materialize once the GOB and the rest of Botswana society identify with the role that the San play in Botswana's collective, historic identity. The people of Botswana must recognize the value of protecting the San way of life, including recognition that indigenous groups can contribute to contemporary society. These cultures are not simply relics of the past. To this end, NGOs working on indigenous issues should pursue cultural awareness campaigns that expose the public to the potential contributions of the San.

The San can indeed play a very important role in modern Botswana. Their unmatched knowledge of the region's biodiversity and other forms of indigenous wisdom is both scientifically and historically valuable. Given the San's knowledge, a partnership with the San could be very useful as the GOB pursues conservation and eco-tourism initiatives to protect and preserve Botswana's unique flora and fauna.²⁵⁷ In recognition of this knowledge, the Trust for Okavango Cultural and Development Initiatives began a project in 2005 in which the San work with GIS mapping technologies to map territories and knowledge of wild foods in the Okavango.²⁵⁸ Some Veld products historically used by the San have recently garnered commercial value, such as the Hoodia cactus, which international scientists are currently analyzing as a potential weight loss supplement.²⁵⁹ The Hoodia plant is neither easy to find nor recognize, presenting an opportunity for the San to offer valuable assistance.

The San, much like the Maasai in Kenya, also are a source of interest for tourists because they represent the oldest chapter in Botswana's collective history, and because of their cultural distinc-

257. On tourism possibilities generally, see Erdener Kaynak & Edward E. Marandu, *Tourism Market Potential Analysis in Botswana: A Delphi Study*, 45 J. TRAVEL RES. 227 (2006).

258. IPACC, *supra* note 39.

259. See Wezi Tjaronda, *Namibia: Biggest Market for Hoodia, Originally Used by San and Nama Tribes, is U.S.*, NEW ERA, Apr. 12, 2007, <http://allafrica.com/stories/200704120215.html>.

tiveness and regional knowledge. They could play a huge role in the future development of the eco-tourism sector.²⁶⁰ There are already several Community Based Natural Resource Management (CBNRM) programs that focus on combining eco-tourism, conservation, and the livelihoods of indigenous groups. Such initiatives inside the Reserve could potentially create environmentally-friendly revenue streams that benefit the San as well as Botswana's tourism industry.

The San have proven their ability to protect the land and its resources in this region for tens of thousands of years and could therefore be effective stewards of environmental projects. In fact, according to one evicted San member, the GOB was in the process of negotiating a management plan in consultation with the San before their eviction in 2002, which would have allowed residents to stay and even hunt and gather.²⁶¹ Following the evictions, the GOB replaced the plan with a new one, according to one witness, which failed to recognize the existence of the San at all.²⁶² Yet CBNRM programs already have taken off in other areas of Botswana, especially in the Okavango Delta, where local communities are empowered to care for the land based on a system of sustainable resource use and stakeholder involvement. The theory behind CBNRM is that local communities, particularly indigenous groups, know how to best protect their resources. These programs strive to combat historical assumptions in which “ ‘conservation’ became code for ‘exclusion and dispossession.’ ”²⁶³

In some areas of the country, the GOB recognizes and supports the link between maintaining the livelihoods of indigenous groups and the protection of lands. In the Okavango, local people act as guides for adventurous tourists in the Delta, sharing intimate knowledge of local flora and fauna. Many indigenous groups also make and sell crafts. Unlike in the CKGR, the GOB supports indigenous groups in the Okavango in these endeavors. Given the similar abilities of the two indigenous groups to act as wardens of the land, it is possible that diamonds in the Kalahari are to blame for the discrepancy in GOB treatment of the groups. Incorporating the San into land management practices in the Reserve would satisfy the desire of the San to live on their land and the desire of the GOB to protect the land. To “develop” the San, much less relegate them to squatter camps, would threaten this role and do nothing for the development of the country as a whole. At the very least, if

260. Hitchcock, *supra* note 105, at 15.

261. *Media Kit—Witnesses*, *supra* note 102.

262. *Id.*

263. Swatuk, *supra* note 64, at 100.

diamond mining within the Reserve is inevitable, the GOB ought to explore ways in which the land can be jointly utilized to the benefit of both. Mining in one section of the Reserve does not have to preclude the ability of the San to live in other sections.

In general, the GOB must better incorporate the lifestyle and the traditions of Botswana's non-Tswana speaking group, both socially and legally. To this end, the GOB ought to "[p]romote incorporation of indigenous knowledge in policy and programme activities" and support, not marginalize, NGOs working with the San while emphasizing participation and dialogue.²⁶⁴ Language will be a very important aspect of respecting San rights in the future. The GOB should permit the San to negotiate in their own language and, even more importantly, to receive education in their own language, as stipulated in ICCPR Article 27.²⁶⁵

The San also are in need of economic and social assistance. The GOB should help facilitate the livelihoods of the San *as they choose to make them*. If there are San who desire to live in the Reserve, their communities will require access to water, healthcare, and educational opportunities. The Special Rapporteur on Indigenous Rights noted in his 2010 report on Botswana that:

The Government should fully and faithfully implement the *Sesana* judgment [sic] and take additional remedial action in accordance with international standards relating to the removal of indigenous peoples from their traditional lands. Such remedial action should include, at a minimum, facilitating the return of all those removed from the reserve who wish to do so, allowing them to engage in subsistence hunting and gathering in accordance with traditional practices, and providing them the same government services available to people of Botswana elsewhere, including, most immediately, access to water Indigenous people who have remained or returned to the reserve face harsh and dangerous conditions due to a lack of access to water, a situation that could be easily remedied by reactivating the boreholes in the reserve. The Government should reactive the boreholes

264. Keitseope Nthomang, *Relentless Colonialism: The Case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana*, 42 J. MODERN AFR. STUD. 415, 432 (2004).

265. International Covenant on Civil and Political Rights art. 27, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

or otherwise secure access to water for inhabitants of the reserve as a matter of urgent priority.²⁶⁶

The San also are in dire need of political representation. Botswana did an excellent job of incorporating traditional Tswana institutions such as the *kgotla* into modern politics. It also has facilitated the involvement of traditional chiefs in politics. This ought to provide some foundation from which to create a system that affords political representation to these remote and distinct communities, including allowing the San to elect their own representatives, rather than have the GOB appoint them.

Social programs for the San can be financed just as many projects are in Botswana, through GOB revenues, which stem mostly from diamonds. If, in the end, it becomes clear that the San were forcibly removed from their homes to make way for diamond mining, it seems only fair that, at the very least, they should benefit from the subsequent revenues through social and economic assistance programs.

The San ought to have access to schools within a reasonable distance of their communities. A 1995 study found that only 18% of San children were in school.²⁶⁷ There are many reasons for this, including commute time, language barriers, punishment methods that run contrary to San beliefs, discrimination, and the focus of education on Tswana culture.²⁶⁸ An extremely centralized system of education has prevented schools from addressing the diverse needs of various communities around the country.²⁶⁹ The GOB should consider offering classes in San languages, so that progress through education does not have to result in a loss of culture, as it does for so many local and indigenous communities around the world.

Finally, if the GOB truly wishes for the San to “progress” by joining in Botswana society, it might first address the racism confronting San peoples,²⁷⁰ which inhibits their ability to compete in the modern workplace even if they wanted. Perhaps if the San had public support, the GOB would be encouraged to address their situation and implement the ruling. An op-ed in the *Mmegi Reporter* in December 2009 criticizing the GOB’s inertia on the San issue is perhaps an indication of shifting public opinion.²⁷¹

266. *The Situation*, *supra* note 7, at ¶ 97-98.

267. R. Winkle Wagner, *An Endless Desert Walk: Perspectives of Education from the San in Botswana*, 26 INT’L J. EDUC. DEV. 88, 91 (2006).

268. *Id.* at 91-94.

269. *Id.* at 91.

270. *See id.* at 90.

271. *The Executive Must Respect the Judiciary*, MMEGIONLINE, (Dec. 15, 2009),

The courts also have a role in bringing about these changes. This case demonstrates that the courts can function, to some extent, free of GOB influence. If they could not, the San would not have won. Sadly, the San were not so lucky in the recent water rights case of June 9, 2010, in which the High Court ruled against the San, denying their right to access a borehole inside the Reserve.²⁷²

The African Commission on Human and Peoples' Rights issued a Press Statement on August 10, 2010 stating:

The African Commission wishes to recall that, after being forcibly removed from the Central Kalahari Game Reserve in 2002 [sic], the Bushmen won an historic victory on 13 December 2006, when Botswana's High Court ruled that their eviction by the government was 'unlawful and unconstitutional'. The Court also ruled that they have the right to live inside the reserve, on their ancestral land inside the Central Kalahari Game Reserve. This ruling which is consistent with the provisions of the African Charter, in particular articles 2,4,19 and 24 has been welcomed by the international Human Rights community.

The ruling has been however seriously crippled by the denial to Kalahari Bushmen, of the right to water contained in the judgment no. MAHLB-000393-09 delivered Wednesday July 21st by the High Court in Lobatse, Botswana. The High Court ruled that the Bushmen people were not entitled to use a well already established on their traditional land in the Kalahari Game Reserve or excavate a new one.

...
 ... Refusal to allow the Bushmen to use their existing borehole at Mothomelo can only be interpreted as a clear sign that the Government of Botswana is determined to continue what is perceived as a policy of keeping the Bushmen from returning home.²⁷³

It is insufficient, therefore, for the High Court to rule in favor of the San's return, if it is not viable for logistical reasons. The courts must play a role in mending the relationship between the San and the GOB through legal channels, as well as protecting and enforce-

<http://www.mmegi.bw/index.php?sid=9&aid=107&dir=2009/December/Tuesday15>.

272. Innocent Tshukudu, *Back to Dry Land*, THE VOICE, (July 23, 2010), <http://www.thevoicebw.com/?p=2557>.

273. Press Release, African Commission on Human and Peoples' Rights, Press Release on the Situation Facing the Bushmen of the Central Kalahari Game Reserve in Botswana (Aug. 10, 2010).

ing their rights, while NGOs and others battle social, economic, and political marginalization. The courts also have an obligation to continue to utilize international law in reaching verdicts, which will help to demonstrate the country's commitment to the international agreements to which it is a party. Similarly, the GOB should incorporate into national law the international law contained within the agreements it has ratified. Parliament must convene and enact legislation to this effect.

NGOs should increase awareness of these controversial issues in a country that receives media coverage primarily for its strong economy and its flourishing tourism. Legal aid organizations can provide advice and other assistance to the San, including helping them to understand their rights under national and international law, and the courses of action available to them. Conflict resolution organizations can assist both parties in coming to the table to discuss the future of the San and the resolution of these issues amicably.

The international community must continue to pressure the GOB to take action in support of the San. Botswana has shown itself vulnerable to international opinion. Transforming the Declaration on Indigenous Rights into a convention, so that it is binding to states, is another option. While a declaration carries significant moral weight, the indigenous rights it defends could be even more effective if binding.²⁷⁴ Furthermore, the roles of institutions and persons who could influence the vulnerable situation of indigenous persons around the world should be increased. More funds ought to be allocated for conducting missions to various countries in order to bring light to situations like that of the San are necessary. The African Commission on Human and Peoples' Rights also requires support to bolster its status and its finances so that it is able to undertake more investigations and missions. International attention is invaluable, especially for countries like Botswana. If the international community ignores the current situation of the San, the GOB has little incentive to address these issues.

Ultimately, the High Court case neither resolves the San's overall situation nor their tenuous relationship with the GOB or society as a whole. As Olmstead notes, "The outcome of this confrontation remains to be seen, but a resolution is unlikely to be lasting or effective unless the government, civil society and the international community come to grips with the deeper, structural aspects of San subordination in Botswana."²⁷⁵ Land rights repre-

274. UN PRESS KIT – HUMAN RIGHTS AT YOUR FINGERTIPS, <http://www.un.org/rights/50/game.htm#28> (last visited Dec. 22, 2010).

275. Olmstead, *supra* note 37, at 799.

sent only a small portion of the obstacles that the San face in their struggle to access the full range of human rights afforded them under international law, both as indigenous peoples and as individuals. The GOB's compliance with this ruling is important not simply because non-compliance is an indicator of the failures of justice in Botswana, but also because it is indicative of the willingness of the GOB to finally confront its poor relationship with the San and to work toward ameliorating many of the socio-economic issues that marginalize this group and other minorities in Botswana. It is not in anyone's interest for Botswana to allow this issue to continue to erode its international image. The case of the San in the CKGR is representative of the gaps Botswana must fill if it truly wants to become the "African Miracle."

**SOMETHING IS ROTTEN IN THE STATE OF DENMARK:
THE DEPRIVATION OF DEMOCRATIC RIGHTS BY
NATION STATES NOT RECOGNIZING DUAL
CITIZENSHIP**

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INTRODUCTION

Around the world, voting and holding elected office are modern-ly-recognized democratic rights. Yet nation states prohibiting dual citizenship prevent a large number of their own emigrated citizens and immigrants on their soil from exercising these and other important societal functions, as access thereto requires citizenship of one’s nation of domicile. To obtain such citizenship, some nations still require applicants to renounce the citizenship of their countries of origin or even expatriate their own citizens against their

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will upon learning that they have naturalized abroad. Although in today's international and mobile world a large number of people move across borders for private and professional reasons, many are reluctant to give up their original citizenship for practical or sentimental reasons. This is because citizenship is often considered an integral part of one's cultural heritage and a safety valve allowing migrants to return to their countries of origin after having lived abroad. Dual citizenship would enable these migrants to avoid this legal bind. Whereas most nation states—especially those in the European Union (EU)—now fully allow dual citizenship, some still do not. Making matters worse, some nations operate with a highly inequitable system under which as many as 40% of immigrants from some nations are allowed to hold dual citizenship under various legislative exceptions, whereas immigrants from other nations, along with all the nation's own emigrants, are not. This tight-fisted exercise of what may be thought of as “long-arm jurisdiction” affects approximately fifty million Europeans living around the world, including a large number in the United States and Canada, just as it affects a large number of Americans and Canadians who have emigrated to these nations and seek democratic rights there.¹

This Article analyzes how nation states prohibiting dual citizenship no longer have valid reasons to do so, but are increasingly setting themselves apart from the international legal development in comparable modern liberal democracies. The Article uses Denmark as an example of a nation state that stubbornly sticks to yesterday's outdated legal and socio-political rationales against dual citizenship in a thinly-veiled, protectionist attempt to curb immigration. This goal remains unaffected by the mistaken and separate war against dual citizenship; a war which has proven unwinnable. Reality shows that allowing dual citizenship results in few, if any, legal or practical problems at the private or national level. Accordingly, the Article concludes that Western nations that still prohibit dual citizenship should legalize it to ensure equal access to this important right among its citizens and immigrants and to follow the general harmonization of laws in this area at a regional and international level.

1. See *Tables, Graphs, and Maps Interface (TGM) Table: Total Population*, EUROSTAT, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (last visited Dec. 25, 2010) [hereinafter EUROSTAT] (The author notes that the figure is “reversed engineered” from the Web site where the EU estimates that there are around 500 million people in the EU. Since the meticulous calculation done by the grass-roots organization that she worked with shows that 90% of EU citizens have this problem, that would be fifty million people).

I. THE LAW OF CITIZENSHIP

Citizenship “is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”² “Citizenship serves as a central marker of nation-state membership and a means of regulating inclusion and exclusion of (non-)members.”³ Dual citizenship means that a person holds citizenship in two or more nation states at the same time.⁴

Because of the principle of *domaine réservé*, every nation state enjoys sovereignty to determine “the criteria for acquiring the citizenship of that state.”⁵ Citizenship may be obtained through the principles of *jus soli* or *jus sanguinis* or through naturalization. States that observe the *jus soli* principle (“the law of the soil”) grants citizenship to children born within their territory.⁶ The United States is an example of the *jus soli* principle.⁷ States adhering to *jus sanguinis* (“the law of the bloodline”) grant citizenship to children whose parents are citizens of the state in question.⁸ Examples of such states are Turkey and Sweden.⁹ Some states, such as Germany and Holland, adhere to both.¹⁰ Finally, “[t]he term ‘naturalization’ means the conferring of [the] nationality of a state upon a person after birth, by any means whatsoever.”¹¹

As global emigration increases, and as national boundaries are becoming more and more porous, the trend in liberal democracies is to accept dual (and in some cases even multiple) citizenship.¹² Some states apply a *de facto* tolerance of dual citizenship whereby

2. Nottebohm Case (second phase) (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

3. Thomas Faist, *The Fixed and Porous Boundaries of Dual Citizenship*, in DUAL CITIZENSHIP IN EUROPE: FROM NATIONHOOD TO SOCIETAL INTEGRATION 1, 32 (Thomas Faist ed., 2007) [hereinafter Faist Boundaries].

4. Eva Ersbøll, *Dansk Indfødsret i Internationalt og Historisk Perspektiv* [Dual Citizenship in a Historical and International Perspective], in MARIANNE DELLINGER ET AL., DOBBELT STATSBOGERSKAB fra en INTERNATIONAL SYNSVINKEL: Rapport til brug for Folketingets førstebehandling af beslutningsforslag om dobbelt statsborgerskab [Dual Citizenship from an International Point of View: Report for the Parliamentary First Reading of the Resolution on Dual Citizenship], 4, 4 (2009) (Den.), available at <http://www.ft.dk/samling/20081/beslutningsforslag/b55/bilag/6/644139.pdf> (translated by author) [hereinafter Ersbøll Report]; see also EVA ERSBØLL, *Dansk indfødsret internationalt og historisk perspektiv* [Danish Nationality International and Historical Perspective] 187-205 (2008) (translated by author) [hereinafter ERSBØLL Book].

5. Faist Boundaries, *supra* note 3, at 13.

6. *Id.* at 14; U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL 1110, 1(2009), available at <http://www.state.gov/documents/organization/86755.pdf> [hereinafter FAM].

7. FAM, *supra* note 6, at 1; see also U.S. CONST. amend. XIV, § 1 (granting citizenship to “all persons born or naturalized in the United States.”)

8. Faist Boundaries, *supra* note 3, at 14; FAM, *supra* note 6, at 1.

9. Faist Boundaries, *supra* note 3, at 22-23.

10. *Id.* at 22.

11. 8 U.S.C. § 1101(a)(23) (2010).

12. Faist Boundaries, *supra* note 3, at 20-21.

they are indifferent as to whether their citizens are also nationals of another country.¹³ “For example, the ‘oath of allegiance’ notwithstanding, the United States does not require written evidence that immigrants have actually renounced a previous citizenship” before becoming naturalized citizens.¹⁴ The United Kingdom does not regulate dual citizenship at all.¹⁵ In contrast, other states tolerate dual citizenship *de jure*, in other words, through varying national policies.¹⁶ Dual citizenship is an example of “‘internal globalization’: it is . . . how nation-state regulations implicitly or explicitly respond to ties of citizens across states . . . [and] there is . . . a clear direction favouring it.”¹⁷ It has been “welcomed . . . as a means to equalize individual rights between natives and newcomers.”¹⁸ As the rights of citizens and persons have gained in importance in relation to considerations of mere state sovereignty, dual citizenship is even surfacing as a potential human right in international law contexts.¹⁹ However, some nations still take a restrictive stance on dual citizenship and, for example, require that children holding dual citizenship choose one upon reaching maturity or even strip their nationals of citizenship upon naturalization in another country.²⁰ This attitude stands in stark contrast to the modern international development within citizenship law and policy and creates a multitude of problems for persons holding citizenship in these countries, even outside their borders.

However, citizenship is not only a benefit for the individual. With citizenship also comes “the dut[ies] to serve in the armed forces in order to protect state sovereignty against exterior threats,” as well as the internal “dut[ies] to pay taxes, to acknowledge the rights and liberties of other citizens, and to accept democratically legitimated decisions of majorities.”²¹

II. DUAL CITIZENSHIP IN A HISTORICAL EURO-INTERNATIONAL PERSPECTIVE

Socio-political views of citizenship have changed dramatically in the past two centuries. Modern citizenship can be traced back to

13. *Id.* at 21.

14. *Id.*

15. *Id.*

16. *Id.* at 20-21.

17. *Id.* at 3.

18. Faist Boundaries, *supra* note 3, at 3.

19. *Id.* at 20.

20. *Id.* at 21; Act on the Acquisition of Danish Nationality §7(1)-(3) (1951) (amended 1991) (Den.), available at <http://www.unhcr.org/refworld/docid/3ae6b4df3c.html> [hereinafter Nationality Act].

21. Faist Boundaries, *supra* note 3, at 11.

the 1800s.²² At the time, dual citizenship was mainly considered an “evil” to be avoided as it was seen as a source of conflicts of interests.²³ For example, nation states sought to avoid problems relating to extradition and military service duties.²⁴ Equally important was the notion that people could only be loyal toward one country.²⁵ Dual citizenship was even seen as a type of political bigamy or “cheating on” both nation states.²⁶ For example, in 1849, George Bancroft—the first American ambassador to Germany—stated that “one could just as . . . [well] tolerate a man with two wives as a man with” dual citizenship.²⁷ From 1868 to 1874, Bancroft helped instigate the U.S. entering into bilateral agreements with twenty-six nations aimed at avoiding dual citizenship.²⁸ In the 1900s, work was undertaken at the international level to limit dual citizenship and solve the conflicts it had caused.²⁹ Among other instruments, the 1930 Hague Convention was adopted with these goals in mind.³⁰ Its preamble expresses the clear belief that “it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only.”³¹ As its name evinces, the Council of Europe Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1968 Convention) had the same aim.³² Nonetheless, the Convention also recognized that multiple nationality does occur, in particular where the nationality of a second State Party has been acquired automatically, or where a state that is not a party to Chapter I allows multiple nationality in other cases.³³ As late as 1974, the Federal Constitutional Court of Germany interpreted dual citizenship as “an evil.”³⁴

Not withstanding such “iron laws”³⁵ and holdings, the fight

22. Ersbøll Report, *supra* note 4, at 4.

23. *Id.*

24. *Id.* at 5.

25. *Id.*

26. *Id.* at 4; ERSBØLL Book, *supra* note 4, at 187.

27. Ersbøll Report, *supra* note 4, at 5.

28. *Id.*

29. *Id.*

30. Convention On Certain Questions Relating to the Conflict Of Nationality Laws, preamble, Apr. 12, 1930, 179 L.N.T.S. 89.

31. *Id.*

32. See Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, *opened for signature* May 6, 1963, 634 U.N.T.S. 221 (entered into force March 28, 1968) [hereinafter 1968 Convention].

33. *Id.* at art. 1.

34. Thomas Faist, *Dual Citizenship: Change, Prospects, and Limits*, in DUAL CITIZENSHIP IN EUROPE: FROM NATIONHOOD TO SOCIETAL INTEGRATION, *supra* note 3, at 181 [hereinafter Faist Changes].

35. Faist Boundaries, *supra* note 3, at 14.

against dual citizenship proved impossible to win.³⁶ Modern society developed in a much more international direction than governments foresaw prior to the 1968 Convention. Globalization, improved travel opportunities, and heavily increased migration patterns changed the national composition of many countries just as other citizenship-related issues gained more significance than the principle of avoiding dual citizenship altogether.³⁷ In particular, gender equality affected the discourse significantly.³⁸ Very few nation states have stuck to yesteryear's principle that upon marriage, women should give up their own citizenship and acquire that of their husbands.³⁹ Currently, women in mixed marriages typically retain their original citizenship and have the same right as their husbands to confer their citizenship to their children, who thus become dual citizens upon birth.⁴⁰ Further, because of increased migration patterns, more and more children are born to parents of different nationalities just as many refugees and immigrants are unable to become released from their original citizenship because it is either legally impossible to do so, or because it is so difficult bureaucratically that the emigrants' new nations do not insist on the release.⁴¹ Accordingly, a great number of people now enjoy dual citizenship without this resulting in significant problems at the private or international level.⁴²

In 1993, a more modern international view of dual citizenship resulted in the Second Protocol amending the 1968 Convention.⁴³ The foundation for this updated Protocol was twofold.⁴⁴ First, the Protocol was built on the notion that a large number of migrants have settled permanently in new host countries and that their integration in these countries can be assisted "through the acquisition of the nationality" of their host countries.⁴⁵ Second, that the large number of mixed marriages created a "need to facilitate acquisition by one spouse of the nationality of the other spouse and the acquisition by their children of the nationality of both parents,

36. Ersbøll Report, *supra* note 4, at 5.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. MARIANNE DELLINGER ET AL, DOBBELT STATSBOGERSKAB fra en INTERNATIONAL SYNSVINKEL: Rapport til brug for Folketingets førstebehandling af beslutningsforslag om dobbelt statsborgerskab [Dual Citizenship from an International Point of View: Report for the Parliamentary First Reading of the Resolution on Dual Citizenship] (Den.) 2.

42. *Id.*

43. Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, *opened for signature* Feb. 2, 1993, E.T.S. No. 149 (entered into force March 24, 1995).

44. *Id.*

45. *Id.*

in order to encourage unity of nationality within the same family.”⁴⁶ However, the Protocol only added the new provisions that the parties *may*, if they so desire, allow immigrants to retain their nationality of origin, but did not put any affirmative pressure on its parties to do so.⁴⁷

This situation changed to some extent with the 1997 European Convention on Nationality (2000 Convention).⁴⁸ Whereas this Convention recognized “that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality,”⁴⁹ and thus enabled state parties to continue to reject dual citizenship, it also required state parties to allow for “children having different nationalities acquired automatically at birth to retain these nationalities,” and for nationals of state parties to “possess another nationality where this other nationality is automatically acquired by marriage.”⁵⁰ Further, it required that state parties “shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.”⁵¹ Of value to today’s discourse promoting dual citizenship is the fact that the 2000 Convention clearly enunciates the objective of achieving greater unity between its members in regards to citizenship law: the desire to avoid discrimination in matters relating to nationality; the principle that no one shall be arbitrarily deprived of his/her citizenship; the principle that nationals of a State Party in possession of another nationality shall have the same rights and duties as other nationals of that State Party; and, perhaps for the first time, connects dual citizenship to issues of human rights and fundamental freedoms.⁵²

Realism and modern notions of equal access to democratic rights weigh in favor of liberal democracies allowing dual citizenship. Today, an increased tolerance of dual citizenship can thus clearly be discerned.⁵³ Even countries that previously conditioned the naturalization of immigrants on the “relinquishment of their previous citizenship” are currently much more likely to allow for

46. *Id.*

47. *Id.* at art. 1.

48. European Convention on Nationality, *opened for signature* Nov. 6, 1997, 2135 U.N.T.S. 213 (entered into force March 1, 2000) [hereinafter 2000 Convention].

49. *Id.* at preamble.

50. *Id.* at art. 14(1).

51. *Id.* at art. 16.

52. *See generally id.*

53. *See, e.g.,* Faist Boundaries, *supra* note 3, at 24; T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, EXECUTIVE SUMMARY: CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION 6 (2002), *available at* http://carnegieendowment.org/files/Citizenship3_ExecSummary_English.pdf.

the retention of original citizenship.⁵⁴ “In a nutshell, the proliferation of dual citizenship is today not only a question of decision-making on the policy level, but is a widespread practice exhibiting a progressive trend.”⁵⁵

In the EU, twenty-one of twenty-seven EU nations currently accept dual citizenship.⁵⁶ Only six still automatically expatriate their citizens upon learning that they have become naturalized in other nations. These are Austria, Denmark, Estonia, Holland, Latvia, and the Czech Republic.⁵⁷ However, Holland applies a highly relaxed or pragmatic approach to this issue.⁵⁸ The Dutch Citizenship Act of 2000 made it easier for Dutch emigrants to retain Dutch citizenship and hold dual citizenship while making it more difficult to acquire Dutch citizenship.⁵⁹ Further, because Dutch legislation is “selectively accepting of multiple nationality,”⁶⁰ it contains a large number of exceptions that in reality result in dual citizenship being allowed in connection with about three-quarters of all naturalizations.⁶¹ Similarly, Austria, Denmark, and the Czech Republic apply a number of exceptions to their official rules against dual citizenship,⁶² thus muddling the situation further. For example, Austrian emigrants—like the Dutch—may retain their citizenship upon naturalization in another country.⁶³ Thus, approximately 90.5% of EU residents—451 million people⁶⁴—enjoy

54. Faist *Boundaries*, *supra* note 3, at 14.

55. *Id.* at 26.

56. Schweizerische Eidgenossenschaft: Bericht des Bundesamtes für Migration über hängige Fragen des Bürgerrechts [Swiss Confederation: Report of the Federal Office for Migration Pending Questions of Citizenship] 97 (2005), available at http://www.schweizerpass.admin.ch/content/dam/data/migration/buergerrecht/berichte/ber_buergerrechte-d.pdf [hereinafter Swiss Confederation Report] (translated by author); see also Dellinger et al., *supra* note 41, at 6; *Danes Abroad Join Fight for Dual Citizenship*, STATSBOERGER.DK (Den.), Apr. 29, 2008, <http://www.statsborger.dk/english.htm>.

57. Swiss Confederation Report, *supra* note 56, at 97; See ALFRED M. BOLL, MULTIPLE NATIONALITY AND INTERNATIONAL LAW 321, 360, 445, 447 (2007); Besvarelse af spørgsmål nr. 30 stillet af Folketingets Indfødsretsudvalg til ministeren for flygtninge, indvandrere og integration [Answer to Question No. 30 Posed by the Danish Parliament's Citizenship Committee to the Secretary of Refugees, Immigrants and Integration] 1 (2003) (Den.) [hereinafter Answer] (translated by author); Citizenship Act (Estonia), 1995, c. 1, § 2, available at <http://www.legaltext.ee/text/en/X40001K6.htm>; *Latvian Citizenship*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LATVIA, <http://www.mfa.gov.lv/en/service/4727/> (last visited Jan. 15, 2011).

58. Betty de Hart, *The End of Multiculturalism: The End of Dual Citizenship? Political and Public Debates on Dual Citizenship in the Netherlands (1980-2004)*, in DUAL CITIZENSHIP IN EUROPE: FROM NATIONHOOD TO SOCIETY INTEGRATION, *supra* note 3, at 78, 98; BOLL, *supra* note 57, at 466.

59. de Hart, *supra* note 58, at 78.

60. BOLL, *supra* note 57, at 466.

61. de Hart, *supra* note 58, at 98.

62. See BOLL, *supra* note 57, at 321, 360-61, 463-64.

63. See *id.* at 321 (noting that “[n]aturalisation abroad results in automatic deprivation of Austrian nationality, however an application may be made within two years before any foreign naturalisation to retain Austrian nationality”).

64. EUROSTAT, *supra* note 1.

dual citizenship rights.⁶⁵ Still, this means that a significant amount of people—approximately fifty million Europeans—must, in many cases, either live with this highly unequal situation or relinquish their original nationality to obtain the important democratic and socio-political rights connected to enjoying citizenship in their countries of domicile. These figures just account for EU nationals. Globally, the figures are much higher, making the situation more inequitable.

III. THE DANISH CASE AND COMPARABLE NATIONS

Nations with the most restrictive rules in relation to dual citizenship can be identified by one or more of the following criteria:

- (1) Assignment by birth: only one citizenship possible;
- (2) Obligation to choose one citizenship on reaching maturity;
- (3) Renunciation requirement (in some cases, proof also required) upon naturalization in another country; and
- (4) Forced expatriation upon naturalization in another country.⁶⁶

Denmark is an example of one of these nations. According to the Danish Minister for Refugee, Immigration, and Integration Affairs (Danish Minister), “[i]t is a basic principle in Danish citizenship legislation that dual citizenship is to be limited insofar as possible.”⁶⁷ In pertinent part, the Act on Danish Citizenship thus provides as follows:

Danish citizenship will be lost by:

- (1) anyone who acquires foreign citizenship upon application or explicit agreement;
- (2) anyone who acquires foreign citizenship by entering into public service in another nation; and
- (3) unmarried children under the age of eighteen who become foreign citizens by way of a parent, who has or shares the right of custody, acquiring foreign citizenship as mentioned in section 1 or 2 above, unless the other parent remains a Danish citizen and shares custody.⁶⁸

Notably, the loss of Danish (and hence EU) citizenship is automatic, and no dispensations will be granted.⁶⁹ Further, children born with dual citizenship outside of Denmark who have never

65. *Danes Abroad Join Fight for Dual Citizenship*, *supra* note 56.

66. Faist *Boundaries*, *supra* note 3, at 21.

67. *Dual Nationality*, NEW TO DENMARK.DK: THE OFFICIAL PORTAL FOR FOREIGNERS AND INTEGRATION, http://www.nyidanmark.dk/en-us/citizenship/danish_nationality/dual_nationality.htm (last visited Dec. 29, 2010).

68. Nationality Act, *supra* note 20, at § 7.

69. Answer, *supra* note 57, at 2.

lived in Denmark and who have no demonstrable connection to Denmark will lose their Danish citizenship by the age of twenty-two.⁷⁰ Similarly, foreign nationals applying to become naturalized Danish citizens will be stripped of their previous citizenship upon naturalization.⁷¹ If the expatriation does not take place automatically upon naturalization in Denmark, the applicant will be required to demonstrate renunciation as a condition for naturalization.⁷² For these reasons, Denmark meets criteria Nos. two through four, thus placing it among the most restrictive nations in the EU.

At the same time, Denmark allows a “large number of people,” estimated at more than 40% of immigrants, to enjoy dual citizenship,⁷³ thus creating a situation of highly unequal access to this important privilege. This situation arises because of the following legislative exceptions:

- (1) Children born to one Danish parent and one citizen of a nation that follows the *jus sanguinis* principle may remain dual citizens;
- (2) Children born to two Danish parents in nations following the *jus soli* principle may remain dual citizens;
- (3) Unmarried children under the age of eighteen will obtain Danish citizenship when a foreign mother marries a Danish father and may hold dual citizenship;
- (4) Children adopted from abroad under the age of twelve will become Danish citizens upon adoption by an unmarried Danish citizen, or by a married couple of which at least one parent is a Danish citizen, but may retain their original citizenship when becoming Danish citizens;
- (5) Foreigners between eighteen and twenty-three years old who have resided in Denmark for at least ten years, five of which must be within the past six years, and who have not been subject to criminal penalties may acquire Danish citizenship by submitting an affidavit declaring their intent to do so to a Danish municipal authority. Such persons will not be required to relinquish their original citizenship;

70. Nationality Act, *supra* note 20, at § 8.

71. *Id.* at § 7.

72. *Id.* at § 4.

73. Folketingets Kommunaludvalg, Indfødsretsudvalget, Folketingets Lovsekretariat [Danish Parliament's Municipality Committee, Citizenship Sub-committee, Parliamentary Legal Department] 1 (2002) (Den.) [hereinafter Municipality Committee] (translated by author); Answer, *supra* note 57, at 4; Ministeriet for Flygtninge, Indvandrere og Integration, Udredning om reglerne for dobbelt statsborgerskab i Danmark, i andre lande og i forhold til internationale konventioner [Danish Ministry of Refugee, Immigration, and Integration Affairs, Explanation of the Rules for Dual Citizenship in Denmark, in Other Nations and in Relation to International Conventions] 5 (2009) [hereinafter Explanation of the Rules] (translated by author).

(6) Persons who have become naturalized Danish citizens and for whom it is not possible, or it is extremely difficult, to become released from their original citizenship, or where the Danish authorities accept the retention of the foreign citizenship, may retain dual citizenship.⁷⁴

Thus, a large number of people in Denmark who were *not* originally Danish citizens already, in spite of an official government stance *against* dual citizenship, enjoy dual citizenship; whereas another large number of original Danish citizens living abroad do not have the same privilege, and will lose their citizenship upon naturalizing in their countries of domicile. Perhaps given this highly inequitable situation, Danish government officials twice told the author, a Danish citizen residing and working in the United States, that as long as she did not inform the Danish authorities if she obtains United States citizenship, they would never find out as the United States does not inform Denmark of newly naturalized American citizens,⁷⁵ thus, in effect, also signaling a *de facto* tolerance of dual citizenship, at least toward the United States.

In rejecting dual citizenship, Denmark continually cites to the traditional argument that dual citizenship must be limited to the greatest extent possible.⁷⁶ In doing so, Denmark still relies on the principles of the 1967 Convention, although clearly acknowledging both that it was a product of its time *and* that the 2000 Convention now clearly enables nations to adopt more up-to-date laws, if they so desire.⁷⁷ Further, Denmark continually cites to the Jan. 14, 2002 Common Nordic Agreement on the Implementation of Certain Citizenship Stipulations,⁷⁸ although dual citizenship laws have recently changed markedly in most of the other four Nordic countries. To wit: Finland, Iceland, and Sweden now fully accept dual citizenship.⁷⁹ Sweden is considered the most liberal because it has, since 2001, explicitly allowed for full dual citizenship rights without posing any requirements for renouncing one's former citizenship.⁸⁰ Currently, only Norway⁸¹ and Denmark still require the renunciation of former citizenship when acquiring Norwegian and Danish citizenship, respectively.⁸² Accordingly, although Denmark

74. Municipality Committee, *supra* note 73 at 4; Answer, *supra* note 57, at 1-2.

75. Names, titles, and dates withheld for reasons of confidentiality.

76. *See, e.g.*, Municipality Committee, *supra* note 73, at 1; Explanation of the Rules, *supra* note 73, at 1.

77. Explanation of the Rules, *supra* note 73 at 7-9.

78. *Id.* at 9.

79. *Id.*

80. Faist Boundaries, *supra* note 3, at 22.

81. *Dual Citizenship*, NORWEGIAN DIRECTORATE OF IMMIGRATION, <http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Citizenship-/Dual-citizenship/> (last visited Dec.29, 2010).

82. Nationality Act, *supra* note 20, at § 4.

cites to the Nordic “agreement” as if binding international law, the former majority behind this has actually eroded. Most Nordic nations now accept dual citizenship. Nonetheless, the Minister claims that Denmark’s basic objective of limiting dual citizenship is in accordance with its international obligations in this area.⁸³ Whereas Denmark may follow the letter of the law, it certainly does not follow the spirit of modern international considerations in this area.

Traditionally, Denmark has accepted numerous immigrants from Turkey and Poland, just as many Danish citizens have emigrated to the United States and Canada. For comparative reasons, it is thus relevant to briefly examine the tolerance toward dual citizenship in those nations. Canada and the United States both accept dual citizenship.⁸⁴ The Turkish authorities also officially allow dual citizenship, “the only stipulation being that the person notifies the Turkish government when another citizenship is acquired.”⁸⁵ Although Poland has made no legislative changes toward an official tolerance of dual citizenship, it has simply turned a blind eye on it, “thus engaging in *de facto* tolerance.”⁸⁶ Thus, even outside the Nordic region and the EU, nations to and with which Denmark has strong mutual ties and interests have changed their attitudes toward dual citizenship, thus making it even more remarkable that Denmark, which normally equates itself with modern democracies and legal trends, does not change *its* legal landscape accordingly.

IV. REJECTION OF DUAL CITIZENSHIP: A PARADE OF HORRIBLES

Why do some nations widely accept dual citizenship whereas others still resist? One explanation may be that the more actively a state pursues the integration of immigrants through multicultural policies, the more likely it is to tolerate dual citizenship.⁸⁷ By contrast, the more national policies are geared toward assimilationism, in other words trying to melt immigrants into a uniform “majority core,” the less likely such nations are to accept dual citizenship.⁸⁸ In Sweden and Holland, discourse involving culturally open-minded notions such as “multiculturalism” and “minorities policy” saw a meteoric rise in the 1980s, whereas in countries such as Denmark and Germany, the concept of “multiculturalism” has

83. Explanation of the Rules, *supra* note 73, at 8.

84. *Id.* at 9; Faist Boundaries, *supra* note 3, at 21.

85. Faist Changes, *supra* note 34, at 184.

86. *Id.*

87. *Id.* at 189.

88. *Id.*

been subject to some resistance and even stark political conflict.⁸⁹ In these nations, immigration is often looked upon as a “one-way street” where immigrants are more or less supposed to adapt fully to local culture without displaying “too many” of their own traits in public, and where undivided loyalty of citizens to the state is still required. In these “reluctant” nations, the dual citizenship discourse has been related not so much to actual national or international problems to be solved, but to rather simplistic arguments linked to “unrelated policy issues such as increased [but unwarranted] immigration, threats to welfare . . . systems, and criminality.”⁹⁰ This could explain the more conservative view, as an example, of Germany’s slow change toward allowing dual citizenship. In fact, it is typically the case that “the more polarized the respective party system is along ideological lines and the less consensus-oriented the political style of confrontation, the higher are the chances that political issues around nation, culture, and citizenship will tend to be conflict-ridden.”⁹¹ In the author’s experience, such discourse is frequently seen in Western Europe among political parties that see immigration from non-Western nations as a threat to the nation state and the “way things used to be,” rather than as an opportunity for positive societal growth or, at a minimum, an unavoidable trend in modern society which simply cannot be stemmed, and certainly not through the outright prohibition of dual citizenship. For example, current majority political interest in stemming immigration has, in Denmark, contributed significantly to the political and sometimes popular sentiment against dual citizenship. This is so even though legislation in the two areas is logically unrelated because unwanted and illegal immigration can be addressed through separate and tailored legislation while still allowing Danish citizens abroad and legal immigrants to Denmark to hold dual citizenship. In other words, dual citizenship affects only those people who have *already* obtained permission to reside in a certain country, or who are nationals thereof, whereas immigration law is geared toward regulating those who seek to *enter* a nation in the first place.

Another major argument against dual citizenship is the perceived problem of people being able to vote in more than one nation. “[T]he ties of citizens reaching into multiple states seem to challenge the supposed congruence of the demos, state territory, and state authority and, in particular, violate basic principles such

89. *Id.*

90. Faist *Boundaries*, *supra* note 3, at 38.

91. *Id.* at 28.

as ‘one person, one vote.’”⁹² The latter is not perceived as a threat by proponents of dual citizenship “because dual citizens do not have *multiple* votes in *one* polity,” but rather “*one in each* polity of which they are full members,” such as through residency.⁹³ It should not matter whether a Dane living in the United States, for example, can vote in both nations as long as he or she cannot vote more than once in each place, which, of course, nobody is promoting.

Of further stated concern is whether dual citizens would have to serve in the military of more than one nation. However, both the 1968 and the 2000 Conventions call for nations to recognize the equivalency of service in one nation as that in another.⁹⁴ Should a nation nonetheless retain a requirement that a person also serves in the military of that nation, dual citizenship applicants must evaluate the relative significance to their cases of this disadvantage before seeking to retain or obtain citizenship in such nations or before traveling thereto.⁹⁵ In resisting dual citizenship for the above reasons, Denmark, for example, also cites to national security interests and the fear that a person may be considered to be an enemy in both countries of citizenship.⁹⁶ The same counterargument applies: in applying voluntarily for dual citizenship, this would be the (arguably highly remote) risk that the applicant must carefully balance.

In some nations, people with dual citizenship cannot hold certain high-level professional positions that allow them to exert more than *de minimis* influence on the government of their host nation.⁹⁷ In this case, it has been said to be advantageous for both the citizen and the nation state to limit citizenship in order to avoid true conflicts of interest to several nations.⁹⁸ On the other hand, an outright prohibition against dual citizenship results in arguably unreasonably severe limits on broader types of employment in nations such as the United States where only U.S. citizens may be appointed to the vast majority of federal jobs.⁹⁹ Exceptions to this rule may be granted in only very narrow circumstances and only

92. *Id.* at 10.

93. *Id.*

94. 1968 Convention, *supra* note 32, at art. 5; 2000 Convention, *supra* note 48, at art. 21.

95. Ersbøll Report, *supra* note 4, at 6-7.

96. Explanation of Rules, *supra* note 76, at 19-21; See Municipality Committee, *supra* note 73, at 5.

97. Ersbøll Report, *supra* note 4, at 4.

98. *Id.* at 5-6.

99. *Federal Employment Information Fact Sheets: Employment of Non-Citizens, USA-JOBS*, <http://www.usajobs.opm.gov/EL/noncitizensemployment.asp> (last visited Jan. 15, 2011).

by few agencies.¹⁰⁰ Further, a non-citizen applicant is told to “contact the agency in which he or she is interested, concerning questions of employment eligibility.”¹⁰¹ In the author’s experience, federal agencies have enough applicants to choose from and thus always require U.S. citizenship for such eligibility. Thus, without any changes of law, agencies are free to impose stricter limits on this employment aspect than what official guidelines call for and to exclude people from employment based not on the applicant’s substantive qualifications and loyalties, but on what modernly is seen as a formality, i.e. citizenship. Accordingly, citizens of nations that do not accept dual citizenship will thus have to choose between what may be attractive employment opportunities, and an equally strong interest in retaining citizenship in another country. In today’s internationally competitive world, this is arguably as an unreasonable choice given the very few recognized advantages of prohibiting dual citizenship.

Traditional notions further held that nation states could never offer their citizens diplomatic protections and assistance in relation to other nations in which the affected person also held citizenship.¹⁰² Some government officials thus still believe that clarity in relation to which country should render diplomatic aid is better ensured by prohibiting dual citizenship outright.¹⁰³ However, new proposed law has changed this situation. In 2004, the International Law Commission of the United Nations adopted nineteen draft articles on diplomatic protections.¹⁰⁴ Articles 6 and 7 specifically cover diplomatic protections in relation to multiple nationality. Article 6 relates to situations involving third-party states and provides that “[t]wo or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.”¹⁰⁵ Article 7, which relates to possible tensions between the two particular states of nationality provides that “a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national *unless* the nationality of the former State is predominant”¹⁰⁶ The identification of a “dominant” or “effective” citizenship is done by emphasizing aspects such as residency, length of stay in a given nation, time of naturalization, place of education, employment, pay-

100. *Id.*

101. *Id.*

102. Ersbøll Report, *supra* note 4, at 7.

103. Interview with Birthe Rønn Hornbech, Minister for Refugees, Immigrants and Integration Affairs, in Roskilde, Den. (Apr. 8, 2009).

104. BOLL, *supra* note 57, at 121.

105. *Id.*

106. *Id.*

ment of taxes, bank accounts, military service, etc.¹⁰⁷ Further, “it is a clear principle of international law that the country where the dual citizen *is located at the moment* takes no account of the individual’s other citizenship.”¹⁰⁸ Accordingly, existing principles of international law already prescribe whether nations should grant protections to those of their citizens who hold dual citizenship. As mentioned, adults seeking dual citizenship must be presumed to be aware that certain disadvantages thereof may exist, and that one of those may be the lack of diplomatic protections as broad as if the person had been a citizen of one nation state only. As with most aspects of life, few things come with only advantages. Persons seeking dual citizenship should inform themselves thoroughly of the consequences thereof before accepting it. Holland, for example, acknowledges this viewpoint in allowing dual citizenship and affirmatively advises its citizens that it may not always be possible for Holland to exercise protection on behalf of its nationals in their other countries of nationality.¹⁰⁹

In some countries such as Denmark and Norway, issues of family disputes and child abductions have been used extensively in arguing against dual citizenship.¹¹⁰ This issue typically does not affect the citizenship of children since they already enjoy the right to dual citizenship, namely that of both their parents. Rather, the perceived problem may arise where one parent is prohibited from leaving the country for legal reasons, is ordered to deposit his/her passport with the government to ensure this, but can travel abroad with his/her child on the passport of the other country of citizenship. Whereas this problem may be real, the risk of child abduction already exists, dual citizenship or not: some nations refuse to absolve their citizens of citizenship, some abductors may simply use falsified passports, and even if naturalized citizens have been released from their original citizenship, they can fairly easily reacquire this and thus again possess two passports. An example of the latter was seen in the case of thousands of former Turkish citizens who reacquired their original citizenship after having been released therefrom when becoming naturalized German citizens.¹¹¹ It is, of course, a highly desirable goal to seek to prevent child abduction through all means possible, but rules against dual citizenship are largely ineffective in reaching that goal.

Some stark opponents even believe that dual citizenship may erode state sovereignty as citizens can withdraw from decisions

107. Ersbøll Report, *supra* note 4, at 4; BOLL, *supra* note 57, at 110, 282, 284-86.

108. Faist Changes, *supra* note 34, at 184 (emphasis added).

109. BOLL, *supra* note 57, at 466.

110. Ersbøll Report, *supra* note 4, at 7; Municipality Committee, *supra* note 73, at 5.

111. Faist Changes, *supra* note 34, at 183.

they helped create by “choosing the exit option and relocating to another country.”¹¹² Finally, multiple loyalties have traditionally been seen as “damaging to the public spirit,”¹¹³ although this notion seems to be losing prevalence.

Finally, Denmark further cites to the risk of dual citizens having to pay taxes in two nations.¹¹⁴ However, taxation treaties, such as that between the United States and Denmark, have for years prevented that outcome, which Danish government officials recognize.¹¹⁵ Denmark also stubbornly cites to perceived problems in connection with inheritance or property law,¹¹⁶ notwithstanding the fact that numerous Danish citizens *already* face severe problems in this and in employment contexts by *not* having dual citizenship. It would typically be a legal advantage, not a disadvantage, for Danish and other EU citizens abroad to hold dual citizenship. In an example of what appears to be grasping for straws in rejecting this modern right, Denmark even cites to the “risk of [naturalized citizens] being prosecuted for alleged violations of the law when visiting their native countries,”¹¹⁷ although this risk arguably already exists under international criminal prosecution agreements when the few potentially at-risk persons are *only* Danish citizens. Similarly, Denmark cites to an alleged “general uncertainty as to which civil or criminal legislation to apply in cases of international legal disputes,”¹¹⁸ even though private or government attorneys practicing international law are presumably fully capable of advocating for and solving such choice of law problems.

In short, a few legitimate concerns over dual citizenship exist, but the parade of horrors envisioned by opponents is just that. Researchers have found “little empirical evidence to support the standard arguments raised against dual nationality and many compelling reasons for modern liberal-democratic states to accept it. Accepting the legitimacy of dual nationality is justified as a matter of respect for a migrant's connections and affiliations with the country of origin.”¹¹⁹

Instead of serving legitimate goals, prohibitions against dual citizenship often result in both the “long arm” denial of significant democratic rights of citizens living outside their home countries,

112. Faist *Boundaries*, *supra* note 3, at 10.

113. *Id.*

114. Municipality Committee, *supra* note 73, at 5.

115. *See generally* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Den., *opened for signature* Aug. 19, 1999, T.I.A.S. No. 13,056 (entered into force March 31, 2000).

116. Municipality Committee, *supra* note 73, at 5.

117. *Id.*

118. *Id.*

119. ALEINIKOFF & KLUSMEYER, *supra* note 53, at 7.

and similar problems for immigrants to nations that do not allow dual citizenship. This is examined in the next section.

V. DEMOCRACY DENIED: NOT HAVING CITIZENSHIP IN ONE'S COUNTRY OF RESIDENCY RESULTS IN A LOSS OF SIGNIFICANT SOCIO-POLITICAL AND DEMOCRATIC RIGHTS

Modernly, having citizenship where one lives is of recognized social and democratic importance. First, “[c]itizenship is a functional prerequisite for political integration and reflects the state of societal integration.”¹²⁰ Citizens who enjoy equal political liberty tend to obey the laws to whose creation they have contributed through regular democratic processes, “and to whose validity they thus consent” to a greater extent than non-citizens¹²¹ who, in many cases, have no or severely restricted voting rights in their countries of residency. For example, in the United States, only citizens may vote in any referendum, whereas in Denmark, non-citizen residents may vote in local elections.

Accordingly, “immigrant groups, with few exceptions, have had little impact on policy debates and outcomes,”¹²² including issues of dual citizenship. “In essence, citizenship builds on collective self-determination, i.e. democracy, and essentially comprises three mutually qualifying dimensions: first, the legally guaranteed status of equal political freedom and democratic self-determination; second, equal rights and obligations; and third, membership in a political community.”¹²³ From a global perspective, “citizenship still remains one crucial defining aspect of full inclusion at the nation-society or nation-state level.”¹²⁴ It has even been said that “[w]ithout a state, there can be no citizenship; without citizenship, there can be no democracy.”¹²⁵

At the private level, citizenship is important because it forms part of a person’s identity.¹²⁶ Citizens not only feel attached to their nation states, but also to their fellow citizens and, in particular, to their close personal and professional relationships.¹²⁷ In today’s globalized world, more and more people are experiencing emotional, personal, and professional attachments to more than

120. Faist *Boundaries*, *supra* note 3, at 35.

121. *Id.* at 10.

122. *Id.* at 29.

123. *Id.* at 9.

124. Faist *Changes*, *supra* note 34, at 199.

125. Faist *Boundaries*, *supra* note 3, at 9 (quoting Juan J. Linz & Alfred C. Stepan, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 28 (1996)).

126. Ersbøll Report, *supra* note 4, at 6.

127. *Id.*

one nation state at a time.¹²⁸ As mentioned, many states now understand this and thus allow dual citizenship. In the author's experience, not having citizenship further means not being able to, for example, apply for most, if not all, federal employment (in the United States, especially after 9/11); not being able to be on the board of one's own company (Canada); being subject to diminished inheritance laws (United States); and potentially even risk being expelled from one's nation of residence upon the death of one's citizen spouse unless possessing a certain amount of money (Italy). Citizenship is also important in connection with property law in several nations.¹²⁹

Given the above serious impairments of democratic, personal, and professional opportunities, why do emigrants not simply adopt citizenship in their new countries of residence when eligible to do so? Many nationals from or in the states that still do not recognize dual citizenship choose not to become citizens in their new nations of residency in order not to lose their original citizenship. Some harbor hopes of one day returning to their country of origin, perhaps upon retirement.¹³⁰ In the case of EU citizens residing outside the EU, some wish to be able to return to another EU nation, as is the case under current EU law. People do not necessarily move to another country to live there for the rest of their lives.¹³¹ Many move from one country to another and on to a third, but would like to be able to return for family and other personal reasons.¹³² Some feel a consistent and deep socio-psychological association with their country of origin although living and working in another state. To them, relinquishing their original citizenship would be akin to betraying their motherland, original culture, and ancestral roots. Yet others have children and want to be able to give them the chance of being able to choose the respective parent's citizenship and perhaps move back to study or work in the parent's country of origin, if only for a while. Some stubbornly hold on to their original citizenship out of a deep-rooted belief that the otherwise very uniform rules of the Union should, for democratic reasons, apply to all EU citizens and not, as is currently the case, exclude a minority for random and outdated reasons. No matter what the reasons, voluntarily giving up or being stripped of one's original citizenship is unquestionably a major change of identity that, in the case of voluntary citizenship relinquishment, is not undertaken easily.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Ersbøll Report, *supra* note 4, at 6

VI. SHOOTING ONESELF IN THE FOOT: NATION STATES MAY LOSE MORE THAN THEY GAIN BY NOT ACCEPTING DUAL CITIZENSHIP

Allowing dual citizenship also has recognized advantages at the national level. “[M]any emigration countries have seized upon dual citizenship as an instrument to forge and maintain transnational links with emigrants living abroad.”¹³³ In turn, this could help emigration countries further their economic interests, such as through “continued flows of remittances and investments by emigrants.”¹³⁴ It also could further the countries’ political aims, such as by using “emigrants as loyal lobby groups.”¹³⁵ For example, Turkey sees its migrant communities as a lobby group abroad that may eventually help open the doors to Turkey’s much desired accession to the EU.¹³⁶ In short, dual citizenship may, from a transnational perspective, be seen as an extension of modern multicultural policy that further complements national membership for states interested in promoting or at least tolerating their “citizens’ transnational social and symbolic ties for instrumental purposes.”¹³⁷

Although nations “are usually more tolerant of the multiple memberships of their own citizens living abroad than they are in relation to immigrant newcomers on their own territory,” the latter carries the significant advantage that dual citizenship promotes—integration of immigrants.¹³⁸ Ironically, the nations that currently prohibit dual citizenship are often the same ones complaining about the alleged unwillingness of immigrants to assimilate to their new cultures. This is, for example, the case in Denmark. What such immigration countries seem to disregard is the fact that immigration is not necessarily a one-way street; with trust and equal rights among citizens typically comes greater social and political integration. Dual citizenship could also, from a perhaps harsh, but realistic point of view, be seen as exit insurance,¹³⁹ enabling immigrant nations to, in legally warranted cases, expel individuals to their original countries; whereas this would, of course, be impossible if the immigrant only holds the passport of their residence nation.

In what is known as “selective tolerance,”¹⁴⁰ some nations such as Holland and Turkey make it easier for their own nationals to

133. Faist *Boundaries*, *supra* note 3, at 5.

134. *Id.* at 6.

135. *Id.*

136. Faist *Changes*, *supra* note 34, at 183.

137. Faist *Boundaries*, *supra* note 3, at 18.

138. *Id.* at 16.

139. *Id.* at 18.

140. Faist *Changes*, *supra* note 34, at 182.

obtain citizenship abroad than for immigrants to obtain domestic citizenship.¹⁴¹ Similarly, Turkey allows for “citizenship light”¹⁴² by allowing its former citizens to hold a “pink card” giving them “rights equivalent to those held by full Turkish citizens, except the right to vote in Turkish elections.”¹⁴³ This enables Turks abroad to participate in socio-political processes abroad as full citizens of their new countries of residency while preventing a previously existing transnational diplomatic problem between Germany and Turkey when Germany “demanded release from Turkish citizenship as a requirement for inclusion into German citizenship, [but where] the Turkish authorities had seen no problem in re-granting Turkish citizenship to those it had released before.”¹⁴⁴ However, such differential treatment of citizenship rights is clearly undesirable seen from an equal rights point of view. In fact, “the more discretionary the rules and the more latitude the authorities have, the more th[e] trend [of selective tolerance] prevails, a state of affairs that essentially signals weak development of the rule of law.”¹⁴⁵ In liberal-democratic states, citizenship policy ought to be “closely guided by the norms of fairness and justice that are fundamental to modern democratic ideals.”¹⁴⁶ “Settled foreign nationals pay taxes, obey the law, contribute to the community, and bear the same economic and social misfortunes as citizens. Barring them from equal access to public benefits means that they contribute to the state without receiving the benefits that go to other members of the community.”¹⁴⁷ Conversely, “[p]romoting political participation of settled foreign nationals recognizes that they are, in the main, fully functioning members of the social and economic life of a society, that they have an interest in their communities, and that they frequently have perspectives on issues that enhance the consideration of public policies.”¹⁴⁸ Denying the same significant benefits to the nations' own original citizens abroad cannot but be in the overall national interest seen from a modern point of view.

In short, for democratic nations to accept dual citizens for immigrants at home on equal terms with citizenship for their citizens abroad would signal a greater and much needed amount of true respect for equal rights and opportunities. This ought to be of significant concern for any nation, but especially for nations who are

141. *Id.* at 177, 182; Faist *Boundaries*, *supra* note 3, 22-23.

142. Faist *Changes*, *supra* note 34, at 183.

143. Faist *Boundaries*, *supra* note 3, at 24.

144. Faist *Changes*, *supra* note 34, at 183.

145. *Id.* at 182.

146. ALEINIKOFF & KLUSMEYER, *supra* note 53, at 3.

147. *Id.* at 9.

148. *Id.* at 8.

often seen as, and wish to remain as, progressive models for democracy and the development of law. However, even though the reasons for fully and officially adopting dual citizenship seem obvious, certain nations remain unconvinced. Accordingly, the next section will analyze the theories, principles, and instruments of law that may be used to put pressure on these nations to adopt dual citizenship.

VII. A MODERN LEGAL AND POLICY-BASED FRAMEWORK FOR CHANGE IN CITIZENSHIP LAW

The days are long gone when international consensus was directed at limiting dual citizenship. But what about the reluctant nations that continue to reject modern trends in this area? Are they abiding by international law in doing so? Is there a way to apply pressure on them from an international legal angle to lead them onto a pathway toward more equal rights for all?

A. Top down solutions

From a traditional “hard law” point of view, little can be done. Sovereign nations are, as established, free to bestow citizenship upon the subjects they find eligible. Of course, this applies to EU nations as well: “[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.”¹⁴⁹ Because states traditionally have been reluctant to relinquish their right to determine the conditions of their citizenship, Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) grants an affirmative right to acquire citizenship only to children.¹⁵⁰ In short, existing treaties do not affirmatively *require* states to accept dual citizenship.

An argument perhaps could be made under customary international law that, as in the Danish case, allowing more than 40% of immigrants to hold dual citizenship, while officially rejecting dual citizenship, amounts to consistent state practice. However, as Denmark repeatedly expresses its awareness of its right to limit dual citizenship under still existing, although outmoded, international agreements, as well as its intent to continue doing so, *opinio*

149. Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239.

150. International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [hereinafter ICCPR].

juris in favor of dual citizenship clearly does not exist in the Danish case.

Under modern “soft law” theories, especially those pertaining to human rights, a different picture emerges:

[A] key factor influencing the increase in tolerance of dual citizenship . . . is perhaps the growing importance of human rights in international and national law. Viewed from a post-national perspective, citizenship has gradually emerged as a quasi-human right over the past decades, a trend that has been accelerated by supranational integration within the EU.¹⁵¹

This “rights revolution”¹⁵² presents the “tension between the principles of universal human rights, on the one hand, and the principle of democratic self-determination” on the other.¹⁵³ For example, the European Court of Human Rights allows EU citizens to lodge an application against states bound by the Convention for the Protection of Human Rights and Fundamental Freedoms if the citizens believe that they have personally and directly been a victim of a violation of the rights set out in the Convention or its Protocols.¹⁵⁴ In particular, the court states that it recognizes the protection of the “right to vote and to stand for election,” and prohibits “discrimination in the enjoyment of the rights and freedoms set out in the Convention,”¹⁵⁵ rights and protections arguably disregarded by current dual citizenship policies in select countries. Whereas half a century ago the judiciary primarily prioritized the state perspective when passing judgment on individuals’ claimed links with states (as in the famous 1955 *Nottebohm* case), international courts are now increasingly shifting attention to the rights of individuals.¹⁵⁶ In both “legal cases and legislation, the rights of citizens and persons have gained in importance vis-à-vis considerations of state sovereignty.”¹⁵⁷ However, no court has yet upheld the right to citizenship as a legal status.¹⁵⁸

Although “sovereign states still unilaterally decide on the at-

151. Faist Changes, *supra* note 34, at 174.

152. Faist Boundaries, *supra* note 3, at 5, 26.

153. *Id.* at 15.

154. REGISTRY OF THE COURT, EUROPEAN COURT OF HUMAN RIGHTS: QUESTIONS AND ANSWERS 3, http://www.echr.coe.int/NR/rdonlyres/37C26BF0-EE46-437E-B810-EA900D18D49B/0/ENG_Questions_and_Answers.pdf (last visited Dec. 30, 2010).

155. *Id.*

156. Faist Changes, *supra* note 34, at 174-75.

157. Faist Boundaries, *supra* note 3, at 20.

158. *Id.* at 15.

tribution of citizenship,” it should come as no surprise that “they do so under conditions influenced by norms that are often codified both nationally and internationally.”¹⁵⁹ Several international instruments have helped lay the groundwork for the gradual elimination of unquestioned sovereign prerogatives, and an increased recognition of the legitimate claims and rights of individuals. For example, Article 15(2) of the 1948 United Nations Universal Declaration of Human Rights (1948 Declaration) recognizes that “[n]o one shall be *arbitrarily* deprived of his[/her] nationality *nor denied the right to change* his[/her] nationality.”¹⁶⁰ The binding character of the Declaration continues to be debated, but it has nonetheless become the accepted general articulation of this right.¹⁶¹ When some nations allow a large percentage of individuals in their territories to hold dual citizenship under a range of legal exceptions, while officially prohibiting dual citizenship *and* automatically expatriating their own original citizens for obtaining citizenship outside their territory, it could be said that such nations arbitrarily deprive persons of their nationality. It also is interesting to note that the 1978 Convention mentions, as a human right no less, the right to change citizenship.¹⁶²

Further, Article 13(2) of the Declaration stipulates that “[e]veryone has the right to leave any country, including his[/her] own, *and to return to his[/her] country.*”¹⁶³ If obtaining citizenship abroad, one cannot be certain to be able to return to one’s home country any longer. For example, Denmark currently allows expatriated citizens to reacquire Danish citizenship after having resided in Denmark for two years. However, while this may sound like a workable compromise, it creates a false sense of security as one can never be sure that this stipulation will not change with changing political administrations. Thus the right to return to one’s original country of citizenship is *not* fully safeguarded in the current situation (although opponents of dual citizenship would, of course, argue that “this” should simply be interpreted as the one of current citizenship, and if a person acquires second citizenship, the nation of this is the country to which the citizen should be permit-

159. Faist Changes, *supra* note 34, at 173.

160. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/Res/217(III), at art. 15 (Dec. 10, 1948) (emphasis added) [hereinafter 1948 Declaration].

161. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (1986). *See also* American Convention on Human Rights: Pact of San Jose, Costa Rica art. 20, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1979).

[hereinafter 1978 Convention]. Article 20 sets forth that “(1) every person has the right to a nationality; (2) every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality, and (3) no one shall be arbitrarily deprived of his/her nationality or of the right to change it.”

162. 1978 Convention, *supra* note 161, at art. 20.

163. 1948 Declaration, *supra* note 160, at art. 13(a) (emphasis added).

ted to return, not the original country of citizenship).

Article 21(1)-(2) of the 1948 Declaration further emphasizes that “[e]veryone has the right to take part in the government of his[her] country, directly or through freely chosen representatives, [and] [e]veryone has the right of equal access to public service in his[her] country.”¹⁶⁴ Similarly, Article 25(2)-(3) of the ICCPR urges nations to allow every citizen “to vote and to be elected at genuine periodic elections . . . [and] [t]o have access, on general terms of equality, to public service in his country.”¹⁶⁵ Although strictly seen, these provisions govern “original citizens” only, they speak in favor of the ultimate goal of ensuring that people in general can participate in such basic, yet important societal functions as voting and holding public sector jobs. Yet that is precisely what countries prohibiting dual citizenship prevent via their long-arm reach into other nations on whose soil their citizens live, and who similarly deny dual citizenship to immigrants on their own soil. The only way to avoid this grip is for such people to renounce their original citizenship to obtain new citizenship, and thus lose the desired rights such as voting and having the ability to be elected, etc. But this is a step of such tremendous psychological impact that many emigrants simply do not take it, and thus have to exist in a somewhat marginalized way without being able to enjoy these recognized democratic rights that so many others similarly situated do.

In a new theoretical approach to this issue, it also is interesting to contrast the lack of voting rights and the right to be elected to office caused by prohibitions against dual citizenship to issues of poverty. Although at first blush it may seem preposterous to compare access to dual citizenship to an issue as severe as poverty, it should be noted that even the World Bank recognizes that

As poverty has many dimensions, it has to be looked at through a variety of indicators – levels of income and consumption, *social indicators, and indicators of . . . socio/political access. . . . Poverty is . . . lack of representation. . . .* [What is needed is a] call to action so that many more may have . . . a voice in what happens in their communities. . . .¹⁶⁶

Thus it is becoming clear that poverty is no longer just an issue of

164. *Id.* at art. 21.

165. ICCPR, *supra* note 150, at art. 25.

166. *Overview: Understanding, Measuring, and Overcoming Poverty*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,menuPK:336998~pagePK:149018~piPK:149093~theSitePK:336992,00.html> (pages accessed through <http://web.archive.org>) (emphasis added).

monetary resources only, but also of other significant societal opportunities, which is exactly what the long-arm reach of prohibitions against dual citizenship prevents.

In Europe, the divergence between national-level legislation and EU-level goals is significant. As shown, whereas most nations are tolerant to dual citizenship, some are clearly not. This is in spite of the fact that the preamble to the European Convention on Nationality promotes “greater unity between its members, . . . [the] desir[e] to avoid discrimination in matters relating to nationality, . . . [and that] account should be taken both of the legitimate interests of States *and those of individuals*.”¹⁶⁷ Further, Article 5 of the Convention states the principle that “[t]he rules of a State Party on nationality shall not contain distinctions . . . [based] on the grounds of . . . *national* or *ethnic origin*.”¹⁶⁸ This principle is certainly not followed by those countries, such as Denmark, that operate with two sets of rules: one for people from certain countries where it is impossible or merely difficult to be released from one’s original citizenship, and another for other immigrants or emigrants wishing dual citizenship. Although these countries may mean well in making this distinction, it has the unjust effect of preventing equal access to citizenship on a broad global basis.

In particular, Denmark’s attitude toward internationalism in general, and dual citizenship in particular, is marked by a high degree of double standards. For example, a ministerial report to some political parties proposing a renewed bill allowing dual citizenship *recognizes* the broad international trends and conventions tolerating and even furthering dual citizenship, acknowledges that other countries have *not* experienced any significant problems in connection with the traditional list of perceived problems of dual citizenship such as problems related to diplomatic assistance, military service, choice of law conflicts or national security, yet abruptly concludes that the Danish government “seeks to limit dual citizenship in part because of principles and in part based on practical considerations, [but] that more and more countries allow for dual citizenship, and that some countries retain the principle that dual citizenship must be limited as much as possible for reasons of principle.”¹⁶⁹ The “principles” so ardently stuck to are widely known to stem from the current anti-immigration debate and the mistaken belief that in prohibiting dual citizenship, immigration can be curbed as well. Another way of explaining the nation’s stance on this point simply may be, unfortunately, the fact that not

167. 2000 Convention, *supra* note 48, at preamble (emphasis added).

168. *Id.* at art. 5 (emphasis added).

169. Danish Ministry of Refugee, *supra* note 76, at 22-23.

enough votes are at stake to make this a major political issue, or something as simple as a lack of understanding of the true significance of the problem. In this case, it is true that “[c]oncepts such as human rights or democratic governance are universal reference points, even though they may not be understood in the same way everywhere.”¹⁷⁰

In an even more obvious display of double standards, Denmark seeks to obtain the benefits of globalization for itself at the national level. For example, in an official 2006 report on “Progress, Renewal and Security: Strategy for Denmark in the Global Economy” (a.k.a. the “Globalization Strategy”), Denmark proclaims that it must “participate actively in the international distribution of work” and “create opportunities for people to obtain improved jobs.”¹⁷¹ Further, “Denmark must be a nation where *everybody* has the best possible opportunities for employing their skills and creating progress for themselves and others. A nation with a *global attitude* playing an *active role in world society*.”¹⁷² “*Everybody* should be ready for *change* and innovation.”¹⁷³ One would think that with these goals in mind, Denmark would realize the time has come to bring its dual citizenship legislation up to par with the current global attitude and international norms in the area. The statement that “everybody should be ready for change” presumably also applies to government lawmakers. The contrast between dual citizenship legislation and the Globalization Strategy is even more remarkable given additional statements in the Strategy that “globalization creates new opportunities for Danish citizens and companies *all over the world*” and that

*Danish interests must be handled effectively on the global scene – politically, financially, culturally and specifically for Danish citizens and companies . . . [T]he conditions for taking care of Danish interests abroad change continually. An increasing number of Danes are outside of the Danish borders where they are tourists or live, work or study. It is thus important to ensure that Danish interests are taken care of effectively.*¹⁷⁴

In short, it is stunning that on the one hand, the nation promotes

170. Faist Changes, *supra* note 34, at 197.

171. GOVERNMENT OF DENMARK, FREMGANG, FORNYELSE OG TRYGHED: Strategi for Danmark i den globale økonomi [PROGRESS, INNOVATION AND SECURITY: Strategy for Denmark in the Global Economy] 6 (1991), available at http://www.globalisering.dk/multimedia/55686_indled.pdf (emphasis added) (translated by author).

172. *Id.* (emphasis added).

173. *Id.* (emphasis added).

174. *Id.* at 102 (emphasis added).

itself as a progressive player on the global scene, and even cites to the importance of taking care of private-level Danish interests inside and outside Danish territory for professional reasons, yet for no truly legitimate reason, refuses to take one simple step that other nations have long since recognized as being highly important in today's globalized world: namely allowing equal access to dual citizenship for both the nation's own citizens abroad as well as for all immigrants to the nation state in question.

One should think that ensuring equal access—through the acceptance of dual citizenship—to such important societal functions such as voting, having the ability to be voted into office, holding government jobs at the national level, and inheriting and enjoying property rights on par with other nationals, would be of prime importance to democratic nations, especially those in relatively close-knit regions such as the EU. However, this is not always the case. The current situation with exceptions being granted in a large number of cases, yet with official policies militating in the exact opposite direction, might, if nothing else, lead to the reluctant nations realizing that the difficulty in justifying each exception on reasonable grounds and the costs of administrative procedures in administering such unequal systems simply favor tolerating dual citizenship for all.

B. A bottoms-up approach

Thus far, individuals may have been patient in accepting the legal/political status quo, but initiatives to prompt change are being implemented. For example, the Assembly of French Expatriates joined forces with delegations of Europeans residing outside their country of origin and the French Ministry of Foreign Affairs during the French Presidency of the EU in 2008 and issued the “Paris Declaration” to promote a joint European policy for Europeans residents outside their nations of origin.¹⁷⁵ The Declaration emphasizes the knowledge shared by numerous scholars and, fortunately, also many politicians, that “Europeans resident outside their country of origin are contributors to improved economic, social, cultural and knowledge exchanges in Europe and the rest of the world” and are “bearers of a specifically European message in defence of Europe's values ([e.g.] *human rights and the rights of the citizen* . . .).”¹⁷⁶ In return, the Declaration rightfully calls for

175. See generally Paris Declaration for a European Policy on Europeans Resident Outside Their Country of Origin, Assembly of French Expatriates (Sept. 30, 2008), available at www.assemblee-afe.fr/.../DECLARATION%20DE%20PARIS%20%20%20ang.doc [hereinafter Declaration].

176. *Id.* at 2 (emphasis added).

“universal justice for all Europeans” whether residents within the EU *or* in third countries, and thus for member nations to mutually recognize the rights of all their citizens living outside their country of origin.¹⁷⁷ The Declaration promotes a uniform system of democratic representation, such as the right to vote in national elections, and finds that “it would be appropriate for *all* Member States of the Union to permit their nationals to acquire another nationality *without* thereby losing their nationality of origin.”¹⁷⁸ This would result in many more EU nationals being able to vote in their countries of domicile if not also in their countries of origin. As the Declaration points out, “[a]ll European citizens are entitled to equal treatment under the laws and judicial institutions of all Member States.”¹⁷⁹ The time has come “to put an end to all forms of protectionism,”¹⁸⁰ such as that effectuated through outmoded, regionally divergent, and ineffective anti-dual citizenship, largely aimed at keeping out immigrants rather than addressing dual citizenship issues. Several Danish grassroots organizations are promoting the same message and objective through action aimed at the Danish government.¹⁸¹ Although people seeking dual citizenship from New Zealand to Norway are demanding action in this area now, it remains questionable whether their voices will be heard for the simple, yet ironic reason that they can neither vote in their countries of origin nor in their countries of domicile. Even if they could, their voices might instead be drowned by what currently is seen as more overriding concerns in political rhetoric: border protection, immigration control (whether aimed at legal or illegal immigration), and child abduction issues. These issues could and should be solved hand-in-hand with appropriate citizenship legislation.

“In sum, states’ regulations bearing on citizenship can no longer be deemed to lie solely within their own jurisdictions but are in fact circumscribed by obligations to ensure the full protection of human rights.”¹⁸² “Citizenship in a mobile world is not a concept for navigating between the principles of universal justice and human rights on the one hand, and justice within bounded political communities such as nation-states on the other hand.”¹⁸³ These principles can be merged, as has already been done without significant problems in the EU and beyond. Fragmentation of legisla-

177. *See id.* at 2-3.

178. *Id.* at 6 (emphasis added).

179. *Id.* at 3.

180. *Id.* at 4.

181. *See, e.g., Danes Abroad Join Fight for Dual Citizenship, supra* note 56.

182. Faist *Changes, supra* note 34, at 175.

183. *Id.* at 197.

tion and policies into isolated segments attempting to solve one problem at a time, without regard to the significant consequences in other areas, ought to be a thing of the past. This is especially so when the result is modern, otherwise liberal nation states denying equal access to important democratic rights. Just as preferences for, as an example, national-only trade, labor, and communications were broken down as the world became more international, so could and should concepts of nationality evolve into more harmonious, equitable solutions where nationhood is no longer the only or main predictor of citizenship.

VII. THE DESIGN OF NEW CITIZENSHIP LEGISLATION

This article has demonstrated that it would be more rational for nations to give up the fight against dual citizenship, which cannot be won. Instead, they should adopt appropriate legislation allowing for equal access to dual citizenship as well as the rights and duties related thereto. It is beyond the scope of this article to propose such actual legislation, but it is of course entirely feasible to do so, as shown by countries such as Sweden. Eva Ersbøll, a dual citizenship scholar and researcher, recommends that

[i]t should be a starting point that citizenship is the expression of a real connection to a state. Of course, this means that 'citizenship of convenience' should be avoided. Dual citizenship should be obtainable for first- and second-generation immigrants as well as for emigrants with close connections to both the emigration and immigration states. The decisive factor is whether the applicant can be presumed to have a strong, real interest in remaining attached to both states. Such a presumption does not apply to subsequent generations. It is thus recommended that a state does *not* use the *jus sanguinis* in such a way that third-generation immigrants and beyond automatically acquire the citizenship of the host country. Basically, third and subsequent generations cannot be presumed to have a strong attachment to the state from which their grandparents, great-grandparents or great-great-grandparents emigrated. [Further,] persons with dual citizenship must first and foremost observe the laws of their host nation. Issues of civil status and the like should thus be decided based on the legislation of this nation. Po-

litical rights should first and foremost be exercised in the host nation. Public sector employment where the employee can truly influence how the nation state is governed could be conditioned upon the employee possessing only citizenship of that nation and thus not dual citizenship.¹⁸⁴

The latter concern—allowing only single-citizenship holders access to positions in which great influence can be exercised over the national affairs of a country—could similarly be considered by the United States. Currently, most, if not close to all, federal agencies require U.S. citizenship for employment.¹⁸⁵ This excludes non-citizens (who nonetheless display great loyalty to the United States) from numerous jobs with no impact whatsoever on any law, policy, or governmental decision-making.¹⁸⁶ Further, for some positions it is even required that the applicant be a U.S. citizen *only*, thus excluding even dual citizens from federal employment.¹⁸⁷ This is in spite of the fact that no U.S. law requires such stringent policies and even stipulates that, for example, nationals of NATO allies may, in fact, obtain federal employment.¹⁸⁸ To be sure, nations have an important interest in ensuring that only persons who are truly loyal to the nation work in influential, if not all, national positions, but as demonstrated, citizenship defined *only* on the basis of nationhood is no guarantee of such loyalty (think Unabomber, Timothy McVeigh, and José Padilla, just to name a few). Similarly, many non-citizens in reality display an even greater sense of loyalty to their host country than their country of origin, although wishing to remain a citizen of both for the reasons described above.

184. Ersbøll Report, *supra* note 4, at 5-6.

185. See, e.g., *Frequently Asked Questions: What if I don't have a Social Security Number (SSN)? Are there jobs for non-citizens?*, USAJOBS, http://www.custhelp.usajobs.gov/cgi-bin/usopm.cfg/php/enduser/std_adp.php?p_faqid=24 (last visited Jan. 3, 2011). The site explains that “[o]nly United States citizens and nationals may be appointed in the competitive civil service. However, Federal agencies may employ certain non-citizens who meet specific employability requirements in the excepted service or the Senior Executive Service. Several factors determine whether a Federal agency may employ a non-citizen. There are only a limited number of Federal jobs that are available to non-U.S. citizens.”

186. See, e.g., *Linguist Career Opportunities*, FEDERAL BUREAU OF INVESTIGATION CAREERS, <http://www.fbijobs.gov/1241.asp> (last visited Jan. 3, 2011). The job description states that FBI Contract Linguist applicants must be United States citizens and willing to renounce dual citizenship.

187. *Id.*

188. See, e.g., *Hiring Noncitizens to Fill Permanent Positions*, U.S. DEP'T OF AGRICULTURE: ADMINISTRATIVE AND FINANCIAL MANAGEMENT, <http://www.afm.ars.usda.gov/hrd/jobs/VISA/Noncitizens-PermanentPositions.pdf> (last visited Jan. 3, 2011) (stating that “[e]very Appropriations Act since 1939 has included a ban on using appropriated funds to employ noncitizens within the continental United States” but that “[n]ationals of countries currently allied with the United States in a defense effort (e.g., NATO allies)” are exempt from these bans).

VIII. CONCLUSION

Little empirical evidence supports the standard arguments raised against dual citizenship.¹⁸⁹ Instead, many compelling reasons exist for modern democracies to fully legalize dual citizenship. Doing so would be not only “a matter of respect for a migrant’s connections and affiliations with the country of origin”¹⁹⁰ but also a much greater degree of equality between not only residents of those nations that fully accept dual citizenship and those that do not, but among residents living in nations that allow dual citizenship only for certain immigrants.

Although it may sound relatively simple to give up one’s citizenship to naturalize in a new country of residence in order to obtain the full range of legal and democratic rights and protections of that territory, in the author’s knowledge, many migrants are simply not ready to sever their ties to their countries of origin and thus do not apply for citizenship in their new host countries. Nor should they have to sever these ties when so many others similarly situated are allowed to retain the original citizenship that so many consider an integral part of their basic identity. Further, reality shows that most nations already have adopted dual citizenship laws with few, if any, legal or practical problems. Nations that have not done so should now take steps in the same direction to ensure full equality among citizens at the national, regional, and supranational levels.

189. ALEINIKOFF & KLUSMEYER, *supra* note 53, at 7.

190. *Id.* at 7.

KEEPING THE WELCOME MAT ROLLED-UP: SOCIAL JUSTICE THEORISTS' FAILURE TO EMBRACE ADVERSE POSSESSION AS A REDISTRIBUTIVE TOOL

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“The essential difference between prescription and limitation is that in the former case title can be acquired only by possession as of right. That is the antithesis of what is required for limitation, which perhaps can be described as possession as of wrong.”¹

“Property rights must be defined and structured so as to grant legal protection for particular interests while at the same time limiting that protection to ensure an environment in which all people may exercise their rights Contrary, perhaps, to popular belief, this means that one of the purposes of property systems must be to distribute ownership widely.”²

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1. J.A. Pye (Oxford) Ltd. v. Graham [2000] Ch. 676 at 691 (Eng.)(quoting Buckinghamshire County Council v. Moran [1990] Ch. 623 at 644).

2. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY, 144 (Yale University Press 2000).

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MISSED OPPORTUNITIES: INTRODUCTION

Lord Justice Nourse made the statement above in a seminal case regarding adverse possession out of the United Kingdom. His purpose was to clarify the difference between an implied license by prescription and adverse possession as a limitation action. Yet, his use of the phrase “possession as of wrong” is illustrative of more than just this distinction. “Possession as of wrong” or, perhaps more appropriately, wrongful possession, tracks the intuitive reaction to adverse possession as a concept. Adverse possession, a doctrine which grants a squatter (or boundary encroacher) legal title to another’s property, cannot be *right*. Rather, the grant of title to an adverse possessor must be *wrong*, both in that it effectuates a *wrong* on the *rightful owner* and in a moral sense, insofar as it is understood to be theft, and theft is generally agreed upon to be a moral wrong. Nevertheless, the doctrine of adverse possession persists.

While some theorists defend adverse possession on utilitarian grounds and others challenge it with Lockean, rights-based theories, human rights or social justice theorists rarely discuss the doctrine. Scholars debate a proper definition of the term social justice, but herein it describes both theorists who, and theories which, drawing upon human rights and redistributive justice principles, focus on more egalitarian property systems. *J.A. Pye (Oxford) Ltd. and another v. Graham and another (Pye)*, a recent U.K. case, raised the question of whether adverse possession may violate a human right to own property. The case implicated the then recent-

ly adopted U.K. Human Rights Act of 1998, therein explicitly bringing adverse possession into the human rights realm. Yet, a review of the case as it moved through the U.K. courts and the European Court of Human Rights reveals, however, that courts have not embraced a consideration of adverse possession as playing a role in substantive human rights or social justice concerns. This is due, in part, to the dearth of human rights and social justice scholarship on the doctrine. Though human rights and social justice theorists have failed to fully develop the doctrine, their theories lay the groundwork for utilizing adverse possession as a tool to fashion new property systems. Utilizing adverse possession as a social justice tool can help foster systems with widespread property distribution while actively recognizing and supporting human rights of both owners and those seeking ownership.

To understand the role adverse possession plays in re-envisioning property systems, one must have a working knowledge of the dominant theories of property, as well as social justice scholarship on property distribution. Part I of this paper will outline the major approaches to property law and theory. Part II will then build upon this understanding and transition into a close analysis of adverse possession doctrine, as well as provide an introduction to the *Pye* cases. Part III examines the current, limited discussion of adverse possession in social justice scholarship, as well as delves deeper into social justice property theories. Part IV proposes the adoption of adverse possession as a tool for social justice theorists and delimits the ways in which the doctrine can reform property systems in line with social justice goals, while respecting individual rights.

I. MAJOR THEORIES IN PROPERTY LAW

Prior to discussing *Pye*, adverse possession doctrine, and the role it can play in advancing social justice goals, it is necessary to have a working understanding of the dominant theories justifying private property systems. While this paper aligns itself with social justice goals, an evaluation of the sustainability and/or appropriateness of each theory is outside the scope of, and ancillary to, the focus of this paper. Thus this paper assumes the validity of social justice theories and does not focus on disproving the sustainability or validity of opposing theories. Brief outlines of utilitarian and rights-based theories are provided to give the reader a functioning knowledge of these prevailing approaches explaining property law. Of principle focus are social justice theories of property law, so as to enable a full discussion of the ways in which adverse possession

provides an avenue to the realization of social justice goals which accords with philosophical bases of such theories.

A. Utilitarian Approach

A utilitarian approach to property law focuses on the maximizing of social welfare or happiness.³ Property and property ownership are valuable only insofar as they promote the greatest quantity of social welfare and happiness. Stated differently, utilitarian theorists focus singly on “maximiz[ing] the size of the pie.”⁴ Critics note that concerns of equality of access to, or distribution of, the “pie” are secondary to, or wholly absent from utilitarian arguments.⁵ Ensuring security of title and getting property into the hands of those who value it most are the primary utilitarian means of promoting social welfare.⁶

For utilitarians, property is merely an instrument to the realization of an overarching goal. Security of property rights is essential as it spurs individuals to invest themselves in the development and use of their property. That investment fuels the overall efficiency and welfare of society.⁷ Some utilitarian arguments focus more on maximizing the economic value as a measure of overall systemic utility and thereby social welfare and happiness.⁸ To economic utilitarians, the key function of property laws is to ensure that the person who places the highest value on a given piece of property acquires said property.⁹ Such a goal is fueled by lowering transaction costs to ensure that transfers of property are frequent.¹⁰ With frequent transfers, the overall efficiency and utility of the system are advanced by encouraging property to find its way into the hands of the person who values it most highly.¹¹ A property system that accomplishes this and provides security of title is a utilitarian ideal.

B. Rights-Based Approach

Rights-based theories owe their foundations to John Locke’s

3. See ALI RIZA ÇOBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 37 (Ashgate Publishing 2004).

4. SINGER, *supra* note 2, at 118.

5. *Id.*

6. See ÇOBAN, *supra* note 3, at 38-39; SINGER, *supra* note 2, at 118-19.

7. See ÇOBAN, *supra* note 3, at 38-39.

8. See *id.* at 39.

9. See *id.* at 39-40; SINGER, *supra* note 2, at 118-19.

10. See ÇOBAN, *supra* note 3, at 39-40; SINGER, *supra* note 2, at 120.

11. ÇOBAN, *supra* note 3, at 39-40.

writings on property.¹² Locke founded the right to possession of property in the concept that an individual has the natural right to her own labor. When she invests that labor into property, she gains a natural right to control of that property by virtue of her intrinsic right to her labor; an appropriation of property into which one does not invest her labor is an impermissible appropriation of that person's labor.¹³ Importantly, this right only extends so far as to permit an individual appropriation of property which leaves sufficient property for others.¹⁴ Where the right to property is a natural right all persons have in a state of nature, the right to the protection of property by the State emerges as a result of humankind's consensual agreement to "enter into one Community."¹⁵ Locke's natural right to property, and the consent-based right to protection of property, lays the groundwork for Robert Nozick's influential theory of private property law.

Robert Nozick relies upon Locke to develop his theory of private property as a system of rights acquired through just acquisition and just transfer.¹⁶ In a Nozickian approach, any "distribution is just if it arises from another just distribution by legitimate means."¹⁷ Just transfers are limited to voluntary transactions or gifts; any other appropriation of property is unjust and therefore invalidates the holding.¹⁸ Nozick asserts that the question of whether a holding is just is a historical one, rather than one answered by looking at the current state of holdings; i.e. if a holding was just at the time of acquisition (either by just transfer for or original acquisition), it is just.¹⁹ Thus, in sharp contrast to social justice theorists, consideration of current distributions is an impermissible inquiry.²⁰

Intimately related to his historical evaluation of the justice of a holding is another key aspect of Nozick's view: that anything more than minimal governmental intervention into the regulation of property violates the fundamental principles of just acquisition and transfer.²¹ Redistribution is a foreign and indefensible concept to Nozickians—so long as property is transferred by gifts or an in-

12. *Id.* at 44; SINGER, *supra* note 2, at 168-69.

13. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 287-89 (Peter Laslett ed., Cambridge University Press 3d ed. 1988) (1960); ÇOBAN, *supra* note 3, at 44; SINGER, *supra* note 2, at 168-69.

14. LOCKE, *supra* note 13, at 286.

15. *Id.* at 270-77.

16. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY*, 253-83 (Oxford University Press 1988) [hereinafter WALDRON *PRIVATE PROPERTY*].

17. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, 151 (Basic Books, Inc. 1974).

18. *Id.* at 150-52.

19. *Id.* at 149-55.

20. *Id.* at 153-59.

21. *Id.* at 149.

dividual's uncoerced desire to transact with others, the question of in whose hands said property ends is beyond the State's concern.²² Or, as Nozick summarizes: "*From each as they choose, to each as they are chosen.*"²³

What happens when persons are never chosen, nor able to choose? Social justice theorists take up the considerations of how property systems shape the welfare of each individual and how they may be reconceived to better protect individual welfare and advance social justice.

C. Social Justice Approaches

The following theorists present three distinct but related approaches to social justice theory of property law. Joseph Singer's social relations property system represents the most complete departure from the utilitarian and rights-based approaches to property law. Jeremy Waldron follows a liberal rights-based approach to property that, while similarly focused on individual rights, differs substantially from the Nozickian rights-based model previously discussed. Lastly, the human-flourishing model of property law advanced by Eduardo Peñalver is examined. Peñalver's model embraces both utilitarian and rights-based concepts. Because of their profound social justice focus, Waldron's and Peñalver's theories are more appropriately discussed as social justice theories of property, despite their grounding in the language and theory of natural rights and utilitarianism.

1. Joseph Singer—Social Relations Property System

Singer advances a social relations model of property. Central to Singer's model is the concept that property systems are a matter of social justice. Where rights-based or utilitarian models fail, Singer argues, is in their ignorance or disavowal of the idea that "[p]roperty rights are . . . legal rules that shape the contours of human relationships regarding control of valuable resources."²⁴ Utilitarians avoid answering the moral questions which property systems demand in favor of "promot[ing] the general welfare or social utility."²⁵ Rights-based theorists ignore the impacts on others effectuated by property systems that focus solely upon the protection of individual "entitlements" at the expense of "obliga-

22. *Id.* at 159.

23. NOZICK, *supra* note 17, at 160.

24. SINGER, *supra* note 2, at 134.

25. *Id.* at 117-18.

tions.”²⁶ Property, to Singer, must be understood as a set of “entitlements *as* obligations we owe others with whom we are in relationship.”²⁷

Singer spends a great deal of time arguing the merits of a social justice theory of property against utilitarian and rights-based theories. The inquiry upon which this paper focuses is whether Singer and other social justice theorists err in ignoring adverse possession as a part of social justice property theory. Thus a full evaluation of the details of Singer’s critique of other theories is unnecessary and beyond the scope of this paper. I will assume *arguendo* the validity of Singer’s theory of property and his critique of utilitarian and rights-based theories.

A defining entitlement of Singer’s theory is the right to be able to participate in the property system. To illustrate the pervasiveness of this idea in all property theories, Singer describes a situation of private property gone *wrong*, i.e. counter to what most understand to be the proper functioning of a private property system.²⁸ Singer’s example is set in a previously communist Eastern European country transitioning to a private property system. The prime minister of this country reported to an advisor, presumably one from a country with a private property system resembling our own, that she had successfully transitioned her country to a private property system by granting property ownership to ten families who “could be trusted to guide the country . . . into the bright future of freedom.”²⁹

This example is illuminating in many ways. It draws attention to the importance of the idea that private property should be widely held to the theories that justify private property systems. Those of us who have grown up in private property systems, Singer asserts, “would think the prime minister had a screw loose.”³⁰ Such a concept of private property seems so wrong because a normative justification of a private property system is that “[w]idespread distribution of property is virtually a defining characteristic” of such a system.³¹ Thus whatever property system the prime minister may have instituted, privatized though it may be, could not properly be understood as what we generally think of as a private property system; it does not match our conception of a private property system which “presumes that there will be many owners.”³² A private

26. *Id.* at 16, 171-73.

27. *Id.* at 216 (emphasis added).

28. *Id.* at 140-43.

29. *Id.* at 141.

30. SINGER, *supra* note 2, at 141.

31. *Id.*

32. *Id.*

property system must “at least guarantee everyone the opportunity to become an owner [and] . . . that opportunity must be real rather than hypothetical.”³³ When ownership is not widespread or a system supports unequal distribution, redistribution is required to realize the goal of providing real ownership opportunities.³⁴

Expectations are central to Singer’s property theory, but his definition of expectations differs significantly from that of a rights-based theorist. Singer’s model protects the expectation that all individuals have to be able to meaningfully participate in a property system that provides the “means necessary for a dignified human life.”³⁵ Such an expectation will necessarily impugn what a rights-based theorist would understand to be the expectation that she can exercise her property rights in a relative vacuum, subject only to minimal limitations by government intervention and regulation.³⁶ In a social relations property system, the denial of that expectation is appropriate as a social relations property system need only recognize “justified expectations.”³⁷ An expectation to be able to exert relative absolute control over the alienability, use of, or access to property based simply upon possession of title is an unjustifiable expectation as it “leave[s] others unduly vulnerable”³⁸ to exclusion from the system.³⁹ Thus Singer’s concept of expectations opens the door for redistribution of property based upon realizing justified expectations and overriding the unjustified.

2. Jeremy Waldron—Need for Affirmative Rights

Waldron advances a rights-based approach to defining the role of property in society.⁴⁰ Despite this similarity to Nozick, Waldron’s theory is rightly classified as a social justice theory as it, mirroring other social justice theories, focuses on widespread distribution of property and a consideration of the morality of property systems. Waldron’s point of departure is the individual, in contrast to communitarian theorists who conceptualize the individual

33. *Id.* at 141, 144.

34. *Id.* at 140-44, 160-69. For discussion of the centrality of widespread distribution as a goal of land reform in developing nations, see Amy Ochoa Carson, Note, *East Timor’s Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 *IND. INT’L & COMP. L. REV.* 395 (2007); Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, 16 *N.Y. INT’L L. REV.* 1 (2003); Nick Dancaescu, Note, *Land Reform in Zimbabwe*, 15 *FLA. J. INT’L L.* 615 (2003).

35. *Id.* at 212.

36. SINGER, *supra* note 2, at 73, 211.

37. *Id.* at 211.

38. *Id.* at 211-12.

39. *Id.* at 41-42, 141-43.

40. Jeremy Waldron, *When Justice Replaces Affection: The Need For Rights*, 11 *HARV. J.L. & PUB. POL’Y* 625, 628-29 (1988) [hereinafter Waldron Justice].

as part (and product of) a community.⁴¹ Rather than relying upon “affective bond[s]”⁴² to meet an individual’s needs, Waldron argues for affirmative rights for the individual should the bonds of community and relationships fail.⁴³ Affirmative rights not only protect an individual’s interests and relationships, but also allow her “to initiate *new* relations.”⁴⁴ Waldron’s view is thereby not only compatible with the conception of an individual as part of community, but also provides affirmative protections for when the community may fail to meet an individual’s needs.⁴⁵

A minimum right to property is an essential part of Waldron’s theory. Private property, in modern society, is required for an individual to be able to perform basic human functions: sleeping, bathing, etc.⁴⁶ As such, access to property affects one’s ability to participate in social and economic life, so it follows that those who lack private property lack the freedom to participate as equal human beings in society.⁴⁷ A person’s right to property is a “general” right one has because she is a human being, a Hegelian “free moral agent.”⁴⁸ This stands in stark contrast to the “special” right a person has under a Lockean rights-based theory of property because of her actions to acquire property.⁴⁹ To be able to respect the equality of all human beings, society must ensure that all individuals have a general right to private property.⁵⁰

Waldron is very specific in his use of the term *right*, however. A right of access to a property system is necessary, but insufficient. A right must exist to ensure that “everyone should actually *own* something” rather than just provide an *opportunity* for ownership.⁵¹ As Waldron states, quite explicitly, in his discussion of homelessness and the need for an affirmative right to property, “one cannot pee in an opportunity.”⁵² For example, Waldron recognizes the importance of a constitutional right to property, such as that found in South Africa’s Constitution, but criticizes such a right for falling short of a guarantee. Rather, an individual must have an affirmative right to possess property that she can turn to

41. *Id.* at 631.

42. *Id.* at 629.

43. *Id.* at 631.

44. *Id.* at 631, 642.

45. *Id.* at 634.

46. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 320 (1991) [hereinafter Waldron Homelessness].

47. *Id.* at 320-23.

48. WALDRON PRIVATE PROPERTY, *supra* note 16, at 443-44.

49. *Id.*

50. Waldron Homelessness, *supra* note 46, at 320-25.

51. WALDRON PRIVATE PROPERTY, *supra* note 16, at 390.

52. Waldron Homelessness, *supra* note 46, at 322.

when denied ownership by fate or circumstance.⁵³

3. Eduardo Peñalver—Promoting “Human Flourishing”⁵⁴

Peñalver advances what he terms a “[h]uman [f]lourishing/ [h]uman [c]apabilities” approach to property, which is an amalgamation of rights-based and utilitarian property theories.⁵⁵ Peñalver grounds this approach in the recognition that community is “inherent in the human condition,” essentially saying that we are all dependent upon one another to “develop the distinctively human capacities that allow us to flourish.”⁵⁶ In order to *flourish*, an individual needs not only to be part of a community, but to be able to exercise her own agency “to make meaningful choices.”⁵⁷ Through its emphasis on the agency of the individual, Peñalver’s approach echoes Waldron’s Hegelian argument of a general right to property. Distinctively, however, for Peñalver, the individual is both simultaneously autonomous of, and inseparable from, the community.⁵⁸

To Peñalver, a just society is one in which an individual has the “capabilities” for living “in a manner consistent with norms of equality, dignity, respect . . . justice . . . freedom and autonomy.”⁵⁹ The four defining “capabilities” are for “life,” “freedom,” “practical reason,” and “sociality.”⁶⁰ Property, in the author’s view, is a physical requirement necessary to achieving this state of human flourishing, but it cannot be acquired without others.⁶¹ Like Singer, Peñalver recognizes that capitalism and the current private property system do not effectuate adequate access to property ownership to promote human flourishing.⁶² Acknowledging this, Peñalver argues that the State has an affirmative duty to redistribute “surplus resources.”⁶³ Doing so advances the utilitarian goal of promoting human flourishing, as well as the individual right to exercise one’s agency in the world.⁶⁴ The joint rights-based and utilitarian

53. WALDRON PRIVATE PROPERTY, *supra* note 16, at 392, 408; Waldron Homelessness, *supra* note 46, at 322-23; Waldron Justice, *supra* note 40, at 629.

54. Peñalver co-authored the articles discussed with either Gregory Alexander or Sonia K. Katyal, as indicated in the citations. As Peñalver is the unifying theorist, I refer to the model as his in the text for ease of reference.

55. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 134 (2009).

56. *Id.* at 134-35.

57. *Id.* at 135.

58. *Id.* at 135-36.

59. *Id.* at 140.

60. *Id.* at 138.

61. See Alexander & Peñalver, *supra* note 55, at 138-48.

62. *Id.* at 146.

63. *Id.* at 148.

64. *Id.* at 148-49.

grounding of Peñalver's argument makes his theory distinct, though clearly related to those of Singer and Waldron.

Having a working knowledge of the three major approaches to property law, it is now appropriate to discuss the doctrine of adverse possession. An examination of the doctrine, as well as the *Pye* case, will illustrate the relative uniformity of adverse possession and the theories for and against it in both the United States and the United Kingdom. It will also illustrate the absence of serious social justice theory on adverse possession, despite its potential use as a redistributive tool.

II. ADVERSE POSSESSION DOCTRINE: BACKGROUND AND THE PYE CASES

Adverse possession is a common law doctrine that allows one in possession of land, but lacking legal title to it, to gain title to the property after she has met the required elements of the doctrine.⁶⁵ The change of title from the prior owner to the adverse possessor is not a standard transfer but rather occurs by virtue of the adverse possessor's "possession and the statutory extinguishment of the former owner's title."⁶⁶ While the language of the requirements differs, adverse possession doctrine in the United States predictably tracks that of the United Kingdom.⁶⁷ Because of the significant overlap, one can move freely between discussion of the doctrine and its challenges and justifications in both countries.

A. United States

Modern adverse possession doctrine in the United States requires the adverse possessor to satisfy six requirements to have a successful claim: "(1) actual possession [that is] (2) open and notorious, (3) hostile (without permission), (4) exclusive, (5) continuous, and (6) for the required" statutory period.⁶⁸ Jurisdictions vary in their inquiry into and requirement of a specific state of mind of the adverse possessor regarding the property. For some, the adverse possessor must simply exert actual possession of the property,

65. JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS, 168 (9th ed. 2008); ROGER A. CUNNINGHAM, WILLIAM B. STOEBCUK & DALE A. WHITMAN, THE LAW OF PROPERTY, 757-58 (West Publishing Co. student ed. 1984).

66. Charlotte C. Williams, Comment, *Reaching Back to Move Forward: Using Adverse Possession to Resolve Land Conflicts in Timor-Leste*, 18 PAC. RIM. L. & POL'Y J. 575, 597 (2009).

67. Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 127-28 (1997).

68. CRIBBET ET AL., *supra* note 65, at 177 (discussing the foundational adverse possession case *Marengo Cave Co. v Ross*, 10 N.E.2d 917 (Ind. 1937)).

while other jurisdictions require the possessor to have a “subjective belief that [she] . . . owns the property” or an “intent to displace.”⁶⁹ Under the common law, the adverse possessor had to be in possession for twenty years, though many jurisdictions have reduced that requirement.⁷⁰ While the time of possession required may vary by jurisdiction, adverse possession doctrine is relatively uniform as a “well[-]entrenched” aspect of property law.⁷¹

B. United Kingdom

As it provided the model for U.S. adverse possession doctrine, the U.K. doctrine closely resembles that of the United States.⁷² For an adverse possessor to have a successful claim, she must establish 1) factual possession and the 2) *animus possidendi* (the intent to possess), which are 3) adverse to the title owner’s interest and persist for the statutory period.⁷³ Until 2002, modern U.K. adverse possession doctrine regarding registered land was defined by the combination of the Land Registration Act of 1925 (LRA 1925) and the Limitation Act of 1980 (LA 1980). If the elements of adverse possession were met for the statutorily required period of twelve years, the title owner’s interest was extinguished “without warning and without compensation.”⁷⁴

The Land Registration Act of 2002 (LRA 2002) significantly altered adverse possession.⁷⁵ Rather than an immediate extinguishing of title when all elements have been met, the LRA 2002 now permits an adverse possessor to apply to be granted title after ten years of adverse possession.⁷⁶ After an application is made, the title owner is notified of the adverse possessor’s application.⁷⁷ Unless the adverse possessor is entitled to possession based on a claim of equitable estoppel,⁷⁸ boundary dispute,⁷⁹ or “some other reason,”⁸⁰ the title holder may defeat the application by evicting the squatter and re-establishing possession within two years.⁸¹

69. *Id.*

70. 3 AM. JUR. 2D *Adverse Possession* § 13 (2010).

71. CRIBBET ET AL, *supra* note 65, at 168.

72. Gardiner, *supra* note 67, at 127-28.

73. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689; Julia Simmonds, *Squatter Case Finds Its Way to the European Court of Human Rights*, 10 L. & T. REVIEW 37, 37 n. 2 (2006).

74. Simmonds, *supra* note 73, at 38.

75. *Id.*

76. Land Registration Act, 2002 c. 9, § 97, sch. 6, para. 1(1) (Eng.) [hereinafter LRA 2002].

77. *Id.* at para. 2.

78. *Id.* at para. 5(2).

79. *Id.* at para. 5(4).

80. *Id.* at para. 5(3).

81. Simmonds, *supra* note 73, at 37 n.9.

Thus the LRA 2002 may make it increasingly difficult for adverse possessors to acquire possession.⁸²

C. Theories Supporting and Challenging Adverse Possession

Justification for and criticisms of the doctrine are similar on both sides of the Atlantic. The prevailing justifications for the doctrine—that it clarifies title by eliminating the possibility of old claims and that it encourages efficient use of land—are utilitarian in nature.⁸³ By quieting title, adverse possession arguably contributes to the security of an owner’s interest in property. Once secure in her property rights, the owner, it is presumed, will more fully develop her property or may feel better able to transfer her property to another—either action contributes to the efficiency of the economy.⁸⁴ Rather than letting land lay unused, adverse possession encourages owners to actively use and monitor their land, thereby contributing to the general welfare and “ultimate progress of society.”⁸⁵ Traditional utilitarianism (uninformed by social justice theory) clearly dominates current theoretical justifications for adverse possession.

Dominant criticisms of the doctrine are in line with a Locke via Nozick rights-based approach to property. Calling the doctrine “draconian” and one which “does not accord with justice,”⁸⁶ critics assert that adverse possession “unfairly deprives rightful owners of their title.”⁸⁷ To a Nozickian rights-based theorist, the title owner holds title until she decides to transfer said title through a state-sanctioned just transfer.⁸⁸ Thus adverse possession seems to such a theorist to be little more than theft, which has, regrettably, been backed by the State.

D. Adverse Possession and Human Rights

A potential for a shift in the discourse on adverse possession came in the form of the Human Rights Act of 1998 (HRA 1998). While the United Kingdom ratified the European Convention on

82. *Id.* at 38.

83. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 709-10; CRIBBET ET AL, *supra* note 65, at 176; Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2435, 2441-42 (2001).

84. Williams, *supra* note 66, at 601; Stake, *supra* note 83, at 2435, 2441-42.

85. Gardiner, *supra* note 67, at 156.

86. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 709-10.

87. Stake, *supra* note 83, at 2448.

88. *J.A. Pye (Oxford) Ltd v. U.K.*, 43 Eur. Ct. H.R. 3, 50 (2005) (stating that “[a]s registered freeholders, the applicant’s title [to the land] was absolute and not subject to any restriction, qualification or limitation.”).

Human Rights in 1951 (ECHR), the ECHR protocols did not govern U.K. law until after the HRA 1998.⁸⁹ The specific provision regarding property and the one in debate in *Pye*, is Article 1 of Protocol 1 which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁹⁰

The similarities to the Fifth Amendment of the U.S. Constitution are clear. But for the purposes of this paper, the most important distinction is that the ECHR and the HRA 1998 grew out of and were adopted as part of a growing awareness of the need for affirmative human rights documents. As such, unlike the U.S. Constitution, the ECHR and HRA 1998 explicitly open the door for a discussion of the theories of, philosophical foundations for, and legal implications of human rights doctrines. Strikingly, as one will find after examining *Pye*, even under a system which explicitly recognizes human rights, U.K. courts have not informed their jurisprudence with the theories and discourse of human rights.

E. Overview of Pye

J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd v. The United Kingdom (J.A. Pye (Oxford) Ltd. and others v. Graham and another in the U.K. courts) neatly illustrates the pervasiveness of utilitarian and rights-based arguments on adverse possession. The case moved through the Chancery Court, Court of Appeals and House of Lords within the United Kingdom, after which it proceeded through the lower chamber and Grand Chamber of the European Court of Human Rights.⁹¹ The decisions, as well as the dis-

89. A.W.B. Simpson, *Constitutionalizing the Right of Property: The U.S., England and Europe*, 31 U. HAW. L. REV. 1, 16 (2008).

90. Human Rights Act, 1998, c. 42, § 1(3), sched. 1, pt. 2, art. 1 (Eng.).

91. *J.A. Pye (Oxford) Ltd v. U.K.*, App. No. 44302/02, 46 Eur. H.R. Rep. 45 (2008); *J.A. Pye (Oxford) Ltd v. U.K.*, App. No. 44302/02, 43 Eur. H.R. Rep. 3 (2006); *J.A. Pye (Oxford) Ltd v. Graham* [2002] UKHL 30, 3 All E.R. 865 (appeal taken from Eng.); *J.A. Pye (Oxford)*

sents, provide an accessible means for grasping the theoretical underpinnings of the arguments for and against adverse possession. Additionally, *Pye* is an especially appropriate case as it raised the question of whether adverse possession violates a human right to own property under the Human Rights Act of 1998.

The focus of *Pye* was a dispute of the possession of approximately fifty-seven acres of land.⁹² In 1983, John Graham received a grazing license from J.A. Pye Holdings to use land adjoining the Graham's Manor Farm.⁹³ Pye owned the land with the intention of developing it in the future once the necessary permits could be obtained.⁹⁴ In January 1984, Pye refused to renew the license by way of a letter to the Grahams.⁹⁵ At the close of 1984 and in May 1985, John and Michael Graham, John's son, sent further requests to the company for a renewal of the grazing license.⁹⁶ After the May 1985 letter, there was no evidence of any further contact between the Grahams and Pye until 1997.⁹⁷ At all times since the expiration of the grazing license, the Grahams used the property for grazing, harvested hay, and maintained the boundaries and condition of the property.⁹⁸

The Grahams claimed title to the disputed land under the Limitation Act of 1980. In 1997, the Grahams filed cautions with the Land Registry. Pye then filed an application to counter the cautions, but the Land Registry issued a statement in favor of the Grahams in September 1998. Subsequently Pye filed suit in the Chancery Court to retain possession of the property in January 1999, thereby initiating this illustrative case.⁹⁹

At the Chancery Court, the only question presented was whether there was sufficient evidence for the court to hold in favor of the Grahams as adverse possessors.¹⁰⁰ As the period of adverse possession was initiated and completed prior to 2002, the LA 1980 controlled. LA 1980 provides, in pertinent part, that:

Where the person bringing an action to recover land . . . has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the

Ltd. v. Graham, [2001] EWCA (Civ) 117 (appeal taken from Eng.); *J.A. Pye (Oxford) Ltd*, [2000] Ch. 676.

92. *J.A. Pye (Oxford) Ltd*, 46 Eur. H.R. Rep. 45 at 1087.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *J.A. Pye (Oxford) Ltd*, [2000] Ch. 676 at 676-685.

99. *Id.* at 687.

100. *Id.*

right of action shall be treated as having accrued on the date of the dispossession or discontinuance.¹⁰¹

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him¹⁰²

[A]t the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.¹⁰³

Judge Neuberger held for the Grahams, finding that they had 1) factual possession, 2) the necessary intent to possess the land (*animus possidendi*), and 3) that the possession was adverse under the LA 1980 and LRA 1925.¹⁰⁴ Even as he found in favor of the Grahams as adverse possessors, Judge Neuberger expressed a rights-based criticism of the doctrine:

[T]his is a conclusion which I arrive at with no enthusiasm . . . if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years . . . it does seem draconian to the owner and a windfall for the squatter.¹⁰⁵

Title is supreme and gives the owner the right to do anything (or nothing) with her property. Under this view, the adverse possessor has no viable claim to the property.

Rights-based criticisms, such as Neuberger's, as well as utilitarian justifications for adverse possession, abound throughout the *Pye* opinions. In the Court of Appeal, *Pye* introduced the question of whether the doctrine violates a human right to own property recognized in the United Kingdom by the HRA 1998.¹⁰⁶ The question could not be addressed by the lower court as HRA 1998 did not come into effect until 2000.¹⁰⁷ The Court of Appeal reversed, hold-

101. Limitation Act, 1980, c. 58, § 15(6)(7), sch. 1 (Eng.).

102. *Id.* at pt. 1, 15(1).

103. *Id.* at pt. 1, 17(b).

104. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689.

105. *Id.* at 709-10.

106. *J.A. Pye (Oxford) Ltd.*, [2001] EWCA Civ 117 [18]-[34].

107. *Id.* at [45]-[46].

ing for Pye, on the grounds that the Grahams' possession had not been incompatible with the owner's intent toward the property and therein did not satisfy the requisite intent to possess.¹⁰⁸ Regarding the human rights claim, the court held there was no violation of Article 1 of Protocol 1 of the ECHR, as adverse possession does not deprive an owner of her possessions, but rather her right to bring a claim to keep those possessions.¹⁰⁹ In the alternative, assuming there was a potential violation, the court stated that adverse possession is justified on the utilitarian grounds of clarification of title and the desire to "promote social stability by the protection of . . . established and peaceable possession."¹¹⁰ The court's dismissive treatment of the human rights claim and reversion to utilitarian arguments illustrates the court's failure to seriously consider the relationship between property, adverse possession, and human rights.

After losing at the Court of Appeal, the Grahams appealed the case to the House of Lords. That court reversed the appeal court's judgment and restored the Chancery court's order in favor of the Grahams.¹¹¹ Importantly, the court found the appellate court's interpretation of intent to possess to be in error.¹¹² Additionally, at the House of Lords, Pye conceded that the HRA 1998 could not apply retroactively.¹¹³ However, in a concurring opinion, Lord Hope of Craighead considering the human rights challenge, simply stated that "[f]ortunately . . . a much more rigorous regime has now been enacted [by the LRA of 2002 which will] make it much harder for a squatter . . . to obtain a title to [registered land] against the wishes of the proprietor."¹¹⁴ Lord Hope makes no consideration of the potential rights of an adverse possessor. Thus, while his overall consideration of the human rights issue is brief, it is also incomplete. Echoing the lower courts, Lord Hope criticizes adverse possession on rights-based grounds, and avoids a full discussion of potential corollary human rights implications for the adverse possessor.¹¹⁵

Pye then brought suit in the European Court of Human Rights against the United Kingdom for a violation of Article 1 of Protocol 1 of the ECHR.¹¹⁶ The lower chamber held for Pye, finding that adverse possession doctrine, under the LA 1980 and LRA 1925, vio-

108. *Id.* at [40]-[44].

109. *Id.* at [52(2)].

110. *Id.* at [52(3)].

111. *J.A. Pye (Oxford) Ltd*, [2002] UKHL 30 [2],[66].

112. *Id.* at [31]-[45], [61]-[62].

113. *Id.* at [65].

114. *Id.* at [73].

115. *Id.* at 885 ("Once possession has begun, as in the case of the owner of land with a paper title who has entered into occupation of it, his possession is presumed to continue.")

116. *J.A. Pye (Oxford) Ltd*, 43 Eur. H.R. Rep. 3 at 43 (2006).

lated Article I of Protocol 1.¹¹⁷ The court articulated a rights-based argument, stating that: “[A]s registered freeholders, the applicants’ title to the land was absolute and not subject to any restriction, qualification or limitation;” absent any other defect, the title was absolute.¹¹⁸ The court emphasized that takings in the public interest, which are permissible under Article 1 of Protocol 1, should be recognized “only in exceptional circumstances” and that the taking by adverse possession in this case did not qualify as such a circumstance.¹¹⁹ By relying heavily on Nozickian rights-based theories of adverse possession, the lower chamber failed to change the discourse on adverse possession to one that seriously entertains human rights concerns.

The Grand Chamber, hearing *Pye*, reversed the lower chamber decision, finding there was no violation of Article 1 of Protocol 1.¹²⁰ In its decision, the court found that the United Kingdom’s interest in clarification of title was reasonable under the demands of Article I of Protocol I.¹²¹ Therein, the court relied upon the oft-cited utilitarian justification for adverse possession. In considering the rights of the adverse possessor, the court stated it “would be strained to talk of the ‘acquired rights’ of an adverse possessor.”¹²² Mirroring the lower chamber, the Grand Chamber returned to well-trod theories on adverse possession. Going even further than the lower chamber, the court was dismissive of any potential social justice or human rights claim of the adverse possessor. Again, when faced with a potential to inform adverse possession doctrine with human rights theory, the Grand Chamber, like those before it, failed to do so.

Three decisions in favor of the adverse possessor, two in favor of the title owner, yet not a single decision engages in substantive human rights discussions. The decisions in favor of the Grahams as adverse possessors were granted grudgingly, finding adverse possession “draconian”¹²³ or as illustrative of “[t]he unfairness in the old regime.”¹²⁴ Essentially, in the view of the courts, the Grahams are the undeserving benefactors of an unjust law.¹²⁵ The only human rights entertained are those of the title owner; there is no corresponding discussion of the rights that, though not currently recognized in a human rights document applicable to the United

117. *Id.* at 63-64.

118. *Id.* at 57-58.

119. *Id.* at 63.

120. *J.A. Pye (Oxford) Ltd* 46 Eur. H.R. Rep. 45 at 1106 (2008).

121. *Id.* at 1101.

122. *Id.* at 1105.

123. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 710.

124. *J.A. Pye (Oxford) Ltd.*, [2002] UKHL 30 [73].

125. *Id.* at [28].

Kingdom, the adverse possessor could or should have to title. The only mention of any potentially “acquired rights” is made in passing and demeaned as being essentially inconsequential.¹²⁶ *Pye* may raise human rights questions, but the courts faced with the case skirted a real discussion, offering nothing but the same old answers.

III. ADVERSE POSSESSION AS A TOOL FOR ADVANCING HUMAN RIGHTS AND SOCIAL JUSTICE: CURRENT DISCUSSION

A. *Social Justice Theorists’ Failure to Consider Adverse Possession*

Utilitarian justifications for, and rights-based criticisms of, adverse possession abound. Very few social justice theorists, however, have seriously considered the doctrine as a legal means of increasing access to private property ownership. Those that do address the doctrine frequently collapse into utilitarian arguments of efficient use of property and promotion of general welfare, rather than arguing in support of the doctrine explicitly on social justice grounds.

One such utilitarian argument emerges in “Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws.” In his article, Brian Gardiner argues for a shortening of the statutory periods required for a successful adverse possession claim.¹²⁷ While his goal, insuring access to property for all and eliminating homelessness,¹²⁸ is in accordance with social justice theory, Gardiner’s approach is traditionally utilitarian. Gardiner justifies adverse possession as a means of enhancing the efficient use of property, clarifying title, and eliminating “resource gaps.”¹²⁹ Absent from Gardiner’s discussion is any argument that adverse possession is a means to property ownership that is justified by social justice and/or human rights concerns.¹³⁰ Gardiner’s goal is laudable but his argument in support of adverse possession cannot be construed as part of the social justice approach to property. Herein, Gardiner fails, as do the following social justice theorists, to recognize the redistributive role adverse possession can play in advancing social justice goals.

126. *J.A. Pye (Oxford) Ltd*, 46 Eur. H.R. Rep. 45 at 1105 (2008).

127. Gardiner, *supra* note 67, at 156.

128. *Id.*

129. *Id.*

130. *See generally id.* I do not mean to impugn Gardiner’s goal or intentions in arguing in favor of adverse possession, but rather to highlight the absence of social justice theory on adverse possession by distinguishing Gardiner’s argument as a utilitarian one.

B. Peñalver's Human Flourishing and Adverse Possession

Peñalver makes the most thorough examination of adverse possession of the social justice theorists discussed herein. Although his examination is thorough, it cannot be said to take up the banner for adverse possession as a redistributive tool for social justice property theorists. Rather than a serious consideration of the role adverse possession *can play* in redistributive schemes, Peñalver conducts a largely historical study of the role the doctrine *has played* in shaping property law as we now know it through the settlement of the American West and urban squatter's movements.¹³¹

Peñalver recognizes the role adverse possession can play in drawing attention to inequitable property distribution. Such "acquisitive outlaw conduct," if repeated, may have the ability to raise awareness of the fact that the market and the current property system are failing to adequately protect all individuals.¹³² As such, systematic attempts at adverse possession can be, and have historically been, an awareness-raising mechanism.¹³³ While Peñalver's focus on adverse possession as a social movement tool is largely historical, it opens the door for reconsideration of the current role of the doctrine in social justice property theory.

At the core of Peñalver's argument is that a person in need does not commit a wrong when she takes the property of another.¹³⁴ As discussed earlier, Peñalver recognizes property as a right to which all are entitled as a means of exercising their own agency and promoting human flourishing. If an individual has no other means of obtaining property and is thereby denied her agency and ability to flourish, it is not wrong for that person to "self-help."¹³⁵ Peñalver notes that the adverse possession doctrine and the modern ease of monitoring property combine to ensure that the property taken now is most likely to be "surplus" property that the title owner could afford to ignore.¹³⁶ This fact, for Peñalver, strengthens the moral claim of the adverse possessor to possession.

While calling for an "expansion of existing [self-help] tools,"¹³⁷ Peñalver, in the same breath, largely resigns adverse possession to the category of a previously-useful doctrine. The author's hope for expansion of the doctrine rests on a call to lower the statutory pe-

131. See generally Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

132. *Id.* at 1146.

133. *Id.* at 1146-47.

134. *Id.* at 1170.

135. *Id.* at 1158, 1170-71.

136. *Id.* at 1170-71.

137. Peñalver & Katyal, *supra* note 131, at 1158.

riod to ease the burden on the adverse possessor.¹³⁸ No attempt is made to argue for an attempt to inform the doctrine through social justice theory, despite recognizing that it is likely to be only the propertyless who attempt adverse possession.¹³⁹ Peñalver effectively reconciles himself to a reality in which adverse possession can do nothing but “clear[] titling errors and resolv[e] inconsequential border disputes.”¹⁴⁰

Peñalver should not accept adverse possession as an antique redistributive tool. His theory of property makes property possession a requisite for the realization of individuals’ equality and agency, as well as for the promotion of human flourishing. If Peñalver is committed to widespread distribution of property, he should approach adverse possession with a more creative and welcoming view to promote overall human flourish and individual agency. Peñalver takes a step toward embracing adverse possession, arguing for an “expansion of existing [redistributive] tools.”¹⁴¹ But an expansion means more than just calling for a shortening of statutory period requirements.

Peñalver recognizes that most of the property that would be taken by adverse possession would not be the family farm but would be surplus property,¹⁴² the holding of which by the title owner is, in aggregate, excluding others from ownership. Yet, Peñalver calls only for a shortening of the statutory period to possess property. If, as Peñalver argues, redistribution can be justified by both utilitarian (promotion of human flourishing) and rights-based theories (enabling individual agency), Peñalver should call for the law to consider such factors as part of adverse possession analysis. Considering adverse possession’s redistributive potential alongside its proven potential as social movement tool,¹⁴³ Peñalver’s argument fails not in its attempt to approach adverse possession from a social justice framework, but in stopping short of advocating ways to ensure that adverse possession can continue to be the effective social justice tool he identified it as in history.

C. Waldron’s Rights and Adverse Possession

Waldron’s rights-based theory and adverse possession have a more tenuous relationship than those of Singer and Peñalver. On the surface, it seems as though the doctrine could be a viable redis-

138. *Id.* at 1171.

139. *Id.* at 1170.

140. *Id.* at 1171.

141. *Id.* at 1158.

142. *Id.* at 1170.

143. *See generally* Peñalver & Sonia K. Katyal, *supra* note 131.

tributive tool for Waldron's theory. Waldron is committed to redistribution, explicitly stating that "[n]obody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them;"¹⁴⁴ redistribution must occur to avoid this situation. Adverse possession, in such a view, could be understood as a right to which propertyless are entitled to take the property necessary for life from those who have too much (echoing Peñalver's observation). Yet such a right is not sustainable or sufficient in Waldron's view.¹⁴⁵ The role adverse possession could play in Waldron's theory is largely that of a stopgap measure.

Adverse possession and Waldron's theory do find common ground, as adverse possession is more than an abstract right to property. Waldron is critical of constitutional "rights," finding them to be only abstract opportunities, rather than affirmative guarantees.¹⁴⁶ Adverse possession is more than an abstract opportunity but less than a guarantee. If an individual can meet the statutory requirements, she has a right to bring an action for title to that property, a right she can assert in a court of law. Importantly, however, she is not guaranteed to receive title, a reality that moves the doctrine back to the realm of mere opportunity on Waldron's continuum. Thus, while Waldron could encourage utilization of the doctrine as a currently-sanctioned means of redistribution, he is unlikely to be wholly satisfied with adverse possession as a tool to ensuring universal property ownership.

D. Singer's Social Relations Theory and Adverse Possession

Singer's theory provides the most fertile ground for growing a relationship between social justice theory and adverse possession. Singer's property theory, like those of Waldron and Peñalver, emphasizes the importance of widespread distribution to a humane property system. For Singer, "[p]roperty . . . promotes both autonomy and social welfare,"¹⁴⁷ but to successfully do so, it must be

144. *Id.* at 1154 (quoting JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 240-41 (1993)).

145. WALDRON PRIVATE PROPERTY, *supra* note 16, at 283 (stating that "Of course, no actual property system can include among its legal rules a right that anyone may take from the holdings of another what he needs to survive. Necessity in our law is no defense to theft or trespass . . . however, I have shown how this constraint can be turned into the basis of an argument for a redistributive welfare state—a system which, by ensuring that the situation of desperate need never arises for anybody, effectively guarantees that property rights never have to be asserted and enforced in the face of such need.").

146. Waldron Justice, *supra* note 40, at 630-31; Waldron Homelessness, *supra* note 46, at 322-323; WALDRON PRIVATE PROPERTY, *supra* note 16, at 390-392, 408.

147. SINGER, *supra* note 2, at 162.

available to all in a very real way.¹⁴⁸ Adverse possession is a real means of increasing property distribution. It can provide a non-owner the means to obtain title to private property through her time and work invested in property where she otherwise might be wholly excluded from the property system by circumstance.¹⁴⁹ Furthermore, the doctrine fits particularly well with Singer's concept of justified and unjustified expectations.

Adverse possession recognizes the justified expectations of an individual to be able to participate meaningfully in, and gain access to, the property system. In his brief mention of adverse possession, Singer recognizes it as a doctrine that gives weight to justified expectations in possession of property that may arise outside the formal title system.¹⁵⁰ For Singer, informal arrangements and indicia of possession are not to be ignored in a social relations property system. Rather they are to be respected as one of the many elements which shape relationships to and through property.¹⁵¹

Singer grounds a justified expectation in gaining title to property in the exercise of "long-standing possession" and other "informal arrangements."¹⁵² Nevertheless, like Peñalver, Singer stops short of embracing adverse possession as a doctrine which can play an important role in achieving the social justice goal of widespread property distribution through recognition of justified expectations.¹⁵³ Here it is important to recall Singer's one universal, justified expectation to which all individuals are entitled—"[o]ne expectation we are entitled to have is that we may obtain the means necessary for a dignified human life"—property.¹⁵⁴ Viewed in light of the justified expectation which may arise through possession, adverse possession beckons as a means of recognizing both justified and universal expectations.

Earlier I criticized the United Kingdom and ECHR courts for failing to recognize the potential rights an adverse possessor may have under human rights theories alongside those of the title owner. To avoid becoming the subject of the same criticism, though on the other side of the conflict, it is important to recognize the immediate conflict which may emerge from recognizing adverse possession as a social justice tool: that of the adverse possessor's potentially justified expectation to the property and the expectations

148. *Id.* at 41, 167.

149. Peñalver & Katyal, *supra* note 131, at 1145-46.

150. SINGER, *supra* note 2, at 45-46.

151. *Id.*

152. *Id.* at 46.

153. *See id.*

154. *Id.* at 212.

of the title owner. Singer recognizes this fundamental tension between protecting title owners' expectation of undisturbed ownership and the desire to extend access to property ownership to all individuals.¹⁵⁵ But Singer himself provides the answer to this conflict.

Singer recognizes the difficulty of defining what a reasonable expectation is,¹⁵⁶ but expressly denounces an absolutist notion of ownership.¹⁵⁷ Stated differently, "ownership cannot mean what it is often thought to mean: that one has a right to act without regard for others' interests, needs, and expectations."¹⁵⁸ No system of property, Singer asserts, can be justified without widespread distribution. It follows that no person owning property in a system which fosters unequal distribution can have a justified expectation to absolute possession of his or her property. To assert that such a person has absolute ownership would permit the continuation of an unequal system that, by its very existence, fails to respect the "dignity and equal worth of each individual."¹⁵⁹ If, as Singer asserts, "*owners have obligations as well as rights*,"¹⁶⁰ their obligations extend to the need to recognize competing expectations that call for redistribution to establish a minimum level of equality.¹⁶¹

IV. ADVERSE POSSESSION AS A TOOL FOR SOCIAL JUSTICE: ADVANCING THE DOCTRINE

Adverse possession acknowledges and respects competing expectations of owners and non-owners. As we have seen, courts do not currently evaluate adverse possession claims within the context of the overall property distribution or similar social justice concerns. Rather, courts are heavily steeped in utilitarian and Nozickian rights-based rhetoric and theory. But the fact that courts currently use different language and different rationales does not negate the potential adverse possession has for realizing social justice goals. Were it to be embraced by social justice theorists as such, the current weighing of expectations, which does occur, could be informed by the language of social justice, redistribution, human rights, and individual equality. Doing so would enable theorists to re-envision and remold adverse possession as a social justice tool.

155. *Id.* at 167.

156. SINGER, *supra* note 2, at 46.

157. *Id.* at 163, 172-73.

158. *Id.* at 210.

159. *Id.* at 144.

160. *Id.* at 16.

161. *Id.* at 113-14, 160-62.

It is important, at the outset, to recognize that social justice theorists are not calling for abolition of private property systems, but rather for reform. All three theorists recognize the threat to the stability of the overall property system that an unregulated right to appropriate the property of others may present. However, they also all recognize the inherent instability of inequitable property distribution.¹⁶² Adverse possession can play a role in redistributive efforts to realize a more sustainable property system that respects the human rights of all and advances social justice. Until that goal is realized, there will be a fundamental tension between a right to security in property provided by documents such as the Fifth Amendment or the HRA 1998 and a right to access property ownership.¹⁶³ However, a carefully-crafted conception of adverse possession as a social justice tool can recognize and mediate that tension.

To fully embrace the doctrine, social theorists need not change the consequences of adverse possession, but rather to inform and reenvision the doctrine with social justice theory. The consequence of adverse possession—the transfer of title to property from one individual to another—is easily reconcilable with the redistributive goals of Waldron, Singer and Peñalver. Social justice theory could add a focused evaluation of who the parties gaining and losing title may be. Consider the LRA 2002, a relatively new addition to adverse possession doctrine. While it gives the title owner a chance to reestablish possession, she is barred from doing so if the adverse possessor can demonstrate grounds for equitable estoppel, a boundary dispute, or “some other reason” to retain possession and obtain title.¹⁶⁴ It is discretionary categories such as the LRA 2002’s “some other reason” that social justice theorists can and should exploit.

Informing adverse possession doctrine with social justice theory would leave the doctrine largely unchanged. Recall that adverse possession doctrine in the United States and United Kingdom requires that the adverse possessor exert exclusive, continuous possession of the property that is hostile to the title owner and readily viewable and understood to be actual possession for a required statutory period.¹⁶⁵ All these requirements remain. It is long-standing possession in which an individual acts as owner, which

162. Peñalver & Katyal, *supra* note 131, at 1149-52; SINGER, *supra* note 2, at 137-38, 167; WALDRON PRIVATE PROPERTY, *supra* note 16, at 283.

163. See SINGER, *supra* note 2, at 167.

164. LRA 2002, c. 9, § 97, sch. 6, para. 5(2)-(4).

165. CRIBBET ET AL, *supra* note 65, at 177 (discussing the foundational adverse possession case *Marengo Cave Co. v Ross*, 10 N.E.2d 917 (Ind. 1937)); *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689; Simmonds, *supra* note 73, at 37 n.2.

gives rise in the adverse possessor a justified expectation to gaining title.¹⁶⁶ Social justice theory should, however, advocate a shortening of the required statutory period for adverse possession.

As Peñalver recognizes, current property registration schemes and ease of modern communication combine to make monitoring of property an easy task.¹⁶⁷ This relative ease implies that those who fail to monitor their property exhibit marked carelessness or negligence in failing to do so, which leads to the inference that the property is surplus.¹⁶⁸ This surplus status and careless exercise of ownership combine to lower the weight of the title owner's expectation to continued possession afforded by documents such as the Fifth Amendment or HRA 1998. The effect of surplus status will be discussed below. Carelessness in exercise of ownership lowers the title owner's expectation when juxtaposed with the adverse possessor's careful, actual exercise of possession. To force an adverse possessor, who gains an increasingly justified expectation in obtaining title through her possession, to wait for the expiration of seven to twenty years before she can be assured title, seems an inordinate burden in the face of the less-weighty expectation of the title owner who failed to meet a low bar for monitoring his property. While jurisdictions are likely to vary in their requirements, social justice theory argues in favor of a dramatic shortening of the statutory period to respect these differently-situated expectations.

A change in the required statutory period, while substantive, is minimal in comparison to the primary contribution social justice theory makes to adverse possession doctrine. Informed by social justice theory, adverse possession doctrine would evolve a new requirement: an explicit consideration of the social context of the case. This evaluation would be highly case-specific and would require the court to conduct fact-finding regarding overall property distribution, the need of the adverse possessor, and the ownership status of the title owner. No one element would be dispositive, but rather would be considered as part of a holistic evaluation. Thus adverse possession doctrine informed by social justice theory mirrors current doctrine but with the added evaluation of the broader positioning of each party in society. By embracing this consideration, property law would shift from a sterile system of transfers of rights toward a system that recognizes the needs of individuals and the obligations we owe to each other. Before delving into how courts would evaluate adverse possession once informed by social justice theory, it will be helpful to consider an ideal-type model.

166. SINGER, *supra* note 2, at 45-46.

167. Peñalver & Katyal, *supra* note 131, at 1171.

168. *Id.* at 1170-71.

Consider, for a moment, the following hypothetical. Rebecca is evicted from her apartment for failure to pay rent. Rebecca is a high school teacher in inner city “New Tallahassee,” a fictional urban center, who earns an average teacher’s salary for that market. In addition to supporting herself, however, Rebecca must also support her aging mother, who requires regular medical care. Having nowhere else to turn, Rebecca moves into a building two blocks away that she knows has not been occupied for years. The property is and has been owned by a successful restaurant chain, Tally Eats, which has considered the location for expansion. Rebecca contacts the utility company and successfully poses as a new tenant and is able to get utility service for the unit. Rebecca fixes the appliances, installs new locks, and replaces a few broken windows. Tenants and owners in neighboring buildings, predominantly residential, assume the owner has finally begun leasing again and are fully aware of Rebecca’s “lease” of the apartment. Because Rebecca is no longer paying rent, she is able to save a substantial portion of her salary and thereby improve her overall financial situation. New Tallahassee has a five-year statutory period for adverse possession. At the close of five years, Rebecca files a claim to title of the apartment. The title owner learns of the claim and the case proceeds to the trial court. Assuming Rebecca has met all other statutory requirements, the court, which has adopted the new social justice theory of adverse possession, is left to consider the expectations of both parties shaped by their relative needs, status, and the overall social context.

Need must be assessed at the beginning of the statutory period of possession. Social justice adverse possession is to be used as a redistributive tool, a means of ensuring that those who are otherwise denied access to property ownership can participate in the system and improve their welfare. Need, in this context, exists when a person has been denied her universal expectation to be able to participate in the private property system.¹⁶⁹ For example, a development company attempting to adversely possess the property of a mining company cannot invoke this expectation as it has already achieved ownership status. In contrast, an individual evicted from a previous residence after being laid off from her job, who cannot afford to rent or purchase, can assert this universal expectation. Herein, the need requirement provides a procedural protection against redistribution through adverse possession to those who are already owners.

Let us now return to Rebecca’s example. Rebecca was unable to

169. Though I borrow Singer’s language of a universal expectation, it is important to remember that Waldron and Peñalver also call for widespread distribution of property.

afford to rent property, much less to own, before she became an adverse possessor. She was undeniably in need as she was excluded from participation in the private property system. Rebecca's need derives from her ability to invoke the universal expectation that all possess the opportunity to participate in the property system as equal individuals. To evaluate her need at the close of the statutory period, when Rebecca's need may be less because of her increase in welfare and financial position, would essentially punish her for achieving the security and increased welfare that private property ownership is meant to provide. Thus, to achieve social justice goals of redistribution and to respect the role property plays in advancing individual welfare, the court must confine its evaluation of need to the beginning of the period of possession.

If an adverse possessor meets the need requirement, the court must then consider whether the adverse possessor has other justified expectations that support transfer of title. Singer recognized that an adverse possessor can gain a justified expectation to title through long-term actual possession of property.¹⁷⁰ The more complete an adverse possessor's exercise of possession, the more justified her expectation of obtaining title may become. In an urban environment, the repairs and lock change Rebecca made could suffice. In a more rural environment, the court could require more investment in the property and control over the boundaries and use of the property. The court may also consider whether the adverse possessor is using the property in accordance with general surrounding use. Rebecca used the apartment as a homestead, in accordance with local use, and cared for the property as an owner, thereby strengthening her justified expectation in obtaining title.

Lastly, the court must evaluate the ownership status of the title owner in light of overall property distribution. As previously discussed, the realities of adverse possession doctrine and the ease of monitoring property support the argument that those losing property through adverse possession are likely to be losing surplus property.¹⁷¹ As Singer noticed, no person can have a justified expectation in keeping surplus property while others are systematically excluded from a property system; an argument that, though not using those words, Waldron and Peñalver support.¹⁷² Widespread distribution is a primary goal of social justice theory, and achieving that goal will require redistribution and the corollary devaluation of some title owners' expectation to continued posses-

170. SINGER, *supra* note 2, at 46.

171. Peñalver & Katyal, *supra* note 131, at 1170-71.

172. *Id.* at 1149-52; SINGER, *supra* note 2, at 137-38, 167; WALDRON PRIVATE PROPERTY, *supra* note 16, at 283.

sion. Surplus status, in the social context of a property system that is inequitably distributed, weakens the expectations of a title owner with multiple properties.

Returning to Rebecca's case, Tally Eats is an owner of multiple properties in a system that effectively excludes some from ownership. Tally Eats both failed to monitor its property and does not use the property as a primary source of income or homestead; it was, for all intents and purposes, surplus property, and Tally Eats was a careless owner. In the rare case that an adverse possessor somehow possesses another's homestead or property that is otherwise essential to the title owner's welfare (e.g. a farm which is the title owner's sole source of income), the title owner's expectation of continued possession may be justified and could potentially defeat the adverse possessor's claim. Through such a consideration of justified expectations and overall social context, the court can balance the interests of both the adverse possessor and the title owner.

Such a contextual evaluation of needs, expectations, and ownership status would cause a distinct shift in current doctrine. Rebecca's situation provides an ideal-type model. The real world application likely would be more nuanced. Yet the challenges of changing the law should not stop social justice theorists from attempting to inform adverse possession with theory to make it a viable, redistributive tool. The LRA 2002 provides an opening for social justice theorists to inform U.K. doctrine with these concepts in its language permitting the adverse possessor to argue that she should be granted title for "some other reason."¹⁷³ U.S. doctrine lacks a similarly clear inroad but carries the same redistributive potential. Regrettably, however, social justice theorists have, to date, failed to embrace that potential.

LOOKING TO THE FUTURE: CONCLUDING THOUGHTS

Adverse possession, even once informed by social justice theory, will not be a cure all. Waldron would criticize the doctrine as providing only an *opportunity* to gain ownership, rather than a *guarantee*. But even Waldron, alongside Singer and Peñalver, should embrace adverse possession's potential to provide a state-sanctioned avenue to ownership in a redistributive scheme that balances the justified expectations of all individuals. Such a step could bring us closer to reenvisioning property systems that recognize the social and human rights implications of property ownership.

Pye may have opened the door for considering human rights

173. LRA 2002, c. 9, § 97, sch. 6, para. 5(3).

implications of property law and adverse possession, but its failure to usher in a new era of human rights theory in property law was predictable. The only human rights document available to the court, the HRA 1998, was incomplete, as it only recognized the rights of the title owner. Social justice theorists must demand that courts respect individual autonomy, dignity, and equality by recognizing both a human right to protection of ownership, as well as the right to be able to become a property owner.

Looking to the future, it is helpful to consider an example of the transformative power social justice theory can have on law. In the wake of the human rights nightmare that was apartheid, South Africa, with an aim to “fundamental social transformation,”¹⁷⁴ included in its Constitution a right to housing and a requirement that the government “foster conditions which enable citizens to gain access to land.”¹⁷⁵ Such a fundamental change to recognizing, not only theoretically, but through legal means, the foundational role property plays in shaping individuals’ lives is a laudable and achievable goal. Singer is right to say that the “[o]ne expectation we are entitled to have is that we may obtain the means necessary for a dignified human life.”¹⁷⁶ Law, however, has yet to catch-up with this progressive statement. Adverse possession has a role to play in realizing this expectation, but it cannot play that role unless social justice theorists embrace its redistributive potential and reenvision the doctrine as part of a movement to create a property system which respects and celebrates individual human rights.

174. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 784 (2009).

175. S. AFR. CONST., 1996, §§ 25(5) and 26.

176. SINGER, *supra* note 2, at 212.

**DIETARY SUPPLEMENT REGULATION:
A COMPARATIVE STUDY**

SARA ATHERTON MASON*

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INTRODUCTION

On February 3, 2010, Senator John McCain (R., Ariz.) announced his support of the Dietary Supplement Safety Act of 2010.¹ This Act would require that drug manufacturers disclose all of the ingredients in their dietary supplements and give the Food and Drug Administration (FDA) power to regulate dietary supplements' safety.² His support for the bill was influenced by a United States Governmental Accountability Office (GAO) report concluding that the "FDA should take further action to improve oversight and consumer understanding."³

This was not the first time that Senator McCain had been publicly involved with dietary supplement regulation. In 2003, Senator McCain was a leading force in the increased regulation and ban of ephedra.⁴ However, although publicly encouraging dietary supplement regulation on multiple occasions, on March 5, 2010, he withdrew his support for the bill.⁵ Senator Orrin Hatch from Utah, the state with the largest production of dietary supplements, personally thanked Senator McCain for withdrawing his support as he believed the bill would have "devastating effects on in supplement industry as a whole."⁶

About half of adults in the United States report regularly using dietary supplements,⁷ and the dietary supplement industry and market is growing every year. In 1994, there were only 4000 dietary supplement products available to consumers.⁸ Fast forward to 2008 and there were an estimated 75,000 dietary supplement products available in the market.⁹ The industry has more than

1. John McCain, Ariz. Senator, United States Senate, Introduction of the Dietary Supplement Safety Act of 2010 (Feb. 3, 2010), available at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.Speeches&ContentRecord_id=952dda07-b71c-4034-4f34-c38974978f7d [hereinafter McCain Speech].

2. Dietary Supplement Safety Act of 2010, S. 3002, 111th Cong. (2010).

3. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-250, DIETARY SUPPLEMENTS: FDA SHOULD TAKE FURTHER ACTION TO IMPROVE OVERSIGHT AND CONSUMER UNDERSTANDING (2009). [hereinafter GAO Report]; McCain Speech, *supra* note 1.

4. Reilly Michelle Dunne, Note, *How Much Regulation Can We Swallow? The Ban on Ephedra and How it May Affect Your Access to Dietary Supplements*, 31 J. LEGIS. 351, 360 (2005).

5. Dan Schiff, *McCain Withdraws Support for Dietary Supplement Safety Act*, OVER THE COUNTER TODAY (March 5, 2010), <http://www.overthecountertoday.com/2010/03/mccain-withdraws-support-for-dietary-supplement-safety-act.html>.

6. *Id.*

7. Dietary Supplement Health and Education Act of 1994, Pub L. No. 103-417, 108 Stat. 4325, §2(9)(1994) [hereinafter DSHEA]; see also Michael A. McCann, *Dietary Supplement Labeling: Cognitive Biases, Market Manipulation & Consumer Choice*, 31 AM. J.L. & MED. 215, 219 (2005).

8. GAO Report, *supra* note 3, at 1.

9. *Id.*

quintupled its annual sales since 1994.¹⁰ In 1994, the industry's annual sales were \$4 billion.¹¹ In 2007, sales were approximately \$23.7 billion.¹²

There are a variety of reasons for the dramatic increase in the dietary supplements industry. One reason is that people in the United States are becoming more health conscious and believe that dietary supplements will improve their health and well-being.¹³ People also use dietary supplements as a preventative measure for numerous ailments.¹⁴ Physicians recommend dietary supplements to their patients as well.¹⁵ Lastly, consumers are looking for natural remedies in lieu of seeking costly medical care.¹⁶

While all of those reasons partly contribute to the increase in dietary supplement usage, the main cause for the dramatic increase in the size of the dietary supplements industry is the passage of the Dietary Supplement Health and Education Act of 1994 (DSHEA).¹⁷ The DSHEA effectively prohibits the FDA from regulating dietary supplements for safety and efficacy before they enter the market.¹⁸ Manufacturers of dietary supplements have taken advantage of the lack of regulation by the government and have introduced more than 71,000 dietary supplements to the market in fourteen years.¹⁹

The DSHEA was passed because dietary supplements were presumed safe and effective,²⁰ and with the exception of a few supplements that have received broad media coverage for their safety concerns—namely L-tryptophan²¹ and ephedra²²—dietary supplements are relatively safe.²³ However, their effectiveness is often

10. See McCann, *supra* note 7, at 218; see also GAO Report, *supra* note 3, at 1.

11. McCann, *supra* note 7, at 218.

12. GAO Report, *supra* note 3, at 1.

13. *Dietary Supplement Facts and Figures*, CONSUMER HEALTHCARE PRODUCTS ASSOCIATION, http://www.chpa-info.org/pressroom/DS_FactsFigures.aspx (last visited August 29, 2010); Robert K. Blendon et al., *Americans' Views on the Use and Regulation of Dietary Supplements*, 161 ARCH INTERN MED. 805, 805 (2001).

14. Cathy Wong, *What's in a Bottle? Introduction to Dietary Supplements*, ABOUT.COM (Feb. 3, 2004), http://altmedicine.about.com/cs/govtregulation/a/Intro_Supps.htm.

15. *Id.*

16. DSHEA, *supra* note 7, at §2(10); Edgar R. Cataxinos, Comment, *Regulation of Herbal Medications in the United States: Germany Provides a Model for Reform*, 1995 UTAH L. REV. 561, 561 (1995).

17. See generally DSHEA, *supra* note 7.

18. GAO Report, *supra* note 3, at 2.

19. *Id.* at 1.

20. DSHEA, *supra* note 7, at §2(14).

21. Regulation of Dietary Supplements, 58 Fed. Reg. 33,690, 33,696 (proposed June 18, 1993) (to be codified at 21 C.F.R. Ch. I).

22. Jeff O'Connell, *Dshea Works: the FDA's Ephedra Ban Proves the Agency Already has the Power to Regulate Dietary Supplements*, MUSCLE & FITNESS, May 2004, at 1, available at http://findarticles.com/p/articles/mi_m0801/is_5_65/ai_n6005946/.

23. McCann, *supra* note 7, at 215-16.

questioned,²⁴ and consumers are not educated enough about dietary supplements.²⁵

What half of consumers fail to realize is that dietary supplements in the United States are not regulated by the government.²⁶ When consumers were asked about government involvement in supplement regulation, 81% believed that the FDA should regulate and test for the safety of dietary supplements before they enter the market.²⁷ Although it seems like a good idea for the FDA to regulate dietary supplements, there are many obstacles within the United States. Some scholars have suggested that the United States should have a regulation system similar to that of the European Union (EU) or China,²⁸ and some have gone so far as to suggest Germany's regulation system for a model, which treats dietary supplements like drugs.²⁹

This Note will give economic, industry, and policy rationales for why the United States will not change its current deregulated system in regard to dietary supplements. Part I will discuss why dietary supplement regulation is important for preventative and public health reasons. Part II will give a historical background as to how dietary supplements in the United States have been regulated in the past and how the DSHEA came into existence. Part III will analyze how the EU regulates dietary supplements and will contrast the EU's method of regulation to the United States' method of regulation. Part IV will discuss China's recent move to regulate traditional Chinese medicine (TCM) in order to promote their uses internationally. Finally, Part V will give economic, industry, and policy reasons why the United States will not and cannot adopt a more strict regulation system like that of the EU or China.

I. WHY DIETARY SUPPLEMENTS SHOULD BE REGULATED

As stated earlier, Americans are horribly misinformed as to the benefits and regulation of dietary supplements.³⁰ Many Americans view dietary supplements as safe and believe that they will receive more benefits from the supplements if they take them in megadoses.³¹ Contrary to popular belief, megadoses of dietary supplements

24. See *id.* at 256.

25. GAO Report, *supra* note 3, at 30.

26. *Id.* at 32.

27. Blendon, *supra* note 13, at 809.

28. See generally Iona N. Kaiser, Comment, *Dietary Supplements: Can the Law Control the Hype?*, 37 HOUS. L. REV. 1249 (2000).

29. See Cataxinos, *supra* note 16, at 579.

30. GAO Report, *supra* note 3, at 32.

31. Mark A. Kassel, *From a History of Near Misses: The Future of Dietary Supplement Regulation*, 49 FOOD & DRUG L.J. 237, 237 (1994).

do more harm than good. Research indicates a “correlation between megadoses of dietary supplements and toxic reactions, illness, and death.”³² “Americans are more likely to die from vitamin toxicity than from vitamin deficiency.”³³ Americans use the availability of and easy access to dietary supplements as an indication of their safety, which is just not the case. This is evidenced by the two most popular examples of dietary supplements harming the public: L-Tryptophan and ephedra.

A. The L-Tryptophan Example

Amino acids are considered the building blocks of nature. Some, the nonessential amino acids, are produced naturally within the human body and others, the essential amino acids, cannot be produced in the body so we have to ingest them through foods or dietary supplements.³⁴ L-tryptophan is an essential amino acid found in many foods—poultry, red meat, seafood, vegetables, and legumes.³⁵ The L-tryptophan dietary supplement claimed to combat insomnia and premenstrual syndrome and suppress a person’s appetite.³⁶

In 1989, before the enactment of the DSHEA, a contaminated batch of L-tryptophan hit the market. This contaminated batch caused an outbreak of eosinophilia-myalgia syndrome (EMS), a rare blood disorder.³⁷ The first adverse report was made on November 7, 1989.³⁸ The FDA was able to track reports and swiftly warned the public to discontinue use of L-tryptophan products by November 11th.³⁹ On November 17th, the FDA ordered a recall of L-tryptophan supplements of one hundred milligrams or more.⁴⁰ On November 21st, the FDA stopped importation of L-tryptophan.⁴¹ Even with its swift action, “[o]ver 1500 people were adversely affected by the tainted L-tryptophan, with a reported 38 individuals dead and others paralyzed for life.”⁴²

32. *Id.* at 238.

33. *Id.*

34. *The Chemistry of Amino Acids*, THE BIOLOGY PROJECT, http://www.biology.arizona.edu/biochemistry/problem_sets/aa/aa.html (last visited Aug. 29, 2010).

35. *Foods Highest in Tryptophan*, SELF NUTRITION DATA, <http://www.nutritiondata.com/foods-000079000000000000000000.html> (last visited Aug. 29, 2010).

36. Kassel, *supra* note 31, at 241.

37. *Id.* at 241-42.

38. Carter Anne McGowan, Note, *Learning the Hard Way: L-Tryptophan, the FDA, and the Regulation of Amino Acids*, 3 CORNELL J.L. & PUB. POL’Y 383, 399 (1994).

39. *Id.*

40. *Id.*

41. *Id.*

42. Kassel, *supra* note 31, at 242.

Since this incident happened before the enactment of the DSHEA, the FDA was able to quickly investigate the adverse reactions and take immediate action to protect the public. Even then, there were still catastrophic results for the people who were diagnosed with EMS. After the DSHEA, the FDA would not be able to make such swift determinations or recall unsafe products, which is evidenced by the ephedra incidents.

B. The Ephedra Example

Ephedrine, the active ingredient in the dietary supplement ephedra, is known to boost metabolism, burn calories, act as adrenaline, excite the nervous system, open blood vessels, and stimulate the heart.⁴³ Many athletes took ephedra to “minimize fatigue, control weight, and enhance athletic performance.”⁴⁴ Steve Bechler, a pitcher for the Baltimore Orioles, died from heatstroke and ephedra complications.⁴⁵ Korey Stringer, an offensive lineman for the Minnesota Vikings, died from heatstroke and ephedra complications as well, along with Rashidi Wheeler of Northwestern University and Devaughn Darling of Florida State University.⁴⁶

The FDA recognized the potential dangers of ephedra and ephedrine-containing products as early as 1994 when it issued a “Medical Bulletin” to discourage consumers from taking products with ephedrine as an ingredient.⁴⁷ However, the FDA was restricted from taking more active actions because of the enactment of the DSHEA, which prohibited the FDA’s control over dietary supplements. It took nearly 150 deaths, 16,000 adverse event reports, and 9 years before the FDA and the Department of Health and Human Services banned ephedrine products in 2003.⁴⁸

C. How Regulations Would Have Made a Difference

All of the deaths and adverse reactions to dietary supplements were completely preventable. If the FDA had the power to regulate dietary supplements before they went into the market and into people’s homes as they do with drugs, then many people may still be alive today.⁴⁹ And these aren’t the only dietary supplements with potentially harmful effects. Vitamin A, vitamin B, vitamin D,

43. Dunne, *supra* note 4, at 358.

44. *Id.* at 351.

45. *Id.*

46. *Id.*

47. *Id.* at 359.

48. *Id.* at 352, 360.

49. Kassel, *supra* note 31, at 247-48.

vitamin E, E-ferol, and L-carnitine are just some examples of dietary supplements that can cause serious injuries when taken in megadoses.⁵⁰ When there are so many potential side effects from dietary supplements, how can the FDA not be involved in their regulation? The next section outlines the history of dietary supplement regulation in the United States, ending with complete de-regulation after the DSHEA was passed.

II. BACKGROUND ON THE REGULATION OF DIETARY SUPPLEMENTS IN THE UNITED STATES

A. Early Regulation of Dietary Supplements

Until the mid-nineteenth and early twentieth centuries, dietary supplements were basically unregulated. Things changed in 1850 when the Massachusetts Sanitary Commission published a report that connected contaminated food and drug products to increasing mortality rates.⁵¹ States began enacting laws that allowed them to regulate food and drugs, but that proved harder for the federal government.⁵² At this point, the Supreme Court was narrowly interpreting the Commerce Clause.⁵³ The narrow reading allowed the government only to regulate food and drugs that literally crossed state borders, and at this time, most food and drugs only moved intrastate, leaving the government without recourse.⁵⁴

However, in 1906, the government finally took action and enacted the Pure Food and Drug Act of 1906 (1906 Act), the first act to regulate food and drugs within the United States.⁵⁵ This legislation prevented adulterated food and drugs from being transported in interstate commerce.⁵⁶ The 1906 Act also allowed the FDA enforcement mechanisms to seize food and drugs that were adulterated and to go after the manufacturers.⁵⁷ Similar to current law, the government had to prove that an ingredient was unsafe *after* it entered the market before anything could be done to protect public health.⁵⁸

50. *Id.* at 245-49.

51. McCann, *supra* note 7, at 232.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 232-33; Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, (1906) [hereinafter 1906 Act]; McCann, *supra* note 7, at 232-33.

56. 1906 Act, *supra* note 55, at § 2. . See also 21 U.S.C. § 342 (2006).

57. Peter B. Hutt & Peter B. Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L. J. 2, 8-9 (1984).

58. 1906 Act, *supra* note 55, at § 2.

Another shortfall of the 1906 Act was that it still allowed manufacturers to have misleading labels as to the safety of their products.⁵⁹ Congress tried to curtail this practice when it enacted the Shirley Amendment in 1912, which allowed the government to prosecute manufacturers when their product labels were “false and fraudulent.”⁶⁰ The heavy burden was on the government to prove not only that the label was not true, but also that the manufacturer was aware of it being false.⁶¹

Although state governments were enacting more strict regulations for dietary supplements using their state police power, it was not until 1938 when the federal government took more action in regulating dietary supplements after seventy-three people died from the dietary supplement Elixir Sulfanilamide, which had not been tested before entering the market.⁶²

B. More Regulation

After the Elixir Sulfanilamide incident, Congress replaced the 1906 Act with the Food, Drug, and Cosmetic Act of 1938 (FDCA).⁶³ The FDCA gave the FDA more discretion for regulating dietary supplements.⁶⁴ Although the FDCA had given the FDA more authority to regulate dietary supplements, it did not require pre-market approval, which allowed dietary supplements to enter the market without safeguards.⁶⁵ However, it did allow the FDA to police the labeling of dietary supplements, which was lacking from previous regulation.⁶⁶

Although the FDA had no power to regulate the safety or efficacy of dietary supplements, during this time, they were becoming safer because of other reasons.⁶⁷ Due to private tort liability and the desire to avoid bad publicity, manufacturers began testing the safety of their products before putting them on the market.⁶⁸ However, without minimum safety standards from the government or FDA, manufacturers could still put unsafe products on the market if they chose to do so.

59. McCann, *supra* note 7, at 233; *see also* United States v. Johnson, 221 U.S. 488, 497-98 (1911).

60. Shirley Amendment, Pub. L. No. 62-301, 37 Stat. 416 (1912).

61. *Id.*

62. McCann, *supra* note 7, at 234.

63. *Id.*

64. Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (1938).

65. McCann, *supra* note 7, at 234.

66. *Id.*

67. *Id.* at 234-35.

68. *Id.* at 235.

The FDA took advantage of its policing powers when it came to dietary supplements' labels. In the Supreme Court case *Kordel v. United States*, the Court held that mailed pamphlets and advertisements constituted labeling according to the FDCA, which is a liberal and broad interpretation of the Act.⁶⁹ Just when the FDA was making progress on one front, Congress passed the Food Additives Amendment to the FDCA, which shifted the burden to the FDA to prove that dietary supplements were not safe.⁷⁰ However, the Food Additives Amendment did provide the FDA with more oversight by mandating that food additives needed premarket approval.⁷¹ Dietary ingredients were included under the definition of food additive, so dietary supplements were affected by this legislation.⁷²

The FDA gained momentum in the 1960s, bringing hundreds of misleading label claims in court and rallying to establish premarket approval of drug efficacy claims and potency limits with the Kefauver-Harris Amendment.⁷³ However, the industry and consumers started to actively speak out against more stringent dietary supplement regulations.⁷⁴ The industry obviously did not want to abide by a governmental agency if it did not need to, and consumers were worried about their favorite products being pulled off the market.⁷⁵ Because of lobbying efforts, Congress passed the Proxmire Amendments, which "eliminated maximum limits on the potency of supplements and on combinations of vitamins and minerals and prohibited the classification of any supplement as a drug based on presumptively excessive potency."⁷⁶ With the limited regulatory authority the FDA now had over the dietary supplement industry, the industry exploded and produced more supplements than ever.

C. Nutrition Labeling and Education Act of 1990

With consumers popping dietary supplements like they were candy and being misinformed about the supplements, Congress passed the Nutrition Labeling and Education Act of 1990

69. *Kordel v. U.S.*, 335 U.S. 345, 348-49 (1948).

70. Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (1958).

71. Lars Noah & Richard A. Merrill, *Starting from Scratch?: Reinventing the Food Additive Approval Process*, 78 B.U. L. REV. 329, 331-32 (1998).

72. Stephen H. McNamara, *Dietary Supplements of Botanicals and Other Substances: A New Era of Regulation*, 50 FOOD & DRUG L. J. 341, 343 (1995).

73. McCann, *supra* note 7, at 236.

74. *Id.* at 237.

75. *Id.*

76. *Id.* at 238 (internal citations omitted).

(NLEA).⁷⁷ The NLEA added two new labeling sections to the FDCA.⁷⁸ The first sets forth general nutritional and labeling standards, and the second prohibits manufacturers from giving false promises of disease prevention on dietary supplement labels.⁷⁹

The newly appointed FDA Commissioner, David Kessler, took his newfound authority over dietary supplements and ran with it. Without clear guidelines as to how to enforce the NLEA,⁸⁰ Kessler proposed drastic changes.⁸¹ Kessler wanted to ban many dietary ingredients as unapproved food additives, severely affecting the dietary supplement industry.⁸² The FDA realized how drastic its proposed changes were and prefaced them with this statement: “The Agency recognizes that proposing the same standard for conventional food and dietary supplements is contrary to the view expressed by some members of Congress.”⁸³

As one can imagine, Congress did not appreciate being undercut by the FDA and passed the Dietary Supplement Act of 1992, which delayed enacting the FDA’s changes and gave Congress time to develop more industry-friendly legislation,⁸⁴ the Dietary Supplement Health and Education Act of 1994 (DSHEA).

D. The Dietary Supplement Health and Education Act of 1994

In 1994, Congress passed the very industry-friendly DSHEA legislation. The “DSHEA sought to ‘supersede the [existing] ad hoc patchwork regulatory policy on dietary supplement’ with one that removed ‘unreasonable regulatory barriers limiting or slowing the flow of safe products and accurate information to consumers.’”⁸⁵ One of the main reasons for imposing such industry-friendly legislation was that Congress worked off of the premise that “dietary supplements are safe within a broad range of intake, and safety problems with the supplements are relatively rare.”⁸⁶

The DSHEA expanded the definition of “dietary supplement” to be:

77. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) [hereinafter NLEA].

78. *Id.* at § 3.

79. *Id.*

80. McCann, *supra* note 7, at 240.

81. *Id.*

82. *Id.*

83. *Id.* at 241 (citing Monica Miller, *The History of Dietary Supplement Regulation*, FOUNDATION FOR THE ADVANCEMENT OF INNOVATIVE MEDICINE, available at <http://www.faim.org/supplements.htm>).

84. Dietary Supplement Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491 (1992).

85. McCann, *supra* note 7, at 243.

86. DSHEA, *supra* note 7, at § 2(14).

a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

- (A) a vitamin;
- (B) a mineral;
- (C) an herb or other botanical;
- (D) an amino acid;
- (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
- (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).⁸⁷

The DSHEA now assures that dietary supplements are treated separately from food additives. The main effect of the DSHEA is that it removed any premarket testing for safety or efficacy of dietary supplements.⁸⁸ This put Kessler's plans for more FDA regulations regarding dietary supplements to an instant halt.⁸⁹ The DSHEA only allows the FDA to take action against individual supplements after it is on the market and there is a public health concern—basically, after the damage is done.⁹⁰ The DSHEA imposes the burden of proof on the FDA to show the public health concern of the product.⁹¹

The FDA's limited ability to regulate the safety of dietary supplements before they enter the market has given manufacturers an incentive to make false claims regarding the nutritional efficacy of their products.⁹² Manufacturers engage in this "puffery" because they want their products to sell better, and more importantly, because they know the FDA has a huge burden to bear to show a "significant or unreasonable risk" if it wants to remove the product from the market.⁹³

The burden of proof for the FDA is high. When the DSHEA was first passed, manufacturers of dietary supplements were not required to report adverse effects of their products to the FDA.⁹⁴ This made the FDA's burden almost impossible to meet because it had no access to information it needed to show "a significant or unrea-

87. 21 U.S.C. § 321(ff)(1) (2006).

88. McCann, *supra* note 7, at 244.

89. See Kaiser, *supra* note 28, at 1262.

90. Fiona LeCong, Comment, *Food Supplements Directive: An Attempt to Restore the Public Confidence in Food Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 105, 116 (2007).

91. DSHEA, *supra* note 7, at § 4.

92. Kaiser, *supra* note 28, at 1262.

93. *Id.* at 1262-63.

94. McCann, *supra* note 7, at 251.

sonable risk.”⁹⁵ However, since December 22, 2007, manufacturers are now required to report serious adverse events to the FDA.⁹⁶ Even with this change in legislation, the FDA still has obstacles to meeting its burden: “FDA has limited information on the number and location of dietary supplement firms, the identity and ingredients of products currently available in the marketplace, and mild and moderate adverse events reported to industry.”⁹⁷

Therefore, the FDA’s burden is still hard to meet and without “mandatory recall authority,”⁹⁸ the hoops the FDA has to jump through make it extremely difficult to remove unsafe products from the market. For example, the removal of ephedra came about ten years after the FDA issued its initial advisory against it.⁹⁹ Although the 2007 legislation is a step in the right direction, the FDA’s hands are still tied in a lot of respects.

The DSHEA does provide some safeguards to protect consumers, such as labeling of “statements of nutritional support.”¹⁰⁰ Under the DSHEA, labels “may not claim to diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases,” and it also mandates that a warning stating that the FDA has not approved the use of the dietary supplement must be on the label.¹⁰¹ While this does prevent some “puffery” on the part of manufacturers, they are still able to make statements such as “improves memory and concentration,” “nutritionally supports healthy liver function,” “helps promote general well-being during the cold and flu season,” and “gives adults a competitive edge.”¹⁰²

The DSHEA also called for the opening of the Office of Dietary Supplements (ODS) as part of the National Institute of Health (NIH). The responsibilities of the ODS, as outlined by DSHEA, are:

- To explore more fully the potential role of dietary supplements as a significant part of the efforts of the United States to improve health care.
- To promote scientific study of the benefits of dietary supplements in maintaining health and preventing chronic disease and other health-related conditions.
- To conduct and coordinate scientific research within NIH relating to dietary supplements.

95. Kaiser, *supra* note 28, at 1262.

96. GAO Report, *supra* note 3, at 11.

97. *Id.* at 17.

98. *Id.*

99. *Id.* at 2.

100. Margaret Gilhooley, *Herbal Remedies and Dietary Supplements: The Boundaries of Drug Claims and Freedom of Choice*, 49 FLA. L. REV. 663, 685 (1997).

101. Kaiser, *supra* note 28, at 1273-74.

102. Gilhooley, *supra* note 100, at 685.

- To collect and compile the results of scientific research relating to dietary supplements, including scientific data from foreign sources.
- To serve as the principal advisor to the Secretary and to the Assistant Secretary for Health and provide advice to the Director of NIH, the Director of the Centers for Disease Control and Prevention, and the Commissioner of the Food and Drug Administration on issues relating to dietary supplements.¹⁰³

However, very little of the research done by the ODS is known by the public. All of the information is publicly available on the ODS Web site; however, consumers, because of the assumption that dietary supplements are safe, do not take advantage of this system. Even if the scientific research reveals problems with dietary supplements, the FDA does not have power to do anything about it.

The DSHEA gives dietary supplement manufacturers a lot of freedom to create and market dietary supplements without necessarily testing for safety or efficacy beforehand. The FDA has some regulatory authority to control labels and to pull products off the market, but according to the Government Accountability Office (GAO), the FDA needs to do more.¹⁰⁴

III. THE EUROPEAN UNION

A. *The EU's Regulation System*

Before 2002, there was no Europe-wide dietary supplement legislation.¹⁰⁵ Dietary supplements were regulated by the individual member states of the European Union, and some chose a system very similar to the system of regulation in the United States.¹⁰⁶ There were no clear guidelines as to whether dietary supplements were to be considered foods or medicines, so they could have been regulated as either.¹⁰⁷

After the occurrence of a few instances that weakened the public's confidence in food safety, the European Union began to harmonize its food safety regulations "in order to offer consumers a wide range of safe and high quality products coming from all

103. ABOUT THE OFFICE OF DIETARY SUPPLEMENTS, http://ods.od.nih.gov/About/about_ods.aspx (last visited Aug. 29, 2010).

104. See generally GAO Report, *supra* note 3.

105. LeCong, *supra* note 90, at 106-07.

106. *Id.*

107. *Id.* at 106-07.

Member States.”¹⁰⁸ In 2002, the European Parliament and Council adopted the Directive 2002/46/EC, the Food Supplements Directive.¹⁰⁹ According to the Directive, “food supplements” are defined as

foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities.¹¹⁰

The Food Supplements Directive provides a list of vitamins and minerals that are safe to use in food supplements,¹¹¹ and if a vitamin or mineral is not on the list, then it must receive premarket approval before it can be offered for sale on the market.¹¹² There are 112 vitamins and minerals on the “positive list” of approved supplements.¹¹³ If a supplement is not included in the list, the manufacturer must seek approval.¹¹⁴ It is estimated that it could take two to three years before there is enough data to put a supplement on the positive list.¹¹⁵ This research can cost the manufacturer \$119,000 to \$372,000.¹¹⁶

The Food Supplements Directive was quite controversial when it was first introduced, both with dietary supplement manufacturers and consumers.¹¹⁷ The Health Food Manufacturers Association (HFMA), a United Kingdom-based group, claimed that the Food Supplements Directive would cripple the “supplements industry by banning hundreds of nutrients and thousands of supplements if it could not be invalidated or amended.”¹¹⁸ Manufacturers are partic-

108. *Id.* at 107.

109. Council Directive 2002/46 art. 2, 2002 O.J. (L 183) 51, 52 (EC) [hereinafter Food Supplements Directive].

110. *Id.* at art. 4.

111. Nicole Coutrelis, *The Legal Status and Regulatory Context of “Health Foods” in the European Union*, 58 FOOD & DRUG L.J. 35, 39 (2003).

112. LeCong, *supra* note 90, at 108-09.

113. *Id.* at 108.

114. *Id.* at 108-09.

115. *Id.* at 109.

116. *Id.*

117. See Greg Lindquist, Comment, *Diet Starts Monday: An Analysis of Current U.S. Dietary Supplement Regulations Through an International Comparison*, 3 ST. LOUIS U. J. HEALTH L. & POL’Y 123, 139-40 (2009).

118. Shane Starling, *Industry Ponders Court’s Latest Directive Action*, FUNCTIONAL FOODS & NUTRACEUTICALS, Sept. 2005, at 6.

ularly concerned about the ambiguity that remains after the Directive was passed.¹¹⁹ The science and regulatory director at Solgar, UK has stated:

We have accepted that it is a complete wait-and-see situation. Of course we keep up our lobbying efforts but a lot of it is out of our hands now, especially in regard to the Food Supplements Directive (FSD). That's why we have not panicked with this thing because you just can't tell how it is going to pan out. A lot of it comes down to interpretation.¹²⁰

Manufacturers believe that the uncertainty surrounding the Directive is hurting product development so that European manufacturers cannot compete with U.S. manufacturers, where the DSHEA has a "develop first, ask questions later" approach.¹²¹

However, Markos Kyprianou, EU commissioner for health and consumer protection, has expressed that the Directive will not negatively affect liberal markets such as the U.K., Netherlands, and Sweden, but will have positive effects on less liberal markets like Spain, France, and Italy.¹²² Despite these reassurances, members of Consumers for Health Choice (CHC) are fighting for their country's own policies regarding dosing levels of supplements, afraid the Directive will limit their choices.¹²³ It is estimated that up to "three hundred nutrients and nutrient sources" could be taken off the shelves in the U.K. alone.¹²⁴

When brought to the European Court of Justice (ECJ), the ECJ upheld the Food Supplements Directive with advice to improve the process of getting ingredients on the positive list.¹²⁵ As of 2007, the \$6 billion market for supplements in the EU has not felt drastic effects from the Directive.¹²⁶

119. *Regulatory Uncertainty Reigns in European Supplement Markets: Food Supplements Directive Overview*, NUTRITION BUS. J., May/June 2007, at 16 [hereinafter Regulatory Uncertainty Article].

120. *Id.*

121. *Id.*

122. Simon Robinson, *Court Approves EU Vitamin Bill*, EUROPEAN CHEMICAL NEWS, July 18, 2005, at 8.

123. Regulatory Uncertainty Articles, *supra* note 119, at 16.

124. LeCong, *supra* note 90, at 105.

125. Starling, *supra* note 118, at 6.

126. Regulatory Uncertainty Articles, *supra* note 119, at 16.

B. Similarities and Differences Between the EU and U.S. Systems

1. Similarities

The DSHEA and the Food Supplements Directive are both concerned with consumer safety and choice, but go about protecting them in different ways. In the United States, the DSHEA was passed on the premise that dietary supplements are relatively safe.¹²⁷ There are certain supplements whose safety and efficacy are not questioned, so only completely new dietary supplements need to be questioned. The EU takes a different approach by listing the particular ingredients that are allowed to be used and the dosage in which the ingredients can be used.¹²⁸ Although the underlying policy between the two systems is the same, the United States and EU regulate dietary supplements differently.¹²⁹

2. Differences

The obvious and main difference between the regulation system in the United States and the system in the EU is whether premarket approval is required before a dietary supplement enters the market.¹³⁰ The United States has a “develop first, ask questions later” approach,¹³¹ while the EU only allows supplements into the market after they have been proven safe.¹³² After a vitamin or nutrient is proven safe and effective, it is put on the “positive list” (Annexes I and II to the Directive), and manufacturers are free to use them for their dietary supplements.¹³³ If a vitamin or nutrient is not on the positive list, then the manufacturer needs to seek approval by showing that it is safe and effective before it can be used in the supplement.¹³⁴ The testing necessary to show that a vitamin or nutrient is safe and effective can take up to three years,¹³⁵ delaying the opportunity for the supplement to enter the market and delaying profits by the manufacturer.

127. DSHEA, *supra* note 7, at § 2(14).

128. LeCong, *supra* note 90, at 108.

129. See Richard E. Nowak, Note, *DSHEA's Failure: Why a Proactive Approach to Dietary Supplement Regulation is Needed to Effectively Protect Consumers*, 2010 U. ILL. L. REV. 1045, 1074-76 (2010) (analyzing the differences between the DSHEA and the Food Supplements Directive).

130. See generally DSHEA, *supra* note 7; see generally Food Supplements Directive, *supra* note 109.

131. Regulatory Uncertainty Article, *supra* note 119, at 16.

132. Food Supplements Directive, *supra* note 109.

133. *Id.* at art. 4(1).

134. LeCong, *supra* note 90, at 108-09.

135. *Id.*

In the United States, the DSHEA effectively removed any authority the FDA had to prevent unsafe and ineffective supplements from entering the market.¹³⁶ After the DSHEA passed, “manufacturers introduced an overwhelming array of products of unproven safety and efficacy” into the U.S. market.¹³⁷ Any supplement that was available before October 15, 1994 was grandfathered into the system, meaning that they do not have to make any showing of their safety or efficacy.¹³⁸ New dietary supplements have to meet one of two requirements:

- (1) it contains only dietary ingredients that have been “present in the food supply as an article used for food in a form in which the food has not been chemically altered” or
- (2) there is evidence that the dietary ingredient is reasonably expected to be safe under the conditions of use recommended or suggested in the product’s labeling.¹³⁹

Manufacturers depending on the second prong of the requirement only have to notify the FDA of the evidence they used for the basis of their decision seventy-five days before the supplement is to go on the market.¹⁴⁰

A mechanism that the FDA does have for controlling the supplements on the market is with the Dietary Supplement and Non-prescription Drug Consumer Protection Act.¹⁴¹ This act requires companies to report any serious adverse reactions of a supplement to the FDA.¹⁴² However, moderate and mild adverse reactions are not required to be reported, which limits the FDA’s ability to determine if a product is unsafe.¹⁴³ In addition, there is a severe lack of underreporting, which leaves the FDA with incomplete information to do its job.¹⁴⁴

Another major difference between the two systems is how the burden of proof is allocated. Even when the FDA determines that a dietary supplement is unsafe or ineffective, the burden remains on the FDA to prove that it is unsafe or ineffective.¹⁴⁵ In the EU, the manufacturer has the burden of proving that a supplement is safe

136. GAO Report, *supra* note 3, at 2.

137. W. Steven Pray, *Health Fraud and the Resurgence of Quackery in the United States: A Warning to the European Union*, 11 PHARMACEUTICALS POL’Y & L. 113, 122 (2009).

138. GAO Report, *supra* note 3, at 10.

139. *Id.*

140. *Id.*

141. Dietary Supplement and Nonprescription Drug Consumer Protection Act, Pub. L. No. 109-462, 120 Stat. 3469 (2006).

142. GAO Report, *supra* note 3, at 11.

143. *Id.*

144. *Id.* at 6.

145. DSHEA, *supra* note 7.

before it is put on the market.¹⁴⁶ This makes sense because the manufacturer is privy to the research and tests regarding its supplements. Because of lack of information regarding manufacturers and their ingredients, limited research, lack of mandatory recall authority, and underreporting of adverse effects, the FDA is at a huge disadvantage to meet the burden of proof to remove a supplement from the market.¹⁴⁷ The EU removes all of those problems by making approval mandatory before a dietary supplement is available to the market.

IV. CHINA

A. Regulation of Traditional Chinese Medicines in China

Since the passage of the 1982 Chinese Constitution, the People's Republic of China (China) has regulated traditional Chinese medicines (TCMs) and is taking every effort to create an international market for its product.¹⁴⁸ In the past, TCMs have not been regulated by China, mostly because of their status as a cultural institution.¹⁴⁹ Although TCMs have a history of long use by the Chinese, there is "little evidence of uniformity in the preparation, ingredients, and dosage of traditional Chinese medical treatments."¹⁵⁰ The State Food and Drug Administration (SFDA) of China has the responsibility

[t]o take charge of formulating regulations of Traditional Chinese Medicines (TCMs) and ethno-medicines, and supervise their implementation, draw up quality standards of TCMs and ethno-medicines, formulating Good Agricultural Practices for Chinese crude drugs and Processing Standards for prepared slices of Chinese crude drugs and supervising their implementation, and carry out protection system for certain TCMs.¹⁵¹

146. See LeCong, *supra* note 90, at 108-09 (noting that manufacturers attempting to get substances added to the "positives list" face costly tests and a lengthy application process).

147. GAO Report, *supra* note 3, at 6-7; Nowak, *supra* note 129, at 1068.

148. Teresa Schroeder, Comment, *Chinese Regulation of Traditional Chinese Medicine in the Modern World: Can the Chinese Effectively Profit from One of Their Most Valuable Cultural Resources?*, 11 PAC. RIM. L. & POL'Y J. 687, 688 (2002).

149. *Id.* at 689.

150. *Id.*

151. *About SFDA: Main Responsibilities*, STATE FOOD AND DRUG ADMINISTRATION, P.R. CHINA, <http://eng.sfda.gov.cn/eng> (last visited Aug. 29, 2010).

In addition to the SFDA, China also has the State Administration of Traditional Chinese Medicine (SATMC) dedicated solely to regulating TCMs.¹⁵²

National regulation of TCMs ramped up in 1992 with the passage of the Regulations of Protection of Traditional Chinese Medicines, which seeks “to raise the quality of all varieties of traditional Chinese medicines, promote the development of TCM medicines, and perhaps most importantly, protect the legal rights and interests of enterprises engaging in the production of TCM.”¹⁵³ To receive a “Certificate of Variety of Traditional Chinese Medicine under Protection,” the TCMs must have clinical and scientific research to support their efficacy and safety.¹⁵⁴ Under the new regulation system, TCMs “are held to the same standards as other Chinese drug manufacturers. Under these new laws, all manufacturers, producers, and wholesalers must be licensed by local and national agencies, all drug institutions are subject to investigation, and violation of the laws results in large fines and loss of license.”¹⁵⁵

TCMs are subjected to “rigorous pharmaceutical testing,” similar to drugs.¹⁵⁶ TCMs are generally categorized as a Category I pharmaceutical, and they have special requirements to meet because they are TCMs. These requirements include providing information regarding “sourcing, cultivation, ecological environment, collection, handling, processing, and preparation . . . in the pretrial testing phase. Only after final completion, reporting, and examination may the medicines be approved for production.”¹⁵⁷

China is now taking an interest in how TCMs are developed because China wants a piece of the dietary supplement pie. Since the 1960s, TCMs, especially acupuncture and herbal remedies, have developed an international following.¹⁵⁸ The market for Chinese herbal medicines doubled in ten years, with Europe and the United States being the major importers.¹⁵⁹ China is responsible for 65% of raw exports to make TCMs in other countries, but it is only responsible for 2% of finished TCM products internationally.¹⁶⁰ For finished TCM products, international consumers turn to neighboring countries, such as Japan or Korea, most likely because

152. Schroeder, *supra* note 148, at 702.

153. *Id.* at 703.

154. *Id.* at 704.

155. *Id.* at 707.

156. *Id.*

157. *Id.* at 708 (internal citations omitted).

158. *Id.* at 691.

159. Jane Qiu, *China Plans to Modernize Traditional Medicine*, 446 NATURE 590, 590 (2007).

160. Schroeder, *supra* note 148, at 697.

of the lack of standardization and quality control in China.¹⁶¹ China's new regulations hope to globalize TCMs by 2020.¹⁶²

B. Comparison of China's and the U.S.'s Regulation Systems

Similar to the differences between the EU system of regulation and the U.S. system of regulation, China's regulations are much more strict than the regulations in the United States. "China's recently updated pharmaceutical laws, which include regulation of Chinese herbal medicines, are better equipped than U.S. domestic laws to ensure the quality of herbal remedies."¹⁶³ China now requires that TCMs go through a premarket approval process that the DSHEA eliminated from the U.S. regulation system. China enacted these regulations to be competitive in the international dietary supplement market by raising its standards for TCMs, which begs the question of why Americans are hesitant to purchase Chinese medicines, but hurry to the stores to buy American dietary supplements, which are not regulated.

V. WE CAN'T GO BACK NOW

After passing the DSHEA, Congress made the decision that supplements should be presumed safe, and FDA regulation should be kept at a minimum.¹⁶⁴ With this decision, Congress has sealed our fate. The explosion of the industry combined with consumer misconceptions make it extremely hard to transition back into a more heavily regulated regime.

A. Economic & Industry Arguments

The last thing the dietary supplement industry wants is to be regulated. Since the DSHEA passed, the industry has grown exponentially—going from 4000 supplements to 75,000 supplements available on the market.¹⁶⁵ The expenses on the industry to develop dietary supplements are quite low. Because ingredients on the market before October 15, 1994 are grandfathered into the DSHEA, manufacturers only need to seek FDA approval for new dietary ingredients.¹⁶⁶ The approval process for a new dietary in-

161. *Id.*

162. Qiu, *supra* note 159, at 590.

163. Schroeder, *supra* note 148, at 694.

164. DSHEA, *supra* note 7, at § 2(13-14).

165. GAO Report, *supra* note 3, at 1.

166. *Id.* at 1, 10.

redient is not extensive. To receive approval the manufacturer must provide:

- [Their] name and complete address.
- The name of the new dietary ingredient. If the new dietary ingredient is an herb or other botanical, [they] must include the Latin binomial name (including the author).
- A description of the dietary supplement or dietary supplements that contain the new dietary ingredient, including the:
 - level of the new dietary ingredient in the product;
 - conditions of use of the product stated in the labeling or if no conditions of use are stated, the ordinary conditions of use; and
 - history of use or other evidence of safety establishing that the dietary ingredient, when used under the conditions recommended or suggested in the labeling of the dietary supplement, will be reasonably be [*sic*] expected to be safe.
 - Any reference to published materials must be accompanied by reprints or photostatic copies.
 - Any material in a foreign language must be accompanied by a translation.
- A signature by a person designated by [the proponent] who can be contacted if we have questions.¹⁶⁷

The only outside research that the manufacturer has to conduct is the “history of use or other evidence of safety.”¹⁶⁸ This is a small burden on manufacturers of dietary supplements compared to what drug manufacturers must prove to get FDA approval.

If dietary supplements were to be regulated similarly to drugs, manufacturing costs for dietary supplement developers would explode. It costs an average of \$50 to \$100 million per New Drug Application (NDA), and it is a long process to receive approval.¹⁶⁹ Between preclinical testing, three rounds of human clinical trials, and the FDA approval process, it can take six to nine years before a product can be sold to the public.¹⁷⁰ This application requires

167. New Dietary Ingredients in Dietary Supplements-Background for Industry, What Information Must the Notification Contain?, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Food/DietarySupplements/ucm109764.htm#whatinfo> (last visited Aug. 29, 2010).

168. *Id.*

169. Cataxinos, *supra* note 16, at 574.

170. *Id.* at 573-74.

very extensive research and data to prove that a drug is safe and effective before it can be given to the public.¹⁷¹ There can be 100,000 to 200,000 pages of raw data from research that the FDA has to review before it can grant approval.¹⁷²

The opportunity costs of development would inhibit most manufacturers from investing in dietary supplements. Although it is unlikely that the FDA would have imposed such a severe application process for dietary supplements, the costs would have certainly increased, deterring manufacturers.

Dietary supplement manufacturers are predicting that the Food Supplements Directive will cripple the industry in the EU because of the costs and limitations associated with dietary ingredient approval.¹⁷³ With the capitalist, consumer-choice driven society in the United States, it is unlikely that we would ever try to regulate the dietary supplements industry like the EU or China does.

With regards to the FDA, it just does not have the money or resources to seriously regulate dietary supplements. The FDA's budget for fiscal year 2010 is \$3.2 billion, the largest budget ever for the FDA.¹⁷⁴ For fiscal year 2011, the FDA was able to secure 30% more funding from the government,¹⁷⁵ putting its budget at \$4 billion.¹⁷⁶ These budget increases are going to "set standards for safety, expand laboratory capacity, pilot track and trace technology, strengthen [the FDA's] import safety program, improve data collection and risk analysis and begin to establish an integrated national food safety system with strengthened inspection and response capacity."¹⁷⁷

Although the FDA is receiving a larger budget every year, most of the money is going to strengthen and improve systems already in place. The FDA would require a huge boost in its budget to take on regulating dietary supplements. If the DSHEA had never passed, FDA regulation of dietary supplements would have been more realistic because there were only 4000 supplements on the

171. *Id.* at 573.

172. *Id.*

173. Starling, *supra* note 118, at 6.

174. *Summary of the FDA's FY 2010 Budget*, U.S. FOOD AND DRUG ADMINISTRATION <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/BudgetReports/ucm153154.htm> (last visited Aug. 29, 2010).

175. Tom Karst, *FDA Budget Would Boost Food Safety Funds 30%*, THE PACKER, Feb. 1, 2010, available at <http://thepacker.com/FDA-budget-would-boost-food-safety-funds-30/Article.aspx?oid=981684&aid=117&fid=PACKER-HANDLING-AND-DISTRIBUTING>.

176. Andrew Zajac, *FDA Budget Draws Cries of 'Not Enough'*, L.A. TIMES, Feb. 11, 2010, at A12, available at <http://articles.latimes.com/2010/feb/11/nation/la-na-fda-budget11-2010feb11>.

177. Karst, *supra* note 175.

market, not 75,000.¹⁷⁸ It is now too burdensome to require the FDA to approve supplements before they enter the market because of the sheer number of supplements, lack of funds to provide this type of regulation, and lack of personnel.

B. Policy Arguments

1. Why the EU and China decided to regulate dietary supplements

One of the EU's main concerns when passing the Food Supplements Directive was "to ensure a high level of protection for consumers and facilitate their choice, the products that will be put on to the market must be safe and bear adequate and appropriate labeling."¹⁷⁹ First and foremost, the EU wanted to ensure that its consumers would be protected from unsafe dietary supplements.¹⁸⁰ Secondly, by having only safe products with proper labeling on the market, the EU believed that consumers will be able to make more informed decisions regarding which supplements will be beneficial to them.¹⁸¹ This approach prescreens the beneficial properties of the supplements before they are put onto the market, while the United States' approach makes everything available and allows consumers to make decisions regarding which supplements they want, regardless of whether the supplement will actually be beneficial to the consumer.

Another reason for this legislation in the EU was for harmonization purposes.¹⁸² With an EU directive, all member states are required to uphold the minimum standards of this directive. Some states, like Germany, impose even stricter requirements,¹⁸³ so the Directive is a floor, not a ceiling, for regulations. Harmonization within the EU allows manufacturers to sell their supplements to many states without requiring different procedures than the Directive sets out. This streamlines the development, labeling, and marketing process for manufacturers and ensures safe products throughout the EU.

China had other motives. TCMs are already very popular in China. Most people in China do not have healthcare insurance and cannot afford to go to the hospital, so many turn to TCMs.¹⁸⁴ Chinese political leaders actually advocate for the use of TCMs by the

178. GAO Report, *supra* note 3, at 1.

179. Food Supplements Directive, *supra* note 109, at 5.

180. LeCong, *supra* note 90, at 108.

181. *Id.* at 109.

182. Cataxinos, *supra* note 16, at 588.

183. *Id.* at 585.

184. Qiu, *supra* note 159, at 590.

masses.¹⁸⁵ China wants to break into the international market for dietary supplements. Since the 1960s, the United States has been interested in TCMs, and insurance companies have even begun covering TCM treatments.¹⁸⁶ However, China has not been exporting its TCMs; it really only has been exporting the raw materials to have the TCMs produced elsewhere.¹⁸⁷ China is trying to gain recognition in the international community so that they can export their TCMs, which have been helping their people for ages.

2. Why the United States decided not to regulate dietary supplements

This idea of consumer choice is deeply rooted in our society; however, consumers remain largely *uninformed* regarding dietary supplements *because* of the deregulation.¹⁸⁸ According to a 2002 Harris Poll, over half of adults who responded to the poll believe that dietary supplements are regulated by the government.¹⁸⁹ Consumers are more likely to associate dietary supplements with drugs rather than food, so they assume that supplements are regulated and do not inform themselves as to the safety and efficacy of the products they are using.¹⁹⁰ Therefore, although there is a strong public policy reason for keeping dietary supplements essentially unregulated (allowing informed consumer choices), consumer expectation is that they are regulated, so they do not inform themselves to make good choices.¹⁹¹ “[C]onsumers may believe that if a product is natural, it must be safe; if a little is good, then more must be better; and if a product does not have a warning label, it must be safe.”¹⁹² In fact, based on multiple national surveys, 81% of adults believe that dietary supplements should only be sold after they pass FDA safety standards.¹⁹³

Despite all of this, Congress maintains that consumer choice and free commercial speech outweigh the need for governmental regulation for dietary supplements. Luckily, there have been only a few incidents of unsafe dietary supplements, so Congress’ premise that dietary supplements are usually safe has proven true thus far.

185. Schroeder, *supra* note 148, at 688.

186. *Id.* at 695.

187. *Id.* at 697.

188. McCann, *supra* note 7, at 247.

189. GAO Report, *supra* note 3, at 32.

190. McCann, *supra* note 7, at 247.

191. *Id.*

192. GAO Report, *supra* note 3, at 33.

193. Blendon, *supra* note 13, at 809.

CONCLUSION

The United States' current regulation system puts Americans' health at risk. Congress believes that dietary supplements are presumably safe, but the L-tryptophan, ephedra, and other incidents with dietary supplements prove that is not always the case. The EU and China recognize that for their dietary supplements to be recognized as safe and effective, premarket approval is needed. This ensures that consumers know dietary supplement ingredients, that dietary supplements do what they claim to do, and that the government has power to recall dangerous products from the market. The DSHEA effectively removed any power the FDA had over dietary supplement regulation, resulting in the FDA's hands being tied when it comes to dangerous products on the market, as evidenced by the ephedra case. Complications and adverse reactions to dietary supplements could be avoided if the FDA had premarket approval power. However, now that we have deregulated dietary supplements and the dietary supplement industry is so powerful, it is unlikely that, without a catastrophic incident, the regulation system in the United States will change.

**PROTECTING THE CHILDREN: THE NEED FOR A
MODERN DAY BALANCING TEST TO REGULATE CHILD
LABOR IN INTERNATIONAL BUSINESS**

S. DENAY BROWN*

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INTRODUCTION

The use of child labor in international business, and specifically in the manufacturing context, has become a massive international problem which requires a realistic, enforceable solution. In coming to a realistic and workable solution, it is first important to understand the causes of child labor and realize that often, poverty and cultural trends dictate the use and acceptance of child labor. Next, it is necessary to understand the different players in the international world of child labor, address the importance and abilities of each, and understand the necessity of joint cooperation between all of the entities. Additionally, it is important to understand not only that complete bans on child labor are too restrictive, counterproductive, and an entirely infeasible solution to the prob-

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lem of child labor, but that the alternative, regulation of child labor, is the appropriate solution to the problem.

This Article addresses and analyzes each of these issues and proposes the utilization of a balancing test to establish nonuniform regulations for child labor within international business. The balancing test proposed herein is a seemingly innovative approach to addressing the weighty problem of the use of child labor in international business. Although child labor in general has received much attention in legal scholarship, most of that scholarship has addressed and largely supported the complete abolition of child labor. Unfortunately, however, even in light of the fact that attempts at the complete abolition of child labor are unsuccessful, legal scholarship is lacking in suggestions for alternative means of handling and regulating child labor. In fact, research revealed no other legal works suggesting the use of a nonuniform means of regulating child labor among countries. In contrast, while this Article may not entirely flesh out all of the elements and factors of the proposed balancing test, it serves as an initial attempt to introduce and examine this surprisingly untouched and unrepresented idea of allowing varying regulations and restrictions on child labor among countries.

As discussed in more detail below, in accepting the idea of allowing countries to have differing standards regarding the use of beneficial child labor, it is necessary to understand that having a universal prohibition against, or universal regulation of, child labor is ineffective and counterproductive. History has shown that attempts to regulate child labor with rigid, fixed standards that are applicable to all countries are unsuccessful and unenforced. As a result of cultural differences and poverty levels, some countries have no choice but to utilize child labor. In the face of strict, unbending child labor regulations, these countries will be forced to break standardized regulations and subsequently attempt to shelter and hide their use of child labor for fear of repercussion. The sheltering and hiding of child labor will do nothing but further the child labor problem by forcing child labor underground and out of the light where it can be monitored and regulated.

Because of the varying cultures, poverty levels, needs, and labor practices among differing countries, a balancing test which allows customized regulations for each country is ideal. Such a balancing test, which takes these factors into account and results in customized regulations, is the only appropriate and workable solution to the current child labor problem. These customized regulations, which will allow acceptable child labor, will reduce the necessity of forcing child labor underground and will remove much of

the stigma associated with child labor. As a result, these regulations are much more likely to be respected and enforced, and will open the door for both communication about, and monitoring of the use of, child labor. Ultimately, those that will benefit the most are those that need it the most: the children.

I. THE FOUNDATIONS OF CHILD LABOR

In formulating a solution to the abuse of child labor in the international market, special attention must be paid to adequately addressing both the use of child labor as well as the causes. Thus, it is vital to understand both what child labor is and why it happens. This section explores and discusses the definition of child labor as well as many of the causes.

A. *The Definition of Child Labor*

Due to different cultures and customs among countries, the definition of child labor can vary immensely.¹ As a result, one standard, universal definition of child labor is not applicable to all countries.² For the purposes of this Article, I define *child labor* as “any work done by a person under the age of 16.” Additionally, I will view child labor as one of two types: beneficial and exploitive. Discerning between beneficial and exploitive child labor can be a difficult task as there is no bright-line test to determine when labor crosses the line of acceptability.³ However, it is possible to outline the broad parameters of what constitutes both beneficial and exploitative child labor.

Beneficial child labor or “child work” is defined by some authors as “benign and permissible.”⁴ Although benign and permissible work falls within the definition of beneficial child labor, those terms, without more, are overly simplistic. In its largest sense, beneficial child labor is paid labor that in some form or manner benefits the child and is not exploitive, hazardous, or contrary to their best interests. One key, yet simple, distinction between necessary and exploitive child labor is that children are paid to do beneficial child labor, and exploitive child labor is that which children are compelled to do in situations that hinder their health and

1. Christopher M. Kern, Note, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT'L L. & COM. 177, 178 (2000).

2. *Id.*

3. *See id.* at 183-84 (arguing for the creation of universal standards defining unacceptable child labor).

4. Holly Cullen, *Child Labor Standards: From Treaties to Labels*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87, 93 (Burns H. Weston ed., 2005).

development.⁵ Some authors differentiate between child labor and child work, and define *child labor* as “work done by children that is harmful to them because it is abusive, exploitive, hazardous, or otherwise contrary to their best interests.”⁶ They suggest that this can be differentiated from child work, which is a larger and more encompassing category that can include work that may be in the children’s best interest.⁷ Beneficial child labor is generally synonymous with child work.

Exploitive child labor is defined by some authors as “harmful and impermissible.”⁸ This form of child labor is harmful, “impinge[s] on the well-being of working children,”⁹ and compelled. In general terms, *exploitative* is defined as “[t]he act of taking advantage of something; esp., the act of taking unjust advantage of another for one’s own benefit.”¹⁰ In the realm of child labor, the most accurate and inclusive definition of exploitive child labor is perhaps the International Labor Organization’s definition for the “worst forms” of child labor which is:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹¹

5. Michael F. C. Bourdillon, *Translating Standards into Practice: Confronting Local Barriers*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 143, 144 (Burns H. Weston ed., 2005).

6. Burns H. Weston, *Introduction*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER xv, xv (Burns H. Weston ed., 2005).

7. *Id.*

8. Cullen, *supra* note 4, at 93.

9. *Id.* at 87.

10. BLACK’S LAW DICTIONARY 619 (8th ed. 2004).

11. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), art. 3, *adopted* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000), *available at* <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>; Cullen, *supra* note 4, at 94.

B. Why Child Labor Happens

Child labor is an alarming and rampant problem.¹² As one author states, “[t]he truth is that child labor is a common practice in every country in the world, including the First World, but most especially in the developing world”¹³ The prevalence of the use of child labor is best exemplified by the statistics assembled by the United Nations’ International Labour Organization (ILO). ILO publications released in 2006 indicate that as of 2004, there were 218 million children laborers worldwide between the ages of five and seventeen.¹⁴ This figure showed a decrease from the reports for the year 2000, which indicated an estimate of 246 million child laborers worldwide within the same age group.¹⁵ Additionally, in 2005, the ILO estimated that globally there were seventy-three million working children under the age of ten.¹⁶ Although the 2006 figures released by the ILO showed a slight decrease in the number of child laborers, it is indisputable that with 218 million child laborers worldwide, the problem is still far from being cured.

In attempting to resolve the epidemic of child labor, it is necessary to examine the reasons why child labor occurs. Although the reasons child labor exists are numerous and varying, several causes are easy to identify. First and foremost, poverty is the leading cause of child labor.¹⁷ Other key factors driving the supply of child labor include poor economies, vulnerability, lack of access to credit, poor educational services, lack of social security mechanisms, debt, and increasing population.¹⁸ Additionally, “[c]hild labor flourishes under many conditions: cultural traditions; prejudice and discrimination based on gender, ethnic, religious, or racial issues; unavailability of educational and other alternatives for working children; and no or weak enforcement of compulsory education and

12. See U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS, 1-2 (1994) [hereinafter LABOR REPORT], available at <http://www.dol.gov/ilab/media/reports/iclp/sweat/sweat.pdf>.

13. Llewellyn H. Rockwell, *Campaigns Against Child Labor are Protectionist and Imperialist*, in CHILD LABOR AND SWEATSHOPS 70, 73 (Mary E. Williams ed., 1999).

14. *Facts on Child Labour – 2006*, INT’L LABOUR ORG., http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067558.pdf (last visited Oct. 2, 2010).

15. *Id.*

16. *Facts on Child Labour*, INT’L LABOUR ORG., <http://www.ilocarib.org.tt/portal/images/stories/contenido/pdf/Fact%20Sheets/Fact%20Sheet%20Child%20Labour.pdf> (last visited Oct. 2, 2010).

17. Victor P. Karunan, *Working Children as Change Makers: Perspectives from the South*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 293, 307 (Burns H. Weston ed., 2005); Kern, *supra* note 1, at 182.

18. Karunan, *supra* note 17, at 307-08; Kern, *supra* note 1, at 179; see Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO*, 33 DENV. J. INT’L L. & POL’Y 411, 411 (2005).

child labor laws.”¹⁹ Further, globalization, international trade, and the internationalization of production play a major part in the continuing use of child labor.²⁰ Some experts argue that the child labor problem is fueled by the consolidation of the retail industry into a small number of huge conglomerates.²¹ These conglomerates, including Wal-Mart, K Mart, and J.C. Penney, seek competitive advantages by “out-sourcing” to low-paying suppliers around the world.²²

Together, these factors encourage child labor by creating a demand for cheap, unskilled labor, and by providing easy access to areas of cheap labor.²³ The demand for and access to cheap, unskilled labor enables and encourages companies to continue to use child labor by supplying an appealing ability “to keep labor costs down in a highly competitive global market.”²⁴ Overall, “the historical dependence upon child labor and the standard business objective to maximize financial gain[] are significant barriers in the elimination of exploitive child labor practices.”²⁵ The worldwide impact of these combined forces has been growing insecurity and decreasing labor standards.²⁶

In the private sector, the potential advantages of child labor are often clear to employers. The majority of child labor abuses occur in private sector industries that produce everyday products and require nonskilled work, such as the manufacture of clothing, toys, sneakers, carpets, and sports equipment.²⁷ As one author explains, “[c]hild labor is cheap labor. Children are targeted for non-skilled, labor-intensive work. Because children are docile and easily controlled, employers have no fear of them demanding rights or organizing.”²⁸ One factory worker emphasizes that children, particularly those between the ages of ten and twelve, are the best because “[t]hey are easier to control, not interested in men, or movies, and obedient.”²⁹ As the above statistics and comments make evident, child workers’ popularity with factory owners makes them

19. Linda F. Golodner, *The Apparel Industry Code of Conduct: A Consumer Perspective on Social Responsibility*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 241, 247 (Oliver F. Williams ed., 2000).

20. *Id.*; Karunan, *supra* note 17, at 308.

21. Charles S. Clark, *Child Labor and Sweatshops: An Overview*, in CHILD LABOR AND SWEATSHOPS 10, 12 (Mary E. Williams ed., 1999).

22. *Id.*

23. Golodner, *supra* note 19, at 247; Karunan, *supra* note 17, at 308.

24. Golodner, *supra* note 19, at 247.

25. Kern, *supra* note 1, at 191.

26. *Id.*

27. Clark, *supra* note 21, at 11.

28. Golodner, *supra* note 19, at 246.

29. Shahidul Alam, *Efforts to Ban Goods Made by Children Are Counterproductive*, in CHILD LABOR AND SWEATSHOPS 43, 46 (Mary E. Williams ed., 1999).

heavily utilized.³⁰

II. THE ENTITIES RESPONSIBLE FOR REGULATING CHILD LABOR

When addressing the regulation of child labor in the international scheme, it is necessary to do a two-part analysis. The first part of the analysis involves what entities should be responsible for developing, implementing, and enforcing the applicable standards. The second issue is what standards should be developed, implemented, and enforced. This section examines the first issue: the various players in the area of child labor. Additionally, it addresses the efforts made by each type of actor and discusses the strengths and weaknesses of each.

A. Private Corporations

One level at which human rights issues must be addressed, enforced, and monitored is at the corporate level. The regulation of working conditions and human rights violations at this level is essential not only because modern corporations are powerhouses with the strength, financial means, and power to make changes, but also because these corporations are in the best position to monitor their working conditions. Specifically, these corporations have firsthand knowledge of, and access to, the workers and working conditions utilized by their company.

Historically, however, private corporations were not considered part of the solution to human rights problems. One possible explanation for this is that human rights issues were traditionally addressed in international law by nation states as the sole actors and not by private corporations.³¹ Another possible explanation is that until recently, the economic significance of private corporations was not realized.³²

The first shift toward viewing private corporations as actors in the international human rights scheme occurred after the First World War when “fundamental changes” occurred.³³ These changes “enlarg[ed] the possible group of actors in international law when ‘a new emphasis on the principle of self-determination brought to the forefront a new subject of international law, namely [peoples.]’³⁴ “This metamorphosis of the state’s role, along with

30. *See id.*

31. Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 538 (2002).

32. *Id.*

33. *Id.*

34. *Id.* (quoting Christina Baez, Michele Dearing, Margaret Delatour, & Chris-

an increased dependence on the market, encouraged corporations to *self-regulate* and to act ethically in their business transactions.”³⁵ As a result, both individuals and private corporations were added to the list of actors in the international scheme.³⁶

The second shift in thinking occurred after the Second World War when global trade increased and resulted in the birth of a new private corporation, more particularly the transnational corporation (TNC) or the multinational enterprise (MNE).³⁷ Even as early as the 1990s, estimates of the number of TNCs or MNEs ranged from 35,000 to 37,000. However, their economic significance is what is truly remarkable.³⁸ These entities “ ‘control roughly one-fourth of the world’s assets[]’ and . . . account for ‘as much as one-fourth of the U.S. economy[.]’ ”³⁹ Additionally, of the 100 largest economies in the world, fifty-one are global corporations, while only forty-nine are countries.⁴⁰ Further, the world’s 200 largest corporations produce more than one quarter of the world’s economic activity, and some of the largest TNCs and MNEs have had annual gross sales larger than the gross domestic products of many nation states.⁴¹

As a result of their power and wealth, “[t]he obligation of these corporations to act ethically is critical considering their relative impact on both the economic and humanitarian structure of societies worldwide.”⁴² Because these entities essentially control the economic markets, and because they are ultimately the parties most affected by the regulations, it is essential that they take part in the reform efforts. If these entities participate in the reform process and have a say in the rules and regulations that will affect them, the process will be more likely to produce rules and regulations with which the TNCs and MNEs agree and are willing to abide.

Additionally, these entities must play a part in the en-

tine Dixon, *Multinational Enterprises and Human Rights*, 8 YEARBOOK OF INT’L LAW 183, 211-13 (2000) [sic].

35. Maria Anne Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 385 (2007) (emphasis in original).

36. Wood & Scharffs, *supra* note 31, at 538.

37. *Id.*

38. *Id.* at 538.

39. *Id.* at 539 (quoting John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 467 (2000), citing Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT’L L. J. 1963, 1979 (1996)).

40. Pagnattaro & Peirce, *supra* note 35, at 385.

41. *Id.*; Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 57 (2002); See Wood & Scharffs, *supra* note 31, at 539.

42. Pagnattaro & Peirce, *supra* note 35, at 385.

enforcement of the new rules and regulations. Not only because these entities have so much wealth and power, and thus the means to enforce the regulations, but also because they are the entities that have direct access to the factories and workers and are thus in the best position to monitor and regulate the labor conditions and practices. Former Secretary of Labor Robert Reich often stated that if sweatshops and child labor are to be policed, industry's active cooperation is essential.⁴³ Of course, not all TNCs and MNEs agree. Some argue the exact opposite, claiming that they have no control over their subcontractors and thus the abuses aren't their fault.⁴⁴ The subcontractors, they argue further, must operate within the local cultures, economies, and laws in which they are located, and these cultures and laws are not often in line with Americans'.⁴⁵ One possible explanation for such a position is explained by one author:

Profit-maximization, if not the *only* goal of all business activity, is certainly central to the endeavor. And the pursuit of profit is, by definition, an amoral goal—not necessarily immoral, but morally neutral. An individual or business will achieve the highest level of profit by weighing all decisions according to a self-serving economic scale . . . Multiple layers of control and ownership insulate individuals from a sense of responsibility for corporate actions. The enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.⁴⁶

Even outside of the conflicting opinions of the corporations themselves, there are many differing views and opinions among legal scholars about whether private corporations have duties in the realm of human rights and specifically what those duties are.⁴⁷ Several legal scholars have studied the duties of private corporations and although the scholars differ in their opinions about the specifics, they all agreed that not all private corporations have equal duties but rather that there are “gradations of duties.”⁴⁸ The authors' positions are as follows:

“[A] continuum of legal and moral responsibility that can be

43. Clark, *supra* note 21, at 16.

44. *Id.* at 12.

45. *Id.*

46. Stephens, *supra* note 41, at 46.

47. Wood & Scharffs, *supra* note 31, at 554.

48. *Id.*

divided into four broad levels.” A private corporation “has the greatest duty to act when the company itself is compelled to participate in [a] human rights abuse; situations “imposing the least responsibility for action . . . include scenarios in which the company lacks involvement in the human rights violations as well as influence over the perpetrator of the violations.”⁴⁹ Another author argues that “the [private corporation’s responsibility] depends on how “close[] the [human rights] violations come to the company’s operations” and how “serious [the human rights violations] are.” This second author posits “five levels of responsibility[,]” ranging from most responsible to least responsible⁵⁰[.] . . . The third author contends that “corporate duties are a function of four clusters of issues: the corporation’s relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.”⁵¹

While it is true that some gradation of duty is inevitable as a company will have less control over the operations of a subcontractor versus the operations of their own company, such distance does not always make failure to act excusable. For instance, even companies which lack control over their subcontractors’ operations have the ability to not use subcontractors which are in violation of labor regulations or are utilizing exploitive labor. Additionally, a corporation’s lack of close nexus to the affected population does not permit a company to turn a blind eye to the harmful effects it is causing. Rather, companies should be responsible for the harmful effects they either knowingly cause or have knowledge of, regardless of their direct or indirect relationship to the harms.

In response to pressure and calls for action, many retailers and private corporations have adopted codes of conduct, increased monitoring, and employed strict enforcement of the rules.⁵² Such corporate codes further federal and corporate goals, encourage ethical conduct, and improve self-governance.⁵³ These codes are in acknowledgment of, and a hedge against, corporate misconduct, and they serve many useful functions including communicating to

49. *Id.* at 555 (quoting Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 181 (1997)).

50. *Id.* (quoting Cassel, *supra* note 39, at 1981-84).

51. *Id.* (quoting Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L. J. 443, 496-97 (2001)).

52. Clark, *supra* note 21, at 16.

53. Pagnattaro & Peirce, *supra* note 35, at 377.

“management, employees, and the public that the corporation intends to obey both national and international law” and “encourag[ing] those employees inclined to ‘do the right thing’ to intervene or report violations.”⁵⁴

However, corporations’ efforts to employ codes of conduct have been met with criticism. Many legal scholars and human rights advocates are opposed to corporate codes. Some scholars state that such codes are “mere public relations gimmicks” while others deem them “glossy human rights package[s]”⁵⁵ and assert that they are used “as a vehicle for corporations to (1) distract and confuse conscience-laden consumers, who have demanded that the goods they buy not be made or handled by exploited workers, (2) distract and confuse workers regarding their fundamental rights, and (3) distract and confuse national policy makers.”⁵⁶ Similarly, others have stated that the codes are mere “window dressing” and are not actually followed.⁵⁷ These beliefs may be valid, as Nike’s Chief Executive Officer Philip Knight once said:

We are committed to improving working conditions for the 500,000 people who make our products. We are also a company of people rooted in our responsibility to be a good corporate citizen. I don’t necessarily expect you to believe that, but I will tell you this—it makes us feel better about ourselves.⁵⁸

As Knight’s quote demonstrates, many MNEs and TNCs enact codes of conduct simply to appease the public and shift negative attention without ever intending to act upon such codes. These corporations should be held to their corporate codes of conduct and not allowed to make promises and turn a blind eye.

The current prowess, wealth, and power of TNCs and MNEs makes it undeniable that these entities must be involved in solving the child labor problem from this point forward. However, their involvement is essential not only because of their strength, financial means, and power to make changes, but also because these corporations are in the best position to monitor their working conditions and make a difference in how child labor is handled. As one author said:

54. Wood & Scharffs, *supra* note 31, at 556.

55. *Id.* at 558.

56. *Id.* at 557 (quoting Owen E. Herrstadt, *Voluntary Corporate Codes of Conduct: What’s Missing?*, 16 LAB. L. 349, 350 (2001)).

57. Pagnattaro & Peirce, *supra* note 35, at 393.

58. Kern, *supra* note 1, at 177.

MNEs directly and indirectly influence more lives in developed countries and in less developed countries than any other global institutions, except for a few intergovernmental organizations such as the United Nations, the World Bank, and the International Monetary Fund. A vital presence in many national economies, MNEs have accumulated significant economic and political power. This power puts MNEs in a position to influence government policies in many areas, and makes them key players in basic human rights issues.⁵⁹

The foregoing emphasizes that it is imperative to secure the involvement of TNCs and MNEs in any future movements. Despite the criticism, “codes of conduct can build protective frameworks from the ground up.”⁶⁰ Without the involvement of these entities, and without a good faith effort on their parts, the child labor problem will remain unresolved and unregulated and will continue to flourish.⁶¹

B. National Governments

Nation states are another main player in the child labor and human rights areas. This view is apparently shared by many as a “June 1996 opinion poll released by the International Mass Retail Association showed that 46% of Americans think that the U.S. and foreign governments have the main responsibility to regulate exploitive labor practices abroad.”⁶² Only 29% of Americans said that manufacturers should be responsible for the regulation, and only 18% said that retailers should be responsible.⁶³ As a result, many people look to nation states to come up with the solution to human rights and child labor problems.

Nation states often develop legal regimes including numerous rules which apply to corporations and are enforceable through the nation’s legal system.⁶⁴ However, regulations imposed by national governments are often unenforceable or impractical in the international context as nations have no power to regulate conditions in the other countries with which their corporations do business. Re-

59. Cristina Baez, Michele Dearing, Margaret Delatour, & Christine Dixon, 8 U. MIAMI INT’L & COMP. L. REV. 183, 184 (2000).

60. Laurie S. Wiseberg, *Nongovernmental Organizations in the Struggle Against Child Labor*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 343, 361 (Burns H. Weston ed., 2005).

61. Kern, *supra* note 1, at 191.

62. Clark, *supra* note 21, at 16.

63. *Id.*

64. Stephens, *supra* note 41, at 82.

sultantly, the legal system operates at a disadvantage when regulating multinational actors, especially those with the economic and political power of multinational corporations.⁶⁵ This is largely because corporations are multinational while legal systems are still largely national.⁶⁶ This distinction creates a disconnect between international corporate structures and the law.⁶⁷ Because these multinational corporations are much larger and more powerful than the legal structures that govern them, they have reached a level of transnationality and power that is beyond the reach of domestic law.⁶⁸ As a result, “the multilayered, multinational division of labor and responsibility of the modern corporation, its single-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target.”⁶⁹ As one author points out:

The very strengths of transnationals render them difficult regulatory targets. As corporate power becomes increasingly international and increasingly disassociated from the nation-state, regulation becomes more difficult. “The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world.”⁷⁰ Regulatory schemes are largely domestic, based upon national laws, administrative bodies and judicial systems, while transnationals operate across borders. . . . “[T]he present legal framework has no comfortable, tidy receptacle for such an institution,” producing a tension between the legal theory of independent corporate units, each “operating as a native within the country of its incorporation,” and the reality of the “economic interdependence” of the multinational corporation.⁷¹

Additionally, national legal systems typically exercise jurisdiction only over those corporations based in their nation and often refuse to exercise jurisdiction even for domestic corporations if the activi-

65. *Id.* at 53.

66. *Id.* at 54.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Stephens, supra note 41*, at 58-59 (quoting Claudio Grossman & Daniel D. Bralow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993)).

71. *Id.* (quoting Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 756 (1970)).

ties complained of occurred elsewhere.⁷² As a further hindrance, any foreign attempts at regulation by the United States are often met with hostility since many believe that the United States intervenes only when it is in the best interest of the U.S. economy.⁷³ Overall, attempts to enforce such domestic regulations on other nations can lead to a multitude of inhibiting problems.⁷⁴

Nonetheless, nation states do have the right and power to regulate corporate behavior.⁷⁵ To start, nation states can impose limits on corporate behavior and enact regulations forbidding corporate conduct that constitutes human rights abuses including physical harm, denial of basic labor rights, and harm to the environment.⁷⁶ Next, nation states can enforce these regulations within their jurisdiction and hold corporations liable for violations of these basic rights.⁷⁷ For means of enforcement, it is possible for the state to impose sanctions, including criminal, civil, and administrative penalties, domestically.⁷⁸ The fact that nation states have neglected to enact and enforce such regulations in the past does not prevent them from doing so in the future.

Such attempts at regulation and enforcement have the potential to be successful. For example, the United States has enacted the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA).⁷⁹ Both of these acts are aimed at regulating working conditions and employment practices and ensuring safe, fair, and low-hazard working conditions.⁸⁰ Additionally, both acts are largely successful at achieving their aims and regulating labor conditions in the United States.⁸¹ Other nation states have the potential to do the same in their countries.

Despite the current obstacles and lax enforcement, it is imperative that nation states participate in the elimination of child labor. While some corporations may make attempts to self-regulate, it is undeniable that not all corporations will be proactive and act independently. Therefore, nation states must take responsibility to independently develop and enforce regulations in their home states. Without such outside regulation and enforcement, corporations will be free to disregard any efforts at reform. Thus, if the regulation of child labor is to be successful, the participation of nation

72. *Id.* at 83.

73. *Id.*

74. *See generally* Pagnattaro & Peirce, *supra* note 35.

75. Stephens, *supra* note 41, at 60.

76. *Id.*

77. *Id.*

78. *Id.* at 64.

79. Wood & Scharffs, *supra* note 31, at 560-61.

80. *Id.*

81. *Id.*

states is vital.

C. International Organizations

The involvement of international organizations in the regulations of child labor also is essential. Without an international standard, TNCs and MNEs are likely to move assets and production to avoid unfavorable regulation.⁸² As one author said, the “[p]revention of corporate evasion of regulatory standards requires international consensus on the norms applicable to corporations.”⁸³ Specifically, the involvement of international organizations is essential because they “can apply well-developed human rights norms to hold the various corporate entities responsible for their involvement in human rights abuses, and can rely on accepted principles of international jurisdiction to locate the domestic legal systems empowered to impose liability.”⁸⁴

One international organization that has attempted to make change in the areas of child labor and human rights is the International Labor Organization (ILO). The ILO is a United Nations-related organization that is made up of representatives from government, business, and labor.⁸⁵ The ILO consists of 159 member nations, addresses human rights issues, has consistently been one of the foremost organizations protecting human rights, and pursues consensus between business and labor.⁸⁶ After World War I, the ILO was formed with the intention of creating a forum where labor unions, private corporations, and states could develop solutions to employment issues.⁸⁷

Many of the ILO conventions involving human rights cover the areas of minimum wages, work hours, workplace health and safety, and the elimination of forced labor, child labor, and discrimination.⁸⁸ Critics of the ILO charge that their guidelines are “limited and [break] little new ground, mostly reaffirming the long-standing rights of workers to organize unions, to bargain collectively, and to [have] nondiscriminatory employment.”⁸⁹ Additionally, one of the largest weaknesses of the ILO is their difficulty in

82. Stephens, *supra* note 41, at 59.

83. *Id.*

84. *Id.* at 68.

85. David M. Schilling, *Making Codes of Conduct Credible*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 221, 222 (Oliver F. Williams ed., 2000).

86. Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 83, 92 (Oliver F. Williams ed., 2000); *see* Kern, *supra* note 1, at 189.

87. Kern, *supra* note 1, at 189.

88. Meintjes, *supra* note 86, at 92.

89. *Id.* (quoting Cassel, *Supra* note 39, at 1979) (internal citation omitted).

enforcing judgments.⁹⁰ Particularly, the ILO does not have authority to provide remedies to injured parties which renders them “a rather hollow institution because they embrace the proper legislation to implement labor standards but have no practical means by which to mandate these standards.”⁹¹ If member states do not abide by their duty to follow the laws, the ILO is limited to airing the crimes in the court of public opinion.⁹² Although the ILO does not have the power to sanction companies for the purposes of enforcement, it does have an established complaint procedure.⁹³ The complaint procedure involves a Standing Committee on Multinational Enterprises which is empowered “to investigate and make specific findings of code violations by individual companies.”⁹⁴

The ILO has made several attempts to regulate the use of child labor. Early instruments did not distinguish between harmful and beneficial child labor, but instead aimed to abolish all forms of child labor and were largely unsuccessful.⁹⁵ However, Convention 138, the Minimum Age Convention, was developed in 1973 and contained clauses which allowed for distinguishing between the two types of labor.⁹⁶ The Convention provides that the minimum age of working children “shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years”⁹⁷ and “no one under that age shall be admitted to employment or work in any occupation.”⁹⁸ The declaration provides for exceptions allowing the age to be reduced to thirteen years for light work in all countries and to fourteen years for all work in countries where the member’s “economy and educational facilities are insufficiently developed.”⁹⁹ Additionally, in those countries which qualify to have the minimum age lowered to fourteen for all work, they may reduce the minimum age to twelve years for light work.¹⁰⁰ Although it was a significant step in the right direction, Convention 138 was criticized for being “poorly drafted” and “failing to take into account the actual practice of child employment in developed and developing countries.”¹⁰¹ As a result, the Convention

90. Kern, *supra* note 1, at 189.

91. *Id.* at 190.

92. *Id.*

93. Meintjes, *supra* note 86, at 92.

94. *Id.*; Cullen, *supra* note 4, at 89-92.

95. Cullen, *supra* note 4, at 89.

96. *See generally* Convention Concerning Minimum Age for Admission to Employment (ILO No. 138), adopted on June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976) available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

97. *Id.* at art. 2(3).

98. *Id.* at art. 2(1).

99. *Id.*

100. *Id.* at art. 7(4).

101. Cullen, *supra* note 4, at 91.

never received much support from nation states and the issue of child labor remained stagnant for the time.¹⁰²

Although not directly aimed at child labor, the ILO also made an attempt to influence human rights in 1977 when it developed a code titled the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.¹⁰³ The declaration “created voluntary guidelines for corporations in the area of ‘employment, training, worker conditions, and industrial relations.’”¹⁰⁴ Additionally, it contained “mechanisms for reporting abuses and problems”¹⁰⁵ and, in lieu of operating directly on multinational corporations, it relied on governments to ratify and implement its provisions by implementing their own legislation to legally bind corporations.¹⁰⁶ The guidelines created by the declaration are largely not enforced as a result of their “voluntary and nonlegally binding status.”¹⁰⁷ Consequently, the Declaration did not make great changes in the areas of human rights and child labor.

The child labor movement again gained steam in 1999 with the adoption of ILO Convention No. 182 (C182) Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor.¹⁰⁸ C182 has been the most quickly and widely ratified convention in ILO history.¹⁰⁹ The Convention took an important step and distinguished between “child work (generally benign), ‘child labor’ (harmful), and ‘worst forms of child labor’ (abusive, inherently rights violating).”¹¹⁰ But even C182 has its critics. Some argue that the Convention defines harm too narrowly, while others argue that the definition of the worst type was driven not by “an analysis of what types of work interfere with a child’s development” but rather “by the gravity of the harms involved and the need for political consensus.”¹¹¹ Regardless of the criticism, C182 has been the most widely accepted and modern thinking Convention.¹¹²

As exemplified by C182, the ILO and other international organizations have the means to significantly influence child labor regulations. Although their means of enforcement may be lacking, their ability to create regulations to which nation states can look and require compliance cannot be ignored.

102. *Id.* at 87.

103. Pagnattaro & Peirce, *supra* note 35, at 389.

104. *Id.*

105. Schilling, *supra* note 85, at 222

106. Pagnattaro & Peirce, *supra* note 35, at 389.

107. Schilling, *supra* note 85, at 222.

108. Cullen, *supra* note 4, at 87.

109. *Id.* at 94.

110. *Id.* at 97.

111. *Id.* at 97-98.

112. *Id.* at 94, 98.

III. WHAT STANDARDS SHOULD BE DEVELOPED AND IMPLEMENTED

As stated above, child labor should be addressed in a two-part analysis. The first part of that analysis was what entities should be responsible for developing, implementing, and enforcing the applicable standards. As addressed above, it will take the involvement of private corporations, nation states, and international organizations working in conjunction to make leeway on the child labor problem. Having established what entities should be responsible for establishing and enforcing child labor standards, it is now necessary to explore what standards these entities should develop and implement. Thus, what standards should be developed, implemented, and enforced is discussed in this section.

A. Complete Bans on Child Labor

In the context of child labor, advocates often argue for complete bans of child labor in one of two ways: either as a complete ban on imports from companies or countries who use child labor or as a complete ban on child labor itself. For the purposes of this Article, the term “complete ban” will include both of these types of bans, as the results are often the same.

As a means of dealing with the child labor problem, many human rights advocates petition for complete bans of child labor and suggest the suspension of tariff benefits for offending countries and the withdrawal of any funding from international lenders to these offending countries.¹¹³ Tom Harkin, a Democratic senator from Iowa, is a proponent of a complete ban on imports of products made by children.¹¹⁴ Harkin, who introduced the Child Labor Deterrence Act in Congress, which would ban imports of goods produced by children, argues that “[c]hildren in developing countries, for the sake of their future and that of their economies, should be in schools and not in factories working long hours for little or no pay under hazardous conditions.”¹¹⁵

However, many efforts to impose a complete ban on products made by children are often challenged as attempts to meddle in the affairs of other sovereign nations as well as attempts to shield domestic industries against cheap imports.¹¹⁶ As one author explains, “[t]here are only three groups pushing for more restrictions on imports: domestic producers who seek special immunity from

113. Clark, *supra* note 21, at 14.

114. Tom Harkin, *The United States Should Ban Imports of Products Made by Children*, in CHILD LABOR AND SWEATSHOPS 38, 38 (Mary E. Williams ed., 1999).

115. *Id.* at 39.

116. Clark, *supra* note 21, at 15; see Alam, *supra* note 29, at 44.

competition, labor unions that want consumers to be taxed to prop up their inflated wages, and the federal government which seeks ever more power over economic life.”¹¹⁷ Others allege that when attempting to make or implement such bans, “[t]he US is wielding power without responsibility. A nation with a history of genocide and slavery, and a reputation for being a bully in international politics, suddenly proclaims itself a champion of people’s rights, but refuses to make concessions over the rates it will pay.”¹¹⁸ Some argue that countries which boycott products from countries utilizing child labor “strengthen their governments at the expense of the market.”¹¹⁹ And still, others label campaigns against child labor as protectionist, imperialist, and left-wing demands.¹²⁰

Although appealing, a complete ban is not an ideal or even practical solution to the problem of child labor.¹²¹ Advocates of complete bans, including Harkin, tend to gloss over the benefits of child labor and downplay the strong ties of poverty and child labor, instead pointing to the unavailability or inadequacy of schools and the prevalence of military spending over education and health services.¹²² However, such advocates, including Harkin, are misled, as complete bans on child labor are counterproductive and can backfire. These advocates ignore the fact that there are many benefits, both direct and indirect, to child labor. Most importantly, these advocates ignore that there are real dangers associated with complete bans as “[u]nrealistic rules on minimum age can have the effect of driving child work underground, where employers conceal the use of the underaged and the conditions under which they work.”¹²³ Forcing child labor underground and into concealment only further hinders any attempts at monitoring or regulating such labor.

An analysis of complete bans on child labor is incomplete without exploring the many ways in which such complete bans are counterproductive and can backfire. Complete bans on child labor or imports born of child labor, have led to instances in which companies, after a threat of action by importing governments or companies, have eliminated the use of all child labor.¹²⁴ These eliminations did nothing but force children to resort to more drastic measures for employment such as prostitution, begging, or new

117. Rockwell, *supra* note 13, at 73-74.

118. Alam, *supra* note 29, at 47.

119. Rockwell, *supra* note 13, at 73.

120. *Id.* at 70.

121. Kern, *supra* note 1, at 179; *see generally* Samida, *supra* note 18.

122. *See* Harkin, *supra* note 114, at 40.

123. Cullen, *supra* note 4, at 90.

124. Clark, *supra* note 21, at 15.

employment in even worse working conditions.¹²⁵ Further, the implementation of stricter labor standards in one region or country simply leads the manufacturers to seek labor in other regions or countries and does nothing to help the underlying problem.¹²⁶

In one example of the backfiring of complete bans, 50,000 Bangladeshi children garment workers lost their jobs in 1994 after news of Harkin's Child Labor Deterrence bill surfaced.¹²⁷ The bill was an attempt to "stop the economic exploitation of children and to get them out of the most dangerous jobs . . . by limiting the role of the U.S. in providing an open market for foreign goods made by underage kids," and it proposed a complete ban on the importation of products made by children overseas.¹²⁸ As a result of the firings, the ILO and UNICEF found that many of the children took on more dangerous work such as stone crushing or prostitution to make ends meet.¹²⁹ Stories such as this underscore the dangers of complete bans. Without the work, children are forced to choose between a life of increased poverty or more exploitative, often illegal, work.¹³⁰ As one senior ILO worker said:

What we have done here in Bangladesh is described as fantastic . . . I wonder how fantastic it really is. How much difference will these two or three years in school make to these children? In three years, the helper could have been an operator, with better pay and more savings This is an experiment by the donors, and the Bangladeshi children have to pay.¹³¹

Many economists also persuade against complete bans, pointing out that there usually isn't a better option for these children.¹³² Paul Krugman, an economist at the Massachusetts Institute of Technology, points to an example of destitute parents sometimes selling their children who are not allowed or able to work and says, "[i]f that is the alternative, it is not so easy to say that children should not be working in factories."¹³³

An additional argument against complete bans on child labor is

125. *Id.*

126. *Id.* at 13.

127. *Introduction, in CHILD LABOR AND SWEATSHOPS* 7, 8 (Mary E. Williams ed., 1999) [hereinafter *Sweatshops Intro*]; See Alam, *supra* note 29, at 44.

128. Harkin, *supra* note 114, at 41.

129. *Sweatshops Intro, supra* note 127, at 8; Alam, *supra* note 29, at 44.

130. *Sweatshops Intro, supra* note 127 at 9.

131. Alam, *supra* note 29, at 47.

132. Allen R. Myerson, *Sweatshops Often Benefit the Economies of Developing Nations, in CHILD LABOR AND SWEATSHOPS* 32, 32 (Mary E. Williams ed., 1999).

133. *Id.* at 34.

that child labor should not be eliminated entirely as it has benefits. For some countries, child labor is not a negative, but is instead a necessity, and it is not “per se” evil, unacceptable, or even wrong, but is instead a part of everyday life and is considered a societal norm.¹³⁴ In these countries, child labor is not used for the purposes of abuse, exploitation, or profit, but rather can be beneficial to both the children and to their countries.

Overall, even outside of these countries, most people would likely “agree that child labor, in limited amounts and in certain situations, can be beneficial.”¹³⁵ Alec Fyfe, a former education officer for UNICEF, has stated that “child work can be a positive experience and, in the best circumstances, children’s work can prepare them for a productive adult life.”¹³⁶ One author argues that hard work increases children’s sense of self-worth; it allows them to face difficult challenges and to take responsibility for their actions, and it provides for opportunity and discovery.¹³⁷ The author goes so far as to say that she “feel[s] sorry for youngsters nowadays who are being told by the adult world that they’re not supposed to do real work—the straining, grinding kind that tests your strength and helps pay the bills” and says that she would like children “to have a chance to discover the rewards of labor while they’re young, adventuresome, and impressionable.”¹³⁸ Additionally, working children allow “families undergoing extreme hardship to support themselves” and “contribute to family income and gain valuable experience and are seen as a net asset to families and society. But when children are not allowed to work, their economic value to families is reduced and they become net liabilities.”¹³⁹ Moreover, child labor and the garment industry in particular have increased the income of working-class families and have allowed children to choose to work in factories rather than as servants.¹⁴⁰ This choice allows children both greater economic stability and greater self-respect.¹⁴¹

However, child labor does not come without a cost. One way in which child labor can harm children is by depriving them of educational opportunities.¹⁴² Because of the time requirements of working, child laborers often frequently miss school or drop out alto-

134. Kern, *supra* note 1, at 178-79.

135. *Id.* at 183.

136. *Id.* (internal citations omitted).

137. Hannah Lapp, *Child Labor is Beneficial*, in *CHILD LABOR AND SWEATSHOPS* 36, 36 (Mary E. Williams ed., 1999).

138. *Id.* at 37.

139. Rockwell, *supra* note 13, at 72-73.

140. Alam, *supra* note 29, at 46-47.

141. *Id.* at 47.

142. Kern, *supra* note 1, at 180.

gether. Without an education, the children will have fewer career opportunities.¹⁴³ Other harms presented by child labor include mental and physical damage, and delayed mental and physical development.¹⁴⁴ As a result of children being less biologically mature and physically strong, they are more susceptible to chemical contaminants that may be found in the workplace and more susceptible to injury.¹⁴⁵ Additionally, some of the more severe harms include children being exploited for sex, used for military personnel, and being forced to work in highly dangerous work conditions involving disease and deadly chemicals.¹⁴⁶ However, it is important to note that because child labor that impinges on the well-being of working children is not allowed under the regulations proposed herein, the more egregious harms listed here would still be forbidden even under the new proposed regulations. Additionally, the argument that education opens doors for career opportunities assumes that there are posteducation career options available for these children, which is not often the case in developing countries.

Even in light of the harms that child labor can cause, many former proponents of complete child labor bans often change their minds about such viewpoints when exposed to the realities of the child labor situation and benefits that it can produce. One production manager at a garment factory who had formerly supported the movement for a complete ban stated, "I was happy that someone was fighting for children's rights. But now that I work in a factory and have to turn away these children who need jobs. [sic] I see things differently."¹⁴⁷

In consideration of the foregoing risks and harms that complete bans on child labor cause, it is apparent that a complete ban on child labor is not the solution. As a result, further options, specifically the regulation of child labor, must be explored.

B. Regulating Child Labor

In an effort to avoid the harsh consequences often accompanying complete bans, many organizations advocate for safe and humane working conditions along with an intense examination of the socioeconomic conditions that require young children to work.¹⁴⁸ In sum, such views often encourage a labor regulation approach in lieu of a complete ban. A labor regulation approach to child labor is

143. *Id.*

144. *Id.* at 181.

145. Clark, *supra* note 21, at 11-12.

146. Kern, *supra* note 1, at 180-81; *see id.*

147. Alam, *supra* note 29, at 46.

148. Sweatshops Intro, *supra* note 127, at 9.

“treating child labor as an issue to be resolved via the setting of agreed legal rules concerning minimum ages for employment, similar to the regulation of such other aspects of the employment relationship as the health and safety of workers.”¹⁴⁹ The U.S. Department of Labor in its International Child Labor Study summarized the position of advocates favoring regulation in lieu of complete bans as follows:

Other advocates for children’s rights – probably a majority – believe that the immediate abolition of all child labor is unrealistic and, in many cases, contrary to the interests of the children themselves. They recommend first abolishing the most abusive forms of child labor, and, in order to avoid a situation in which a reduction of child labor in one sector of the economy will simply lead to an increase in another, government then should strictly regulate remaining forms of child labor to provide appropriate protections and benefits for those who must work to survive. They believe that the issue of child labor, especially in the more impoverished countries of the developing world, cannot be viewed in isolation but must be addressed in the broader context of social, economic, and educational development as a whole.¹⁵⁰

The author believes this view is correct. In order to effectively protect children, exploitive child labor must be attacked, and thus, the abusive forms of child labor must be abolished. Additionally, because complete bans are counterproductive, a regulatory approach to the remaining, beneficial forms of child labor is the most likely type of constraint to be effective.

Additionally, regulation, not complete bans, appears to be what children workers prefer. In 1996, the first international conference of child laborers was held in Kundapur, India.¹⁵¹ There, child delegates from thirty-three developing countries drafted a proposal that rejected boycotts and called for “work with dignity, with hours adapted so that we have time for education and leisure” along with “professional training, access to good health care, and more actions that would address ‘the root causes of our situation, primarily poverty.’”¹⁵²

A system of regulation recognizes that it is beneficial, both to the children themselves and to the economies of which they are a

149. Cullen, *supra* note 4, at 88.

150. LABOR REPORT, *supra* note 12, at 4.

151. Sweatshops Intro, *supra* note 127, at 9.

152. *Id.*

part, to allow some beneficial child labor. Additionally, allowing some forms of child labor persuades some countries and companies to avoid hiding child labor and forcing it underground, and instead allowing it to stay in view where it can be properly monitored and regulated. However, a system of regulation also recognizes that some forms of child labor, such as child prostitution, bonded labor, and hazardous working conditions, cannot be regulated and must be entirely abolished.¹⁵³ Such an approach takes into account the realities of the cultural and economic situations in many countries which make child labor necessary. Because it abolishes the harmful types of child labor, yet embraces beneficial child labor, a regulatory approach is the most likely to be effective and should be supported and enacted.

IV. RECOMMENDATIONS

A. What Standards Should be Implemented and Developed

The first step to establishing an effective system of controlling child labor is working towards a regulatory scheme in lieu of a complete ban. As discussed above, a complete ban on child labor is a closed-minded concept and is not an ideal or even feasible solution. The harms of complete bans far outweigh the benefits. Additionally, establishing an effective system will require disregarding the concept that a regulation be universal. Just as it is closed-minded to say that all child labor should be banned, it is equally closed-minded and unrealistic to say that a universal standard should apply to all countries. Such a position does not take into account the realities of different countries' cultures, environments, poverty levels, and other conditions. Abraham Katz, president of the United States Council for International Business, agrees that no across the board, one-solution-fits-all approach can deal constructively with and adequately solve this complex issue and has acknowledged a "need to respect local culture and customs."¹⁵⁴

Attempts to regulate child labor thus far have failed to make this realization. Although the ILO has come a long way in recognizing the differences between child labor and child work, it still poses the same standard restrictions on all countries. The failure of the ILO convention's attempts to implement universal standards is evidence that such an approach is not feasible. To date, all of the conventions and declarations established by the ILO have attempted to apply one fixed standard to all countries and result-

153. See LABOR REPORT, *supra* note 12, at 4.

154. Clark, *supra* note 21, at 15.

antly have been criticized and rejected by nations or, although accepted, have been largely unenforced or not followed.

Instead of focusing on the universal, strict requirements supplied by the ILO and advocated for by various interest groups, we should focus on attempting to establish an agreement that takes into account all of the different needs and cultures of varying nations, and, most importantly, the best interests of their children. "If we are to improve the lives of working children, international standards must be adapted to the children, their families, and their communities."¹⁵⁵ To do this, a system should be established which will be customizable to each country. In recognition of the fact that child labor happens regardless of complete bans, the system should allow and regulate beneficial child labor and eliminate exploitive child labor.

Accordingly, to determine whether child labor should be permitted in a particular country and, if allowed, to what extent it should be permitted, a balancing test should be established and employed. The balancing test should weigh the harms of child labor to children against the benefits resulting from the labor. As one author states, "[w]e need to balance the harm that can come from employment against the rights of children to the benefits that can come to them and their right to have a say in decisions affecting their lives."¹⁵⁶ Only when the balancing test determines that the benefits of child labor in a particular area or region outweigh the harms should the child labor be allowed. In whole, the ideal balancing test would consider numerous economic factors, cultural traditions and norms, as well as the relevant country's children's best interests and opinions.

Of the economic factors to be considered, the most influential factors would most likely be those which are indicative of the quality of life and economic position of a nation and its residing citizens. Quality of life and economic posterity of a nation and its citizens are vital considerations as these can strongly indicate the current welfare of a nation and its residents. Accordingly, they can reflect on the necessity (or lack of necessity) for the use of child labor as well as the benefits that child labor could bring if utilized. Relevant factors would include the poverty level, establishment and output of social welfare and/or social security programs, gross domestic product, per capita income, and other similar factors and indicators. Of these factors, strong consideration should be given to the level of economic development and the adequacy of social security and/or social welfare programs as these conditions have been

155. Bourdillon, *supra* note 5, at 143.

156. *Id.* at 147.

shown to have a strong bearing on the quality of life within a nation.¹⁵⁷ Additionally, access to education, as well as the availability of post-education opportunities, should be assessed.

Above all, the balancing test should focus on and revolve around the child's best interests. As one author states, "[a]n overriding right in decisions concerning children is that the best interests of the child must be given primary consideration, and for this reason different rights can be in tension and need to be balanced against one another."¹⁵⁸ One major part of understanding what is in a child's best interest is understanding the unique situations in which individual children live.¹⁵⁹ As a result, an analysis of children's best interests would include different factors dependent on a child's culture and economy.

Additionally, considering the best interests of the children always includes taking into account their opinions. If we want to help working children, we need to find better options for them, not take away the ones they have chosen to survive; if we are to do this effectively, we must take their opinions seriously. If we listen to the children, we focus less on formal employment and more on how children are treated, even within the confines of private homes and families.¹⁶⁰ As discussed above, child labor can have many mental and psychological benefits for children. Without listening to children, it is impossible to know how they value their work, and thus impossible to determine what is in their best interests. Essentially, a child's opinion and preferences regarding his participation in child labor would act only to weigh more heavily on the side of beneficial or harmful, depending on whether he perceives his involvement in child labor to be an asset or a burden.

Regardless of the benefits, exploitive child labor should not be allowed in any form. As discussed in detail above, *exploitive child labor* is defined as "harmful and impermissible."¹⁶¹ As one scholar rightfully said, "to address child labour without addressing exploitation is to treat the symptom, not the disease."¹⁶² Additionally, if the balancing test determines that the labor is more harmful to the child than beneficial, it should not be allowed. As a result of the differing benefits of child labor in countries with different cultures and poverty levels, the balancing test will result in different standards for different countries.

157. See John B. Williamson, *Social Security and Physical Quality of Life in Developing Nations: A Cross-National Analysis*, 19 SOC. INDICATORS RES. 205, 205 (1987).

158. Bourdillon, *supra* note 5, at 143.

159. *Id.*

160. *Id.* at 163.

161. Cullen, *supra* note 4, at 93.

162. Alam, *supra* note 29, at 47.

Some critics may argue that it will be more costly or expensive to establish and implement a balancing test. However, all child advocates, and surely most citizens, would agree that the costs are worth it. Having such a balancing test would allow beneficial child labor to continue in the areas that need it. In light of the reality that child labor will continue where needed, despite complete bans and strict regulations, having a balancing test that allows beneficial child labor to stay “above ground” where it can be monitored will allow for much safer conditions. As a result, any costs of such a test will be far outweighed by the benefits.

B. The Entities Responsible for Regulating Child Labor

In light of the difficulties facing corporate self-governance, domestic laws, and international organizations when working individually, it is imperative that private corporations, nation states, and international organizations all work in conjunction to establish a foundation for the regulation of child labor. “It will absolutely take a united effort to adequately eliminate child labor abuses.”¹⁶³

First, an international organization should be responsible for establishing the balancing test. An international organization would have access to, or the means to get, the information necessary to determine and quantify both the various relevant factors and how much weight they should be given.

After the establishment of the balancing test, nation states should be responsible for supplying the specifics necessary to apply the balancing test to their nations. As a result, nation states would indirectly, through the information supplied, establish what the applicable standard should be for their respective countries. The standards established by the nation states should be reviewed by an international organization that can assess the validity of their claims and determine if such standards are truly in the best interests of the children and other laborers in their countries. Additionally, nation states should be responsible for holding all corporations who are either organized in their jurisdiction (regardless of where the violation occurs) or operating in their jurisdiction to the applicable standard. Further, the standards established by nation states would be a floor, meaning that differing standards between corporations and nation states should not be a conflict, as corporations who wish to hold themselves to a higher standard than that

163. Kern, *supra* note 1, at 198.

of a country with which they conduct business are free to do so.

Lastly, it is necessary to address the largely varying, unregulated, and often unenforced codes of conducts proposed by many TNCs or MNEs. Because of the power of TNCs and MNEs, it is important that they are involved in the movement to regulate child labor. TNCs and MNEs should be encouraged to establish codes of conduct. To make these corporate codes of conduct effective, an international organization and/or nation states should have the ability to hold the corporations responsible for violations of such codes.

CONCLUSION

In lieu of having one universal regulation which applies to all countries, a balancing test should be established which allows countries to have differing standards regarding the use of beneficial child labor. Regardless of the benefits, exploitive child labor should never be utilized and should be eliminated. Additionally, it is essential that international organizations, nation states, and TNCs and MNEs each have a role and a responsibility in establishing and enforcing the regulations. Having all three entities working in conjunction to resolve the problems surrounding child labor will effectuate a reasonable, valid, and enforceable solution to the global problem of child labor.