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CHILE'S FAILED ATTEMPT TO GET A NEW CONSTITUTION: OR THE CHALLENGES OF DEMOCRATIC CONSTITUTION MAKING IN A POLARIZED ERA

Javier Couso*

INTRODUCTION

Over the last decade or so, the academic literature on constitution making has experienced something of a boom,[1] in parallel to the

* UDP/U. of Utrecht.

intensification of the activity of international entities devoted to providing expert advice and assistance on what—until not long ago—was an understudied and undertheorized field.[2] In the midst of these developments, best practices have been identified and prescriptions issued on how the constituent process should be conducted.[3] Perhaps because constitutional replacement—as opposed to constitutional amendments—are exceptional events, there are relatively few cases to analyze. In this context, when the start of a constituent process was announced in Chile (a country generally considered to be a successful case of a transition to democracy among those referred to as the "third wave of democratization") it generated a disproportionate amount of attention for a peripheral country. The interest sparked by Chile's constitution making process was driven, I submit, by the fact that, as opposed to instances of populist-authoritarian constitution making (such as the ones that have taken place over the last couple decades in Venezuela, Hungary, Ecuador, Bolivia, and other countries), Chile offered an interesting "laboratory" of democratic constitution making in this time and age.

After the end of a four-year long attempt to deliver a new constitution, Chile failed to do so. As we shall see in this piece, some of the factors behind the frustrated attempts for a democratically enacted charter are highly specific to the political contingencies experienced by Chile over the last few years. However, there are some general lessons that can be drawn from this country's experience for democratic constitution making in this era. The first is that it is a mistake to expect that, when the political stakes are as high as they are in constitution making, the polarization which characterizes much of the democratic world these days would be somehow interrupted just because a country is embarked on a constituent process. The

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[1] Recent contributions to this literature include: CAMBRIDGE UNIV. PRESS, UNIV. OF CAMBRIDGE, REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES, (Gabriel L. Negretto ed., 2020); Cheryl Saunders, *Constitution-making in the 21st Century*, 4 INT'L REV. L. 1 (2012); Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419 (Michel Rosenfeld & András Sajó eds., 2012); HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (Cambridge Univ. Press 2011); Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?,* 5 ANN. REV. L. SOC. SCI. 201-23 (2009).

[2] Among the many initiatives of constitution making assistance and advice that have intensified over the last couple of decades, *see* Int'l Inst. for Democracy and Electoral Assistance, *Constitution-Building,* INT'L IDEA, https://www.idea.int/theme/constitution-building (last visited Oct. 20, 2023); *Constitutional Assistance*, UNITED NATIONS PEACEMAKER, https://peacemaker.un.org/constitutions-project (last visited Oct. 20, 2023).

[3] One good example of this type of advice can be seen in MARKUS BÖCKENFÖRDE ET AL., A PRACTICAL GUIDE TO CONSTITUTION BUILDING (Int'l IDEA 2011).

second is that the strongly encouraged participatory processes during constitution making endeavors may lead to distortions that are far from the opinion of the electorate because constitutional preferences of highly mobilized groups may occasionally be in sharp contrast with that of the electorate's majority. Finally, Chile's troubling experience of failed constitution making sounds the alarm regarding the preconditions for the viability of the appealing notion that the legitimacy of a constitution making process requires it to be done through an especially elected body and not by panels of experts or *ad hoc* congressional committees (as was often the case during the nineteenth and early twentieth century). Furthermore, Chile's two failed attempts to get a new charter approved in a ratifying referendum, poses the question of the inadequacy of such mechanism to conclude a constitution making effort.

In what follows, this article describes the following: I) The Chilean social uprising and the call for a new constitution; II) Negotiating a constituent process as a way to institutionally-channel a social uprising; III) The main features of Chile's first constituent process; IV) A partisan Constitutional Convention; V) The political dynamics of the first constituent process; VI) Explaining the failure of Chie's first constituent process; VII) The negotiations leading to Chile's second constituent process; and VIII) The unexpected turn to the far right in the election of the Constitutional Council.

I. THE CHILEAN SOCIAL UPRISING AND THE CALL FOR A NEW CONSTITUTION.

Despite being considered one of Latin America's most stable and economically-successful countries, with a relatively orderly transition from dictatorship to democracy,[4] which brought economic progress and a significant reduction of the poverty rate,[5] on October 18, 2019, Chile began

[4] *See* COUNCIL ON HEMISPHERIC AFFAIRS, CHILE IN TRANSITION PROSPECTS AND CHALLENGES FOR LATIN AMERICA'S FORERUNNER OF DEVELOPMENT (Roland Benedikter & Katja Siepmann eds., 2015); Philip Oxhorn, *Recent research on Chile: The Challenge of Understanding "Success"* 34 LAT. AM. RSCH. REV. 255 (1999).

[5] For accounts of Chile's economic growth during its transition to democracy, *see* Klaus Schmidt-Hebbel, *Chile's Economic Growth*, 43 CUADERNOS DE ECONOMIA 5 (2006); Kurt Weyland, *Economic Policy in Chile's New Democracy*, 41 J. OF INTERAMERICAN STUD. AND WORLD AFFAIRS 67 (1999). *See also* Claudio A. Agostini & Philip H. Brown, *Cash Transfers and Poverty Reduction in Chile*, 51 J. OF REG'L SCI. 604 (2011); Mauricio Olavarria-Gambi, *Poverty and Social Programs in Chile,* 13 J. OF POVERTY 99 (2009), and EMANUELA GALASSO,

to experience its most massive, and violent demonstrations in decades. With an intensity resembling the riots that erupted in Europe and the United States in the late 1960s, millions of Chileans took to the streets to protest against an economic model which, for all its success in bringing about economic growth and poverty reduction, was unable to significantly reduce inequality.[6]

The riots and demonstrations were triggered by a small increase in the cost of Santiago's subway system, but a few days later, the demands of protesters shifted toward key aspects of the country's neoliberal model (such as an individualistic pension scheme and an economically-segregated healthcare system).[7] While the social uprising took place at a time (right before the Covid-19 pandemic) when protests were happening in cities as disparate as Paris, Quito, and Hong Kong, Chile's manifestations of discontent were striking because it included something abstract for the average citizen: the demand for a new constitution.[8] This peculiar aspect of the country's uprising led then President, Piñera, to declare with exasperation that, "In civilized countries, discussions are held within the framework of the Constitution; in unstable countries, the Constitution is permanently discussed."[9]

Contrasting with Piñera's remarks, for many constitutional scholars the demand for a new charter was expected, as many of them have been advocating it for over a decade, arguing that the 1980 Constitution not only exhibits serious legitimacy problems (having been imposed by the only criminal dictatorship in the country's history) but, especially, because the constitutional order had proven to be an obstacle to introduce significant

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"With their effort and one opportunity": Alleviating extreme poverty in Chile, in DEVELOPMENT RESEARCH GROUP WORKING PAPER (2006) for an analysis of Chile's successful poverty reduction policies in the post-authoritarian period.

[6] For an analysis of the persistence of income inequality in Chile, *see* Ashley Davis-Hamel, *Successful Neoliberalism? State Policy, Poverty, and Income Inequality in Chile*, 87 INT'L SOC. SCI. REV. 79 (2012); Osvaldo Larrañaga & Juan Pablo Valenzuela, *Estabilidad en la desigualdad. Chile 1990–2003 [Stability in inequality Chile 1990-2003]*, 38 *ESTUDIOS DE ECONOMIA* 295 (2011) (Chile).

[7] *See* Mario Garcés, *October 2019: Social Uprising in Neoliberal Chile*, 28 J. LATIN AM. CULTURAL STUD. 483 (2019).

[8] *See* Rogelio Luque-Lora, *Chile's Social Uprising and Constituent Process: Toward a More-than-human Understanding*, 13 INTERFACE: J. FOR & ABOUT SOC. MOVEMENTS 323 (2021).

[9] Piñera's statement was issued on November 7, 2019, to a television news program. *See* Nuevo Poder, *Piñera: Eventual cambio constitucional debe hacerse dentro de institucionalidad* [*Piñera: "Eventual constitutional change must be made within institutional framework"*], NUEVOPODER.CL (Nov. 5, 2019) (Chile) (author's translation), https://www.nuevopoder.cl/pinera-eventual-cambio-constitucional-debe-hacerse-dentro-de-institucionalidad/.

changes to Chile's radical variant of neoliberal economics.[10] While this is not the place to engage in a detailed analysis of the way in which the 1980 charter constitutionalizes key aspects of the neoliberal model imposed by the military regime, the following examples can illustrate this point: a) Article 19, no. 18, which constitutionalizes the private provision of social security;[11] b) Article 19, no. 9, which does the same in the domain of health care;[12] and c) Article 19, no. 21, which prohibits the creation of state-owned companies unless approved by legislation passed with a super-majoritarian quorum.[13]

In addition to the clauses of the charter that constitutionalize parts of the neoliberal model, the powerful Constitutional Tribunal established by the former has played an important role in preventing the dismantling of

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[10] For other academics that have advocated for a new Constitution since 2009, *see* Javier Couso & Carolina Tohá, *El Sistema Político Chileno Y Sus Desafíos: Un Nuevo Arreglo Constitucional Para El Bicentenario* [*The Chilean Political System and Its Challenges: A New Constitutional Arrangement for the Bicentennial*], *in* EL CHILE QUE VIENE DE DÓNDE VENIMOS, DÓNDE ESTAMOS Y A DÓNDE VAMOS [THE CHILE THAT COMES FROM WHERE WE COME FROM, WHERE WE ARE AND WHERE WE ARE HEADED] 167 (Ediciones Universidad Diego Portales, 2009); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA [THE CHEATING CONSTITUTION] (Lom Ediciones 2013); FERNANDO ATRIA ET AL., EL OTRO MODELO DEL ORDEN NEOLIBERAL AL RÉGIMEN DE LO PÚBLICO [THE OTHER MODEL OF THE NEOLIBERAL ORDER TO THE PUBLIC REGIME] (Random House Mondadori S.A. 2013); Alberto Coddou Mc Manus & Pablo Contreras, *Nueva Constitución y Asamblea Constituyente: La Experiencia De "Marca Tu Voto"* [*New Constitution and Constituent Assembly: The "Mark Your Vote" Experience*] 1 ANUARIO DE DERECHO PÚBLICO UDP 121, 130 (2014); Huneeus C (2014), *La democracia semisoberana: Chile después de Pinochet* (Taurus); Claudia Heiss, *Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism,* 24 CONSTELLATIONS 470 (2017).

[11] Constitución Política de la República de Chile art. 19, no. 18 ("The right to social security . . . . The action of the State shall be aimed at guaranteeing the access of all inhabitants to the enjoyment of uniform basic benefits, *whether granted through public or private institutions* . . . .").

[12] *Id.* at art. 19, no. 9 ("The right to health protection. The State protects the free and equal access to actions for the promotion, protection and recovery of health and rehabilitation of the individual. It shall also be responsible for the coordination and control of health-related actions. It is the State's preferential duty to guarantee the execution of health actions, whether they are provided through public or private institutions, in the form and conditions determined by law, which may establish compulsory contributions. *Each person shall have the right to choose the health system they wish to benefit from, whether it is state or private*.").

[13] *Id*. at art. 19, no. 21 ("The right to develop any economic activity that is not contrary to morality, public order or national security, respecting the legal norms that regulate it. *The State and its agencies may engage in business activities or participate in them only if authorized by a law with a qualified quorum.* In such case, these activities shall be subject to the ordinary legislation applicable to private individuals, without prejudice to the exceptions established by law for justified reasons, which must also be of qualified quorum.").

some elements of the economic model. This has been especially apparent during the second administration of Michele Bachelet (2014-2018), by declaring the unconstitutionality of a number of progressive bills approved by Congress.[14] Recourse of conservative forces to the 1980 Constitution and the Constitutional Tribunal to block social and economic change was apparent when just six weeks before the social uprising, President Piñera's government announced that it would ask the Tribunal to declare unconstitutional seventeen bills being discussed in Congress at the time (including a popular one reducing the working week from 45 to 40 hours).[15]

The link between the social and economic demands at the root of the 2019 social uprising and the 1980 Constitution was not a coincidence. Four decades previously, Pinochet's main legal adviser, Jaime Guzmán, recognized in a piece published shortly before the imposition of the said charter that its very purpose was to serve as a shield against the dismantling of the neoliberal economic model once democracy eventually returned. In Guzmán's own words, the actual point of the Constitution of 1980 was:

> [T]o constrain our adversaries . . . . to follow an action not so different from the one that oneself would yearn for, because -if you excuse the metaphor - the range of alternatives that the Constitution imposes is small enough to make the opposite extremely difficult.[16]

It is hard to find a more candid acknowledgement of the main goal of the Constitution imposed by Chile's dictatorship. Thus, instead of representing a relatively neutral framework for democratic politics to unfold, the very purpose of the 1980 charter was to serve as a constraining devise on democratic politics.

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[14] An example of this type conservative jurisprudence is, decision no. 4, 317 (declaring unconstitutional a provision of a bill approved in 2018, which sought to prohibit the controllers of private universities from pursuing profit-making purposes). Javier Couso, *Chile's Constituent Process: The End of Pinochet's Neoliberal Legality?,* Montaigne Centre Blog (Feb. 24, 2021), https://blog.montaignecentre.com/en/chiles-constituent-process-the-end-of-pinochets-neolibiral-legality/.

[15] Diego Higueras, *Gobierno confirma que estudia acudir al TC por 17 proyectos que se tramitan en el Congreso [The Government confirms that it is studying going to the TC for 17 projects that are being processed in Congress],* ATACAMA NOTICIAS (Sept. 10, 2019) (Chile) (author's translation), https://www.atacamanoticias.cl/2019/09/10/gobierno-confirma-que-estudia-acudir-al-tc-por-17-proyectos-que-se-tramitan-en-el-congreso-2/.

[16] Jaime Guzman, *El Camino Politico* [*The Political Path*]*,* 1 REVISTA REALIDAD 13, 19 (1979) (Chile) (author's translation).

II. NEGOTIATING A CONSTITUENT PROCESS TO INSTITUTIONALLY-CHANNEL A SOCIAL UPRISING

In the weeks following the uprising, while the government agonized over how to deal with the unprecedented demonstrations, the notion to engage in a constitution making process as the only way out of a crisis that was endangering Chile's democracy, started to gain traction.[17] With this option on the table, conservative politicians and intellectuals raised several objections to the idea that a new constitution was the best way to address this crisis. Among the arguments delivered by these groups against channeling the social uprising though a constituent process, the most important were[18]:

1. That a change of the constitutional order would distract from the "real" social demands of the people.
2. That the social upheaval being experienced was not the right context to embark on a constituent process (an argument that contrasts sharply with the one made by conservative groups when President Bachelet proposed a new Constitution in 2014, which provided that there was no need to change the fundamental charter, because there was no crisis in the country).
3. That, because the Piñera administration had been elected only two years before with a program that did not include a new Constitution, now requiring it to embark in that direction was anti-democratic. This argument omitted the fact that, in those same elections, voters supported a majority of representatives to Congress who advocated a new fundamental charter (as well as the fact that, when Bachelet won the presidential elections in 2013 with a program that prominently included the introduction of a new Constitution, which the right-wing minority in Congress blocked, since the quorum necessary to engage in a constituent process required the support of at least part of the conservative parliamentarians).
4. That the 1980 Constitution had been amended so often in the post-authoritarian period, that it was effectively a very different charter from the one introduced by the dictatorship (to this, supporters of a new charter replied that, while it is true that the 1980 Constitution has been amended many times, each and every one of them

[17] *See* Gonzalo Blumel, *La vuelta larga: Crónica personal de la Crisis de Octubre* (Ediciones UC, 2023).

[18] Note: This is a summary that the author made of well-known argument in Chile.

> represented a gracious concession by the political "heirs" of the military regime, the UDI and Renovación Nacional parties), that, at any rate, the amendments were always careful to preserve the key clauses that ensure that the economic model would not be significantly altered by legislation.

Notwithstanding conservative resistance to a constituent process, three weeks after the start of the social uprising, President Piñera eventually called on all political parties to negotiate a process to introduce a new constitution.[19] The negotiation process took place on November 14, and 15, 2019, and included a wide range of political parties (from the conservative UDI to segments of the leftist Frente Amplio, as well as the center-left parties that have been part of the former "Concertación" coalition), and concluded with a declaration that formally announced the start of a constituent process.[20] Immediately after the negotiations succeeded, a committee with representatives from all the parties that had ratified the agreement was established. This group worked for a month on the technical aspects of the agreed upon constituent process (many of which required constitutional amendments to the existing charter) and then presented its report to Congress, which passed the necessary amendments in December.[21] The agreement on a new constitution (only the far right Republicanos and the Communist Party abstained from signing the agreement) contributed to a reduction in turmoil brought by social uprising, providing an institutional way out to the country's worst social and political crisis in decades.

III. THE MAIN FEATURES OF CHILE'S FIRST CONSTITUENT PROCESS

The constitutional amendment passed in December 2019, and introduced a new section to Chapter XV of the Constitution called "*On the procedure to elaborate a New Political Constitution of the Republic,*"[22] materializing the political agreement reached a month earlier. The itinerary of this first constituent process contemplated an enabling—or "*entry*"—plebiscite (originally scheduled to take place in April 2020, but postponed to

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[19] *See* Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile's Constitution-making Process,* 19 INT'L J. CONST. L. 149, 150-51 (2021).

[20] *See Acuerdo Por la Paz Social y la Nueva Constitucion* [*Agreement for Social Peace and the New Const.*], Nov. 15, 2019, (Chile), https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf.

[21] *See* Maria Cristina Escuerdo, *Making a Constituent Assembly Possible in Chile: The Shifting Costs of Opposing Change*, 41 BULL. LATIN AM. RSCH. 641, 641-56 (2021).

[22] *Constitución Política de la República de Chile, Constitución* 1980 [CONSTITUTION] Chapter XV, arts. 127-29 (Chile).

October of that year due to the COVID-19 pandemic) with the purpose of asking Chileans whether they wanted a new constitution, as well as the type of body that would oversee drafting a new text. The overseeing options consisted of a "Constitutional Convention", composed entirely by popularly elected members, or a "Mixed Convention," integrated in equal parts by popularly elected members and by members designated by Congress. If the entry referendum resulted in the approval of the idea of having a new charter, the original itinerary included the election of the constituent body in October 2020 (but this was postponed to May 2021, due to the pandemic). The fully elected Convention was to have 155 members, while the mixed Convention was to be composed of 172 members, 86 specially elected citizens and 86 members of Congress. The constituent body would have nine months to draft a text, with the possibility of extending this deadline for a maximum of three months. Finally, the process contemplated a ratifying (or "*exit*") plebiscite, to be held in 2022, to approve or reject the proposed draft. One peculiar aspect of the rules governing this first constituent process was that, while the entry referendum and the election of the members of the constitution making body was to be done with the—then in place—voluntary vote, the exit referendum required compulsory suffrage (something that probed to be politically relevant, as we shall see below).

Aside from the rules regarding the body in charge of drafting the new charter, this first constituent process had many features that are worth mentioning. First, the process was highly regulated in terms of its procedure, but fairly free in terms of the Constitution's content.[23] Although, the rules governing the process required each clause of the draft to be adopted by two-thirds of the actual members of the constituent body, there were very few substantive constraints on the norms that the Constitutional Convention could adopt. Such restraints include respecting the democratic and republican nature of the Chilean state; respecting International Law including the large number of human rights treaties and conventions that the country has ratified; and respecting final judicial decisions. A second important feature of the process was that the body in charge of elaborating the new charter was to be elected with a gender-parity rule, ensuring that 50% of the constitution making body was integrated by women–a feature without precedent in world constitutionalism. A third key aspect was the prohibition imposed to the body in charge of drafting the new constitution

[23] *See* Javier Couso, *Chile's 'Procedurally Regulated' Constitution-Making Process*, 13 HAGUE J. ON RULE L. 235, 235-51 (2021).

of interfering in any way with the "constituted" (i.e., existing) powers.[24] Additionally, the availability of a conflict-resolution mechanism allowing at least a quarter the Convention's members to ask a panel of five Supreme Court justices to decide whether or not the majority was violating the rules governing the process. Further, it is important to mention that the design contemplated 17 reserved seats, or 12% of the total of the members of the Convention, to Chile's indigenous peoples, a landmark rule in Chile because the current constitution does not even mention the existence of indigenous peoples.

I have described in some detail the itinerary and the rules of Chile's first constituent process given its unprecedented nature in the political and constitutional history of the country. Indeed, in over two hundred years as an independent nation, Chile has never had a fully democratic process of drafting its fundamental charter.[25] In fact, by contrast, the three constitutions that the country has had since 1833—the Constitution of 1833 that came after the civil war and the 1925 and 1980 charters that followed military coups—were drafted by elite individuals that did not represent the bulk of the citizenry. Despite the safeguards and limits exhibited by Chile's first constituent process, apocalyptic voices emerged from the conservative field and announced the final decadence of the country if the "Approve" option prevailed in the referendum. From the other end of the political spectrum, radical leftists complained that the constituent process imposed too many limits to the sovereign power of the Convention, in particular, the quorum of two thirds of the constituent body members to include elements in the new charter.[26]

IV. A PARTISAN CONSTITUTIONAL CONVENTION

After the delays caused by the COVID-19 pandemic, on October 25, 2020, the entry referendum finally took place. Amidst the fear of contagion

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[24] The goal of this rule was to prevent the distorting practice of certain comparative experiences in which, once a constituent assembly or convention is installed, it declares the cessation of the functions of other organs or authorities of the State, such as the legislative or judicial power. In the same vein, it should be noted that the Convention (or its members) will be prohibited from assuming any other functions other than the drafting of a new constitutional text, and that it will be dissolved as of right once the proposed text has been drafted and approved. *Id.* at 248.

[25] *See* PABLO RUIZ-TAGLE, FIVE REPUBLICS AND ONE TRADITION: A HISTORY OF CONSTITUTIONALISM IN CHILE 1810-2020 (Mark Fathi Massoud et al. eds., Ana Luisa Goldsmith trans., 2021).

[26] *See* Camila Vergara, *The Oligarchic Takeover of the Constituent Process*, 54 N. AM. CONG. ON LATIN AM. – REP. ON AM.'S 453, 453-57 (2022).

and the restriction imposed by the government authorities, Chileans overwhelmingly approved the option of having a new constitution. Almost 80 % of those who voted chose this option, while only 18% voted against a new charter.[27] A similar percentage opted for an entirely elected body to do the drafting. The results were not surprising, given that only the far right *Republicanos* and the UDI Party called to reject a new constitution, while the remaining left, center-left, and a sizable portion of the right, supported the "Approve" option.[28] At any rate, the night of the entry referendum, all the political actors started to mobilize for the election of the Convention members, which was set to happen in May 2021. In the case of the right, conscious of the hostile political environment that they faced since the October 2019 uprising, their key goal was to get at least one third of the Convention to be able to exercise a veto power on each of the clauses of the new constitution.[29]

After a campaign interrupted by constant lockdowns, on May 15th and 16th of 2021, Chileans elected 155 members to the Constitutional Convention. The results shocked both political parties and analysts, not just because the right failed to get at least one third of the seats of the Convention, but also due to the stunning results obtained by independents, who had been allowed to run in national lists and pacts for the first time in Chile's electoral history.[30] Correspondingly, 105 out of the 155 elected members were independents.[31] Aside from the surprising dominance of

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[27] *See* PAMELA FIGUEROA, CONST. REFERENDUM DURING THE COVID-19 PANDEMIC: THE CASE OF CHILE 14 (2021).

[28] *See* Paula Molina, *Plebiscito histórico en Chile: apruebo o rechazo, las opciones que tenían los chilenos en el referendo de cambio de Constitución* [*Historic plebiscite in Chile: approve or reject, the options that Chileans had in the referendum to change the Const*.], BBC NEWS MUNDO (Oct. 22, 2020), https://www.bbc.com/mundo/noticias-america-latina-54613149.

[29] *See* Alejandra Jara, *Delgado y escenario de que Chile Vamos supere el tercio en la Convención Constitucional: "Estamos convencidos de que el trabajo de la coalición va a lograr ese objectivo"* [*Delgado and scenario that Chile Vamos surpasses the third in the Const. Convention: "We are convinced that the work of the coalition will achieve that objective"*], LATERCERA (May 15, 2021, 8:04 AM), https://www.latercera.com/politica/noticia/delgado-sobre-escenario-de-que-chile-vamos-supere-un-tercio-de-la-convencion-constitucional-estamos-convencidos-de-que-el-trabajo-de-la-coalicion-va-a-lograr-ese-objetivo/OCAA3UCSDFEF5AOPBUFAZYEGAU/.

[30] *See* Claudia Heiss, *Latin America Erupts: Re-Founding Chile*, 32 J. DEMOCRACY 33, 43 (2021).

[31] This feature of the electoral outcome would prove to be decisive in the failure of this first serious attempt to get a new constitution. *See id.*; Daniel Zovatto, Maria Jaraquemada, *Analysis of the elections in Chile*, INT'L IDEA, (May 25, 2021), https://www.idea.int/news/analysis-elections-chile.

independents, the second most consequential feature of the May 15th and 16th election was how successful the left and left-leaning candidates did, by getting around three-fourths of the seats of the Convention. Despite the fact that the results represented a significant left-turn in a country that (only a couple of years before) had elected a center-right President, the left had almost complete control of the constitution making body. Having said this, the fact that the left was highly fragmented in different groups represented a formidable challenge to agree on a draft. One way to look at the results of the election of the constitution making body of Chile's first constituent process, is that it was the electoral expression of the social uprising, and that it marked an unprecedented presence of voices that had traditionally been marginalized from the governmental structures.[32] This is a reasonable reading of it, but this needs to be combined with the realization that the election of May 2021 also delivered a highly fragmented body with an unprecedented dominance of independents who were heavily divided by different single-issues platforms. This highly unusual electoral outcome created different interpretations of the new constituent process. Thus, while some right-wing leaders declared that the radical left was the dominant group, more objective analysts noted that within the Convention there was not a cohesive left, but that there were many "lefts." Further, these non-cohesive lefts had very different approximations to both the procedural rules governing the constituent process and the content they thought the new constitution ought to have.[33] Thus, for example, while the truly radical left within the Convention (the so-called "Lista del Pueblo" and the Communist Party) called a few weeks after the election to disregard the limits imposed on the constitution making body, they argued that the Convention should have the "*full autonomous power*" that comes with the exercise of "*the original constituent power*."[34] The moderate left supported the meticulous

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[32] *See* John Bartlett, *'A new Chile': political elite rejected in vote for constitutional assembly*, THE GUARDIAN, (May 18, 2021, 4:00 PM), https://www.theguardian.com/world/2021/may/18/a-new-chile-political-elite-rejected-in-vote-for-constitutional-assembly.

[33] *See* MARÍA CRISTINA ESCUDERO & ALEJANDRO OLIVARES L., THE SOCIAL OUTBURST AND POLITICAL REPRESENTATION IN CHILE 178-79 (Bernardo Navarrete & Victor Tricot eds., 2021).

[34] The statement ended by saying, "We call to make effective the popular sovereignty of the constituent, expressed both in the rules of procedure and in the regulations to be given, without subordinating ourselves to an Agreement for Peace that the peoples never subscribed." *See* Francisca Mayorga, 34 constituyentes plantean 6 "garantías democráticas" para la Convención y que ésta no se debe subordinar a reglas del Acuerdo del 15/N [*34 constituents propose 6 "democratic guarantees" for the Convention and that it should not be subordinated to the rules of the 15/N Agreement*], LATERCERA, (June 8, 2021 7:02 PM) (Chile) (author's translation), https://www.latercera.com/politica/noticia/34-constituyentes-plantean-6-garantias-democraticas-

respect for the rules set by Congress for the constituent process.[35] While the differences within these two lefts would continue for the entire operation of the Convention, most of the time the moderate left prevailed. For example, it managed to get the rules of procedure to reproduce the constitutional requirement that each clause should be approved by two thirds of the members of the Convention, although the Communist Party and other radical left groups tried to disregard that rule until the first clause was voted in the Plenary.[36]

Aside from the differences between the two lefts that dominated the Convention, when combined, they had over two thirds of the seats thereby representing an electoral anomaly in Chile. In fact, the May 2021 election delivered a radical outcome for Chile's historical standards, and this became self-evident when, only a few months later, a legislative election produced a very different outcome than the election of convention members.[37] Indeed, the November 2021 elections gave the right significantly more representation (over 33%) than they did in the May 2021 election (less than 24%), while giving the centrist parties their usual share of the vote (around a third of the total), instead of the meager 15% they had in the election for the Convention. These results, which should have been a warning sign to the left and center-left who dominated the Convention, were not taken seriously, except by President elect Boric, who visited the Convention in December and gave a speech specifically directed at the hegemonic leftist forces. He stated, "I do not expect in any case a partisan Convention, at the

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para-la-convencion-y-que-esta-no-se-debe-subordinar-a-reglas-del-acuerdo-del-15n/KYS4C4K7BJABHA3SEMIHOD4ZZY/.

[35] The defense within the moderate left of the two thirds rule to approve each clause of the text to be drafted by the Convention (which was established by the constitutional amendment enabling the first constituent process) was done by one of the most important leaders of this group, conventional Fernando Atria. *See* Federico Joannon, *Fernando Atria, constitueyente: "La regla de los dos tercios crea condiciones para que por primera vez en 30 anos haya un genuino gran acuerdo"* [*Fernando Atria, constituent: "The two-thirds rule creates conditions so that for the first time in 30 years there is a genuine great agreement"*], ELM-STRADOR, (May 26, 2021) (Chile) (author's translation), https://www.elmostrador.cl/destacado/2021/05/26/fernando-atria-constituyente-la-regla-de-los-dos-tercios-crea-condiciones-para-que-por-primera-vez-en-30-anos-haya-un-genuino-gran-acuerdo/.

[36] *See* Paul Follert, *Las otras normas que impactan en el cuórum de 2/3 aprobado por la Convención* [*The other norms that impact the ⅔ quorum approved by the Convention*], PAUTA, (Sept. 29, 2021) (Chile), https://www.pauta.cl/actualidad/2021/09/29/donde-impacta-quorum-dos-tercios-reglamento-convencion-constitucional.html.

[37] *See* OLIVIER DABÈNE, STÉPHANIE ALENDA & JAVIERA ARCE-RIFFO, LATIN AMERICA'S PENDULAR POLITICS, ELECTORAL CYCLES AND ALTERNATIONS 49-54 (Olivier Dabène ed., 2023).

service of our government, because it is not what corresponds. The Convention goes beyond the conjuncture."[38]

Regrettably, Boric's discourse went largely unheard, not merely among the most radical groups of the independent left and the Communist Party, but also by many associates of the moderate left, who thought the congressional election in November 2021 was exceptional (and not that of the members of the Convention). The reason behind the resistance of even close allies of the President to accept the possibility that the electoral results of May 2021 could have been the anomalous one, and therefore Boric's call for a non-partisan new constitution was the prudent thing to do, rested in the conviction of the former that Chile had initiated on 2019 a new historic cycle that demanded a charter committed to social and political transformation, instead of a non-partisan compromise. This interpretation is apparent in the following statement issued by the first Vice-president of the Constitutional Convention, Jaime Bassa:

> I believe that we are at a very important historical moment of a change of cycle. That neoliberal cycle that began to be forged in the 50s and 60s with those agreements between the Chicago School and the Business School of the Catholic University, and the model that was installed after the coup d'état and that unfolded its effects during the 80s and the last thirty years until the revolt. I believe that the milestone of October 2019 is preceded by a cycle of previous important protests: the feminist May 2018, the student revolt of 2011, the pingüinazo of 2006, the environmental demands of 2010, among others. But the revolt marks a break of a form of social coexistence characterized by a certain mode of accumulation of wealth, of power, of capital, which in turn is the reflection of a form of accumulation of poverty, of discomfort and dispossession. *We are in a historical moment of change of cycle, in which that period marked by the radical overvaluation of the private begins to be progressively replaced by a vindication of the common, of the common goods, of nature, of the permanent institutions of the republic, such as the state universities, which put at the service of society, of the people, different forms of academic, ancestral,*

[38] *See* Carlos Reyes P. and Monica Garrido, *Gabriel Boric tras reunión con Loncon: dice que no espera una "Convención partisana al servicio de nuestro gobierno" y que respetará lo que el órgano decida* [*Gabriel Boric after meeting with Loncon: he says that he does not expect a "partisan Convention at the service of our gov't" and that he will respect what the body decides*], LATERCERA, (Dec. 21, 2021 1:09 PM) (Chile) (author's translation), https://www.latercera.com/politica/noticia/gabriel-boric-tras-reunion-con-loncon-dice-que-no-espera-una-convencion-partisana-al-servicio-de-nuestro-gobierno-y-que-respetara-lo-que-el-organo-decida/DXHUI3S23NCZJMHB6NJ3HACP5U/.

> *popular knowledge, and different forms of political and social relations.*[39]

This statement by Frente Amplio, one of the most important leaders at the Convention, makes clear the enterprise in which he thought they were embarked was of historical transcendence, and that drafting a text after a compromise with the diminished right-wing was out of question.

V. THE POLITICAL DYNAMICS OF THE FIRST CONSTITUENT PROCESS

As scheduled in the constituent process itinerary, on July 4, 2021, the Convention held its inauguration with a chaotic ceremony, announcing some of the problems that would de-legitimize it before large portions of Chile's electorate. What saved the day was electing Elisa Loncón, a woman belonging to the reserved seats for indigenous peoples, as President of the Convention. Loncón became the highest ranking public official belonging to an indigenous group in the history of the country.[40]

Soon after the inauguration of the Convention, its members started to work on drafting the rules of procedure, a task that would prove to be much more difficult than anticipated. The drafting process took almost four months out of the maximum, which is twelve, that the Convention was allocated to complete its work. Given the overwhelming dominance of the radical and center-left groups in the Convention, in the days following the Convention's inauguration, some right-wing conventionalists started to immediately work to "reject" the option in the ratifying plebiscite. Given that the right lacked a veto power on anything approved by the radical and moderate left, the most conservative members of the right began to prepare arguments to persuade voters in the exit referendum. This strategy, which seemed far-fetched at the time given the large electoral defeat experienced by the right, proved to be successful in the end, in no small part due to a series of attitudes exhibited by the most radical groups of independents, who not only displayed extravagant behaviors that would eventually cause a

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[39] Jennifer Abate, *Elisa Loncon y Jaime Bassa: Una diversidad que está cambiando la historia* [*Elisa Loncon and Jaime Bassa: A diversity that is changing history*], PALABRA PUBLICA, (Sept. 9, 2021) (Chile) (author's translation), https://palabrapublica.uchile.cl/elisa-loncon-y-jaime-bassa-una-diversidad-que-esta-cambiando-la-historia/.

[40] *See* Paula Huenchumil Jerez, *Cuerpos racializados en espacios de poder: mujeres mapuche en la Convención Constitucional y su impacto mediático* [*Racialized bodies in spaces of power: Mapuche women at the Convention Const. and its media impacts*], 31 REVISTA TEMAS SOCIOLOGICOS, 79, 79-106 (2022) (Chile).

steep fall in the reputation of the Convention as a whole, but also forced the moderate left to accept clauses that were far too radical for the Chilean electorate as a whole. Aside from the latter, many Chileans were shocked by the partisan attitude displayed by some members of the dominant groups in the Convention. For this reason, Chilean's regarded this as antithetical to the spirit of dialogue and unity that, *they thought*, ought to prevail in a constituent body. One example of such attitude happened just days after the election of the members of the Convention, when one of the most voted members of the Convention, Daniel Stingo, stated in national television that:

> Here the right wing did not win . . . it now has a minority. We are going to advance the big issues because we represent the people. Those of us who won represent the people . . . we are going to make the big agreements and . . . the others will have to join in. Those of us who are not [right-wing], to make it clear, so that we do not start going around in circles.[41]

Conventional Stingo was not a member of the radical left, but an independent conventional close to the Frente Amplio list, where President Boric's coalition made things worse. Even if a relatively moderate member of the dominant groups of the Convention exhibits such partisan attitude, the right-wing members of the Convention had reason to believe that there would be little space to engage in a constructive negotiation with the left.

A couple of months after the Convention started, a scandal shocked the country in ways that would prove to be catastrophic to this first constituent process. A journalistic investigation revealed that one of the most charismatic members of the radical independent group, Lista del Pueblo, Rodrigo Rojas Vade, had lied about being a cancer patient–the very condition he had based his campaign upon. The campaign focused on the need to ensure a robust right to health in the new constitution, so people like him would get affordable treatment for his conditions.[42] When Rojas Vade confessed that he had lied to voters, and that he had never had such condition, the credibility of the entire Convention, which until then had

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[41] *Daniel Stingo, el constituyente más votado: "Nosotros vamos a poner los grandes temas (…) Aquí no ganó la derecha"* [*Daniel Stingo, the most voted constituent: "We are going to raise the big issues (…) The right did not win here"*], ELM-STRADOR, (May 24, 2021) (Chile) (author's translation), https://www.elmostrador.cl/dia/2021/05/24/daniel-stingo-el-constituyente-mas-votado-nosotros-vamos-a-poner-los-grandes-temas-aqui-no-gano-la-derecha/.

[42] *See Rodrigo Rojas Vade: el escándalo en Chile después de que el constituyente reconociera que mintió sobre su diagnóstico de cáncer* [*Rodrigo Rojas Vade: the scandal in Chile after the constituent acknowledged that he lied about his cancer diagnosis*], BBC NEWS MUNDO, (Sept. 6, 2021), https://www.bbc.com/mundo/noticias-america-latina-58464987.

been very high in the eyes of regular Chileans, began eroding.[43] Given that the very support for independent candidates came from distrust of traditional parties, the fact that a posterchild of party independence would have been involved in such an elaborate scheme to deceive voters into supporting him let down millions of Chileans who started to distance themselves from the Convention and the constituent process as a whole.

After the "Rojas Vade" scandal, the focus turned to the congressional and presidential elections of November 2021. As we have anticipated above, the outcome of those elections was very different from that of the election of conventionals (that had taken place only a few months earlier, in May 2021), with the right-wing and centrists parties getting the electoral support that they had traditionally gotten (around 36% each of them), while the left received around 33% of support (or half as much as in the Constitutional Convention election).[44] More shockingly, the far-right candidate (José Antonio Kast) won the first round of the presidential election, forcing left-wing candidate, Gabriel Boric, to moderate its discourse in order to prevail in the second round.[45]

The results of the November 2021 elections convinced the bulk of the right-wing members of the Convention that the strategy for preparing the ground to call and reject the text was the best one. Although conventional leftists realized that a negotiation with the right was needed, they couldn't convince the radical left. It was in this context that, by early 2022, the Convention started to draft the text of the new constitution.[46] Thus, in mid-February, the Plenary approved the first clause of the text—which encouraged the left, who managed to organized a very fragmented group of left-wing party members and independents to get the required two-thirds of the Convention to vote in the same direction.[47] The right saw this outcome with concern, because it meant that the left could go ahead and write a text

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[43] At this point, it is worth noting that, even after the Rojas vade affair, the Convention continued to be better evaluated than other political institutions in the country, a tribute to the hope that people still place in it, in the midst of a generalized crisis of the established powers. *See* Aldo Mascareño and Pablo A. Henríquez, *No eres tu, so yo. La montana rusa convencional* [*It's not you, it's Me. The conventional roller coaster*], (Feb. 18, 2022) (Chile) (author's translation), https://c22cepchile.cl/publicaciones/no-eres-tu-soy-yo-la-montana-rusa-convencional/.

[44] *See* Guillermo Larrain et. al., *How not to write a constitution: lessons from Chile*, 196 PUBLIC CHOICE 233, 238 (2023), https://link.springer.com/content/pdf/10.1007/s11127-023-01046-z.pdf.

[45] *Id.*

[46] *Id.*

[47] *Id.*

of its liking without a single vote of theirs.[48] Soon after, the mainstream media started to closely cover some very radical proposals submitted at the different committees of the Convention (such as the emblematic proposal to install in Chile a political system inspired by the Soviet Union, or the nationalization of the entire privately owned copper mining industry). This coverage would prove to be crucial to scare away moderate voters, even though most of those radical clauses were never approved.[49]

The crucial point for Chile's first constituent process would come in March 2022, when the Plenary adopted what appeared to be (in the eyes of many Chileans) an excessively "indigenist" constitutional proposal. In this context, the initial empathy generated by a Mapuche woman leading such a relevant entity, gradually evolved into a dissatisfaction with what appeared in the eyes of many voters as a proposal that was too focused on the rights of the indigenous peoples. In fact, expressions such as the "Plurinational State" alienated many voters, because it was perceived as a threat to the integrity and unity of the State and to national identity.[50] This concern had no basis in constitutional terms, but played a destabilizing role at the symbolic level, since it led many people to consider that plurinationality implied the disintegration of the Chilean State.[51] Something similar happened with a proposal of the Political System Committee that included a sort of "triumvirate" combining a President of the Republic accompanied by a Vice-President and a Cabinet Minister (which some expected to evolve into a sort of de facto Prime Minister). In a country with a deep-rooted presidential tradition, the proposal generated high levels of perplexity and alienation that—even though eventually discarded—contributed to give plausibility to the invective of the opponents of the process to the effect that it was a "delirious" proposal (something which further discredited the Convention in the eyes of public opinion).[52] A third controversial proposal—this time actually adopted by the Plenary— was a clause constitutionalizing the right to abortion, providing different Christian

[48] *Id.*

[49] *Id.* at 243.

[50] *See Id*. at 239.

[51] The fact that the group of experts sent by the Venice Commission found nothing anomalous in adopting plurinationality, or in establishing a specialized justice instance to resolve some controversies generated within indigenous communities (having the Supreme Court as the final reviewing instance, as is the case of what was finally approved by the Convention) did not change the perception that the Convention was being too "indigenist." Eur. Consult. Ass., *Chile-Opinion on the Drafting and Adoption of a new Constitution,* 130th Sess., Doc. No. 4 (2022), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)004-e.

[52] *See* Larrain et. al., *supra* note 44, at 240.

churches and movements with a single crucial motive to reject the entire draft of the Constitution.

In April 2022, a few weeks after the abovementioned proposals became the focus of a national debate, the opinion polls showed— for the first time—that the "Reject" option was ahead of the "approve" one.[53] Immediately after these polls were published, and while the radical left groups of the Convention tried to raise suspicions regarding the reliability of those polls (or to attribute the unexpected results to communication problems), President Boric threw out these attempts to deny reality, pointing out that the Convention should seek:

> [T]he greatest transversality and breadth possible, to build a Constitution that will be a meeting point . . . for Chilean men and women. And that implies that we have to give ourselves space to reflect, to think so that the agreements are broader than what they have been so far *in order to modify whatever needs to be modified* . . . .[54]

Thus, with only three months left for the Convention to conclude its work, for the first time the specter of a failed constituent process appeared in the scenario. Contributing to the climate of confusion, actors who—until a few months before— were favorably disposed to the work of the Convention began to distance themselves from it. This was the case of "Amarillos" movement (which gathered former center-left politicians and intellectuals) that in June of 2022, made a public call to reject the proposal elaborated by the Constitutional Convention antithetical on the grounds that, "The basic structure of the draft seems to us to be out of touch with reality."[55]

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[53] *See* Meritxell Freixas, *Aumenta el rechazo a la nueva Constitución de Chile, según los sondeos* [*Rejection of Chile's new Constitution is on the Rise, polls show*], ELDIARIO.ES (Apr. 29, 2022), https://www.eldiario.es/internacional/aumenta-rechazo-nueva-constitucion-chile-sondeos_1_8910998.html.

[54] *Boric pide "modificar" lo que sea necesario para lograr aprobar Carta Magna* [*Boric Asks to modify whatever is necessary to approve the Magna Carta*], SWISSINFO.CH (Apr. 5, 2022) (Chile) (author's translation), https://www.swissinfo.ch/spa/chile-constituci%C3%B3n_boric-pide--modificar--lo-que-sea-necesario-para-lograr-aprobar-carta-magna/47493952.

[55] In the letter, this group of former center-left politicians and intellectuals declared that: "We voted with hope in the approval and we hoped that the Constitutional Convention would propose to the country a constitution that would gather the demands (...) a constitution that would unite us and that would be profoundly democratic, *but we have read the constitutional text very carefully, we have been attentive to the corrections and we have not found any fundamental transformations. The basic structure of the draft seems to us to be out of touch with reality*."

At this juncture, the question rose as to how to confront the risk that the constituent process might fail, after three years of work.[56] The first option was that the groups dominating the Convention echoed the call of President Boric and moderated the tenor of the proposals they were elaborating, in order to allow a large electorate group to approve the text of the new constitution in the exit referendum.[57] In that scenario, the hegemonic forces of the Convention would have to sacrifice some of their aspirations, with the aim of ensuring that important achievements would materialize in a new charter, as a result. As an alternative scenario, only moderate leftists would follow the presidential recommendation, but radical groups would bet that, even with an extreme text, they could prevail in the ratification plebiscite.[58] The fact that the moderate left failed to persuade the radical left on the risks of failing to prevail in the exit referendum sealed the fate of the process, as we shall see now.

In the final weeks of the campaign for the exit referendum, Chile exhibited a highly polarized environment, coupled with numerous fake news reports regarding the actual content of the draft. In this context, a significant portion of the center-left who supported the "Reject" option seemed to have been decisive for the final outcome, and in what represented a savvy strategy deployed by the Chilean right, their most well-known leaders left the public arena in the last weeks of the campaign, leaving traditional centrist politicians to lead the campaign to "Reject."[59]

On September 4, 2022, the exit referendum finally took place, and the results were nothing short of shocking, not because of the fact that the "Reject" option prevailed, but due to the astonishing margin by what it did—almost 62% supported the rejection, while only 38% "Approved."[60]

Amarillos por Chile llaman a votar Rechazo en el plebiscito de salida [*Yellows for Chile Call for a Vote Rejection in the Exit Plebiscite*], DIARIO UCHILE (June 25, 2022) (author's translation), https://radio.uchile.cl/2022/06/25/se-definieron-amarillos-por-chile-llaman-a-votar-rechazo-en-el-plebiscito-de-salida/.

[56] *Boric pide "modificar" lo que sea necesario para lograr aprobar Carta Magna* [*Boric Asks to modify whatever is necessary to approve the Magna Carta*], *supra* note 54.

[57] *See id*; Javier Couso, *Tides of Change: Analyzing the Power Shift in Chile's Constitutional Process*, CONSTITUTIONNET (May 14, 2023), https://constitutionnet.org/news/tides-change-analyzing-power-shift-chiles-constitutional-process.

[58] *See* Meritxell Freixas, *Rejection of Chile's New Constitution is On the Rise, Polls Show*, ELDIARIO.ES (Apr. 29, 2022), https://www.eldiario.es/internacional/aumenta-rechazo-nueva-constitucion-chile-sondeos_1_8910998.html; Couso, *supra* note 57.

[59] *See* Larrain et. al., *supra* note 44, at 241.

[60] *See Chile Overwhelmingly Rejects Progressive New Constitution*, REUTERS (Sept. 5, 2022), https://www.reuters.com/world/americas/chileans-head-polls-decide-progressive-new-constitution-2022-09-

The surprising results of the exit referendum represented an electoral conservative reaction to the uprising which, furthermore, put into question the interpretations done by politicians and analysts to the meaning of the social uprising.[61] Was it possible that the uprising and its electoral expression, on May 2021, was representative of only the half of the Chileans who mobilized in the street and voted when suffrage was not mandatory? Could it be that forcing the half of the electorate who had never participated in politics before made millions of more conservative Chileans tip the balance into a very different ideological direction? Or was the September 4th plebiscite the expression of the fact that a large majority of voters were scared away by a draft that was too radical for most Chileans? These questions are still being discussed. In the next section I offer my own take on what went wrong with Chile's first attempt to adopt a new constitution.

VI. EXPLAINING THE FAILURE OF CHILE'S FIRST CONSTITUENT PROCESS

Even though a thorough understanding of the causes of Chile's failure to get a new constitution require more time and data, it is possible to advance some hypotheses that can account for what happened. I believe the key factor that explains the failure of the process is the fact that in May 2021, the Convention elected an absolute majority of independents among its members.[62] This feature of the constituent body, which was celebrated in Chile at the time, contrasts with most successful cases of democratic constitution building in recent decades, where political parties were in control of constituent bodies.[63]

The predominance of independents in Chile's Constitutional Convention generated two crucial problems, one at the time of the election of its members, the other during the process of adopting a new constitutional text. First, the presence of a significant portion of independent candidates prevented voters from knowing in advance their ideological orientation, which in turn, led to a Convention with a more leftist outlook than that of the median Chilean voter.[64] In other words, the rules allowing

04/#:~:text=SANTIAGO%2C%20Sept%204%20(Reuters),the%20world's%20most%20progressive%20charters.

[61] *Id.*

[62] *See* Larrain et. al., *supra* note 44, at 236-37.

[63] *See id.* at 234.

[64] *See id.* at 241.

independent candidates to run on national lists led to the election of candidates with attractive personal characteristics, but with more radical positions than what most voters assumed. Critically, the ideological divergence between the Convention and the median voter had a very tangible and eventually devastating impact on the failure of the whole process. The adoption of certain constitutional proposals were just too radical for most Chileans, such as the recognition of "nature" as holder of fundamental rights; the recognition of a full-fledged right to abortion in a country that, only a few years earlier, had managed to decriminalize just three indications of abortion; or the adoption of a form of plurinationalism and indigenous justice that many saw as a menace to the integrity of the State and equality before the law.[65] Thus, even though the core of the proposed Constitution was largely in line with the main tenets of a liberal democratic republic (in no small measure due to the moderating effect that the required quorum of two thirds of the members of the Convention to adopt each constitutional clause had), the existence of some norms that were either too radical for the bulk of the population, or perceived as alien to Chile's constitutional tradition, generated enough opposition to the project, resulting in rejection.[66]

The dominance of independents within the Convention generated a second problem: the almost nil political and legislative experience of most of its members. This was especially marked in the group of radical independents, which led to their refusal to negotiate with right-wing conventionals (in fact, the very notion of negotiating was associated in the imagination of the independent left with lack of integrity).[67] Furthermore, the legislative and political inexperience exhibited by the radical and moderate left translated into the inability to reconsider previously adopted decisions in light of relevant changes in circumstances.[68] For example, the hegemonic groups within the Convention failed to decisively change their course of action when, in the last week of March, opinion polls showed for the first time that the "Reject" option was outperforming the "Approval" option.[69] The Convention's leaders decided to maintain the course of action in utter denial of political realism, betting that opinion surveys were inaccurate or that citizens' attitudes would shift in favor of the Convention's decisions. While this is obviously counterfactual, it can be speculated that a

[65] *See id.* at 239.
[66] *See id*; *Chile Overwhelmingly Rejects Progressive New Constitution, supra* note 60.
[67] *See* Larrain et. al., *supra* note 44, at 241.
[68] *See id.* at 237.
[69] *See id.* at 237 fig.1.

politically-experienced leadership would have taken drastic measures in light of the new scenario. For example, they could have changed the Rules of Procedure in order to open negotiations with the right regarding revising norms already adopted by the Plenary, but considered unacceptable by the latter, aiming to secure at least moderate members of the right—who could have called for approving the new constitution at the referendum. Instead, the bulk of the left remained in denial regarding the crude fact that the "Reject" was steadily ahead in the opinion polls.[70]

As related to this last point, the sense held by most leftists' conventionals—that the exit referendum could not be lost—led the moderate left to focus their efforts in securing the agreement of the radical left. This was to get the two-thirds quorum required to adopt each clause of the new constitution, which prevented the former from engaging in a productive dialogue with the moderate right, because of the perception that entering into deals with the latter could endanger the agreements secured with the radical left.[71] Given that the latter could decisively contribute to get the two thirds quorum, the moderate left was willing to "sacrifice" engaging with the moderate right if that endangered their alliance with the radical left.[72] As one influential moderate left conventional recognized, soon after the exit referendum this strategy proved useful to produce a constitutional text, but it cost the Convention the exit referendum.[73]

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[70] *See id*. at 239-40.

[71] *See id*. at 242; FERNANDO ATRIA, EL PROCESO CONSTITUYENTE Y SU FUTURO DESPUÉS DEL PLEBISCITO [THE CONSTITUENT PROCESS AND ITS FUTURE AFTER THE PLEBISCITE] 17 (LA CASA COMÚN, n.d.) (Chile), https://www.lacasacomun.cl/_files/ugd/0626d9_8d40ab447d4e444d8cc93310d4cab8fb.pdf.

[72] *See* ATRIA, *supra* note 71.

[73] Fernando Atria provided a revealing explanation, from conventional Frente Amplio, who expressed the following: "*The Constitutional Convention had to operate under adverse conditions that it did not choose: extreme initial distrust among its members, with no political articulation external to the Convention* (which in different circumstances the parties could have provided), with a composition that implied that *the two-thirds bloc capable of proposing a new Constitution to Chile could only be built in conversation with the collectives of independents which represented groups that understood themselves to be traditionally excluded* and who then did not exactly arrive grateful for their inclusion. In this context, our participation was always aimed at ensuring that the Convention would be successful in an immediate sense: that it would succeed in presenting the country with a proposal for a new Constitution . . . In retrospect, would I have done anything differently? Of course I would have. *Aware that it was a mistake to exclude the right from the conversation, we made several attempts to include it. We always assumed, however, that these attempts had a limit: they could not put at risk the 2/3 articulation that could give us a new Constitution. This limit was very real and decisive for collectives with whom we needed to talk. Even from our own coalition, Apruebo Dignidad, the FA+ was denounced for*

Another factor that contributed to the failure of Chile's constituent process was the excessively rigid Rules of Procedure adopted by the Convention. The fact that the Rules of Procedure contemplated the approval, article by article, of the constitutional text by the Plenary, made it impossible to reconsider what had already been approved by the latter. Thus, negotiations were precluded at the final stages of the process, when it became clear that some clauses approved by the Plenary were simply unacceptable to both right-wing conventioneers, and more critically, to relevant segments of Chilean society.

Finally, it is worth mentioning that fake news was also a factor that played a role in the defeat of the "Approve" option.[74] Given, that Chile's exit referendum took place after Donald Trump massively deployed the use of fake news in the 2016 presidential election, most right-wing parties got inspiration in the latter and deployed fake news regarding the content of the draft approved by the Convention—a task facilitated by inherent difficulty of understanding a complex and extensive constitutional text containing 388 clauses whose meaning could be easily distorted.[75] An example of fake news that proved to be particularly effective in mobilizing the "Reject" vote was the supposed infringement that the draft inflicted on the property rights of Chileans over their own houses and apartments, as well as on pension funds.[76] However, it would be a mistake to attribute fake news to a decisive role in what was a result generated by various factors, such as those mentioned above.

VII. THE NEGOTIATIONS LEADING TO CHILE'S SECOND CONSTITUENT PROCESS

Immediately after the rejection of the draft presented by the Convention in the exit referendum of September 4, 2022, the political system reacted with an array of different approaches. President Boric went on national television announcing that the government would propitiate an agreement

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'talking with the right'. But now we know that achieving this articulation of 2/3 with the exclusion of the right wing was a success in the Convention *but a failure with a view to the plebiscite,* and that we should have insisted on the need to broaden the conversation. What could we have done for that? Simply refused to continue. This would have jeopardized the development of the Convention, because there were sectors that did not feel a greater responsibility for advancing the proposal for a new Constitution, but rather were seeking to make their own demands visible. *Today, with the clarity that hindsight allows that retrospective view allows, I believe that it was a risk that we should have taken*." *See id.* at 3-5 (author's translation).

[74] *See id.* at 8-9.

[75] *See id.*

[76] *Chile Overwhelmingly Rejects Progressive New Constitution, supra* note 60.

among all the political forces to start a second constituent process that would provide voters with a draft that most Chileans could agree with.[77] The (until then) absolutely absent leader of the Republican party, José Antonio Kast, reappeared on the national stage that same night, declaring the notion of getting a new constitution dead.[78] While the radical and most of the moderate left was in utter disbelief with the results.

The next weeks and months were marked by uncertainty about the prospect of having a second chance to get a new constitution.[79] While most of the traditional right was tempted to bury the whole thing (thinking that the social uprising of 2019 had just been a "nightmare" from which the country had fortunately awaken from), more experienced leaders, such as Javier Macaya (the President of UDI) were conscious that Chile's current charter had been repudiated in the October 2020's entry referendum; that was, at any rate, a highly dis-functional constitution, which made it hard to any President to deliver their electoral promises, due to the tendency that the electoral system has to deliver a fragmented Congress.[80]After months of negotiations, in the early days of December 2022, an agreement to start a second constituent process was formally announced by the bulk of the political parties.[81] This time all political parties with congressional

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[77] President Boric stated the following: "In Chile, institutions work, democracy is more robust. We must listen to the voice of the people. Chilean men and women have demanded a new opportunity to meet and we must live up to this call. *Therefore, I am committed to do my best to build together with the Congress and the civil society a new constituent itinerary.* Society demands from our institutions that we work until we arrive at a proposal that interprets us all, that gives confidence." Veronica Silveri Pazos*, Chile: Boric no desiste y pide un nuevo 'itinerario constituyente' tras el abrumador rechazo a la nueva Constitución* [*Chile: Boric does not give up and calls for a new "constituent itinerary" after the overwhelming rejection of the new Constitution*], VOZMEDIA (Sept.5, 2022) (author's translation), https://voz.us/chile-boric-no-desiste-pide-nuevo-itinerario-constituyente-abrumador-rechazo-nueva-constitucion/.

[78] The leader of Chile's far right Republican Party (and former presidential candidate in 2021, José Antonio Kast, stated on the night of the exit referendum that, "With their vote, millions of Chileans have closed the door to this failed constituent process." *See Qué escenario se plantea en Chile tras el rechazo a la nueva Constitución* [*What is the scenario in Chile after the rejection of the new Constitution?*], EL UNIVERSO (Sept. 5, 2022) (author's translation), https://www.eluniverso.com/noticias/internacional/que-escenario-se-plantea-en-chile-tras-el-rechazo-a-la-nueva-constitucion-nota/.

[79] *See* Larrain et. al., *supra* note 44, at 246.

[80] *See Qué escenario se plantea en Chile tras el rechazo a la nueva Constitución* [*What is the scenario in Chile after the rejection of the new Constitution?*], *supra* note 78.

[81] Valentina Fuentes, *Chilean Political Parties Agree to Have Another Go at Rewriting Constitution*, BLOOMBERG (Dec. 12, 2022, 5:49 PM), https://www.bloomberg.com/news/articles/2022-12-13/chile-will-try-to-write-a-new-constitution-for-a-second-time#xj4y7vzkg.

representation (from the Communist Party to the UDI) as well as the Amarillos movement, agreed on a second constituent process.[82] The only parties that did not sign the agreement were the far-right *Republicanos* and the newly formed "*Partido de la Gente,*" a populist center-right party.[83] The terms of the agreement were, among others, the following:

> 1. The process would be not just procedurally regulated, but it would also include a set of twelve "principles" that would bound the bodies in charge of drafting a new text;
> 2. The new Constitution would be elaborated by a congressionally-designated "*Expert Committee*" of twenty-four members and by a popularly elected "*Constitutional Council*, of 55 members;"
> 3. The process would be much shorter than the previous one, starting with the designation of experts by Congress in January 2023 (and the opening of its deliberations in early March), which will then be followed by the election of the Constitutional council on May 7, and the opening of its deliberations (in June), to end with a ratifying referendum in December, 17 2023;
> 4. Each new clause of the draft would have to be adopted by 3/5 of the Expert Committee and the Constitutional Council;
> 5. A special body, called "Technical Admissibility Committee" would make sure that the other bodies respect the twelve principles that govern the process;
> 6. There would be some mechanism of public participation, but much more restricted than the one in place in the first constituent process; and g) the rules of procedure would be put in place by Congress.[84]

The announcement of an agreement to have a second constituent process was received with mixed reactions by Chileans.[85] After three years since the first process launched, many were tired of the constitutional debate. Others were still disappointed by the failure to approve a constitution a few months earlier. A third group was skeptical of the viability of a second process. At any rate, the constitutional amendment required to start the second process was duly approved on January 11,

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[82] *See REACTION: Chile's New Constitutional Roadmap*, AMERICAS QUARTERLY (Jan. 11, 2023), https://www.americasquarterly.org/article/reaction-chiles-new-constitutional-roadmap/.

[83] *See* Couso, *supra* note 57.

[84] *See Chilean Congress approves bill to launch new constituent process*, PEOPLE'S DISPATCH (Jan. 15, 2023), https://peoplesdispatch.org/2023/01/15/chilean-congress-approves-bill-to-launch-new-constituent-process/; Couso, *supra* note 47.

[85] *See* Larrain et. al., *supra* note 44, at 244-46.

2023[86] and the Expert Committee was inaugurated a few months later in March 2023.[87]

The dynamics of the Expert Committee could not have been more different than the Constitutional Convention of 2021-2022.[88] Composed of a small group which included constitutional scholars, jurists from other areas, former politicians, and social scientists, the Committee started to work with a speed and a disposition to dialogue facilitated by the fact that there was a tie in terms of the ideological shape of the body (with twelve members leaning right, and twelve left).[89] The sheer fact of the political equilibrium of the Committee of Experts, and the uncertainty as to what would be the result of the May 7th election of the Constitutional Council members propitiated a spirit of consensus that allowed the Committee to elaborate a first draft that was fully endorsed by all twenty-four of its members. Considering that the draft agreed upon was signed by all the members of the Expert Committee (including the member of the Republican Party and one member of the Communist Party) most observers were optimistic for the prospect that Chile would finally get a new constitution.[90]

VIII. THE UNEXPECTED TURN TO THE FAR RIGHT IN THE ELECTION OF THE CONSTITUTIONAL COUNCIL

On May 7th, 2023, Chileans once again went to the polls, this time to elect the members of the Constitutional Council—the entity charged with the task of drafting a new constitution based on a preliminary draft prepared by the Committee of Experts.[91] In an astonishing reversal of fortune (after the first constituent process dominated by leftist parties and political movements), the far right Republican Party won a staggering thirty-five

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[86] *See Chilean Congress approves bill to launch new constituent process*, *supra* note 84; *REACTION: Chile's New Constitutional Roadmap*, *supra* note 82.

[87] *See* Valentine Hilaire, *Chile starts second attempt to draft new constitution*, REUTERS (Mar. 6, 2023, 11:41 AM), https://www.reuters.com/world/americas/chile-starts-second-attempt-draft-new-constitution-2023-03-06/#:~:text=SANTIAGO%2C%20March%206%20(Reuters),draft%20was%20installed%20on%20Monday.

[88] *See* Larrain et. al., *supra* note 44, at 236-40.

[89] *See id.* at 246.

[90] *See REACTION: Chile's New Constitutional Roadmap*, *supra* note 82.

[91] *See* Catherine Osborn, *Chile's Constitutional Whiplash*, FOREIGN POLICY (May 12, 2023), https://foreignpolicy.com/2023/05/12/chile-constitutional-council-election-results-rewrite-right-wing-boric-kast/; *Chilean Congress approves bill to launch new constituent process*, *supra* note 84.

percent of the vote, securing twenty-two out of the fifty seats of the Council.[92] This electoral outcome provided them with the power to veto any decision of the body (which required three-fifths, or thirty-one seats, to approve any clause of the constitutional draft).[93] Considering that the coalition of traditional right-wing parties secured eleven seats, the representation of the right in the Constitutional Council totaled thirty-four seats (or the equivalent to two-thirds of the Council).[94] This extraordinary domination of the Council would not only allow the right-wing parties to elaborate draft according to their will, but also to disregard any amendments proposed by the Expert Committee in the final stages of the process.[95] On the other side of the political spectrum, the leftist coalition of Socialists, Frente Amplio and Communists secured only sixteen seats (or about thirty percent of the total), which left them without the power to veto decisions of the right-wing parties.[96] The final seat was won by a member of Chile's Indigenous population, who was elected in a parallel process, that immediately sided with the left.[97]

The results just described were "nothing short of a political earthquake," not only due to their likely impact on the second constituent process, but also because they signaled the unexpected rise of a far-right party as a dominant force in Chile.[98] The factors explaining the extraordinary electoral performance of the *Republicanos* in this critical election are complex and still a matter of debate, but there is growing consensus among observers that a key element was the party's ability to capitalize on the widespread dissatisfaction with a politically weak leftist government grappling with a combination of high crime, an immigration crisis and a period of unusually high inflation. Among these factors, the key one appears to have been the deep sense of insecurity related to organized crime, particularly connected with drug trafficking, in the months preceding the Council elections.[99] Indeed, in what represented something of a "perfect

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[92] *See* Rocío Montes, *Chile's far-right becomes main political force following Constitutional Council elections*, EL PAÍS (May 8, 2023), https://english.elpais.com/international/2023-05-08/chiles-far-right-becomes-main-political-force-following-constitutional-council-elections.html.

[93] Couso, *supra* note 57.

[94] Tom Phillips, *Chile: major blow to president as far right triumphs in key constitution vote*, THE GUARDIAN (May 8, 2023), https://www.theguardian.com/world/2023/may/08/chile-constitution-committee-vote-jose-antonio-kast-gabriel-boric.

[95] Couso, *supra* note 57.

[96] *Id.*

[97] *Id.*

[98] *Id. See also* Phillips, *supra* note 94.

[99] Couso, *supra* note 57. *See also* Osborn, *supra* note 91 (citing Brian Winter, *In Chile and Elsewhere, Crime Is The New Corruption*, AMERICAS QUARTERLY (May 8, 2023),

storm," gang members assassinated one policeman each week–for three consecutive weeks—in the month preceding the election.[100] In at least one of these killings, immigrants were involved, which lent credibility to the *Republicanos'* long-standing attack on immigration. The *Republicanos* campaign is thought to have been helped by these killings, combined with the generalized public outrage generated by President Boric's decision to pardon a group of individuals who were convicted for crimes perpetrated in the 2019 social uprising, but were later found to have common criminal records.[101] Although the May 7th election was held for the specific goal of electing a body that will draft a new constitution, it is clear that in the end it was "captured" by the prevailing social, economic and political issues.[102] This was already apparent in the television and radio campaigns that preceded the election, which rarely addressed actual constitutional debates, but focused on the law, order, and immigration crises facing Chile.[103] Such was the emphasis on these issues that one important opposition leader stated that the election was effectively a referendum on the government's performance.[104]

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https://www.americasquarterly.org/article/in-chile-and-elsewhere-crime-is-the-new-corruption/); Fuentes, *supra* note 52; Rocío Montes and Ana María Sanhueza, *Detenidos dos de los implicados en el asesinato a sangre fría de un policía en Chile* [*Two of those involved in the cold-blooded murder of a police officer in Chile have been arrested*], EL PAIS (Apr. 10, 2023, 4:16 PM), https://elpais.com/chile/2023-04-10/detenidos-dos-de-los-implicados-en-el-asesinato-a-sangre-fria-de-un-policia-en-chile.html**;** Larrain et. al., *supra* note 44 at 246.

[100] Francisca Prieto, *Tercera muerte de un carabinero en 23 días impacta al país: Gobierno anunciará medidas y campaña pasa a segundo plano* [*Third death of a police officer in 23 days impacts the country: Government will announce measures and campaign takes a backseat*], EMOL (Apr. 6, 2023), https://www.emol.com/noticias/Nacional/2023/04/06/1091483/muerte-carabineros-palma-medidas-gobierno.html.

[101] Couso, *supra* note 57. *See also* Rocío Montes, *La polémica por los indultos en Chile fuerza la dimisión de la ministra de Justicia y del jefe de Gabinete de Boric* [*The controversy over pardons in Chile forces the resignation of the Minister of Justice and Boric's Chief of Staff*], EL PAÍS (Jan. 7, 2023, 3:30 PM), https://elpais.com/internacional/2023-01-07/dimite-la-ministra-de-justicia-de-chile-tras-la-polemica-de-los-indultos-a-los-condenados-por-el-estallido-social.html.

[102] Couso*, supra* note 57.

[103] *See id. See also* CNTV Chile, *Franja Oficial CNTV Consejo Constitucional Emisión 02 de mayo 12:45*, YOUTUBE (May 2, 2023), https://www.youtube.com/watch?v=WcLR2HyV4mI.

[104] Couso, supra note 57. *See also* Macarena Faunes, *Chahuán por consejo constitucional: "Hacemos un llamado a los chilenos a plebiscitar el Gobierno de Boric, que ha tenido una nota roja"* [*Chahuán for constitutional advice: "We call on Chileans to plebiscite the Boric Government, which has had a red note"*], T13, (May 5, 2023, 3:00 AM), https://www.t13.cl/noticia/consejo-constitucional/politica/chahuan-por-consejo-constitucional-hacemos-llamado-chilenos-plebiscitar-gobiern.

In sum, the impact of the Constitutional Council election, in much the same way that the 2021 Constitutional Convention shocked the country due to the unexpected good performance of left-wing radicals, the former fell as a political watershed, not just because the Republican Party outperformed the traditional right by a two to one margin, but also because the election gave the combined forces of the right a complete control of the draft of the text to be presented to ratification in December 2023.[105] Furthermore, the electoral outcome meant that the most pivotal body of the process –the Constitutional Council– would be dominated by a party which not only opposed the very idea of introducing a new constitution, but that included a sizable number of leaders who had openly defended the economic and constitutional legacy of the military regime that imposed the very charter that the constituent process aims to replace.[106] A third implication of the election results was that an eventual coalition of Republicans and traditional right-wing parties could unilaterally impose a constitution of their liking, as they would hold two-thirds of the Council.[107] The only check they had was the "Technical Admissibility Committee," a body created to ensure compliance with the twelve constitutional principles that frame the constituent process.[108] However, as I explained in a piece published in Constitutionnet at the time,[109] this was a small obstacle for the hegemony of the right in the Council because the "Admissibility Committee" was equally divided between experts on the right and the left, making it unlikely to be an effective check on the will of the Council.[110] In light of this, the only real constraint that the right-wing coalition in the Council faced was the prospect that their proposal for a new constitution could be rejected in the exit referendum. Yet, since all of the Republicans (and a sizable segment of the traditional right-wing parties) actually liked the existing Constitution of 1980, they found themselves in what initially appeared to be a "win-win" scenario. Even if their proposal for a partisan constitution was rejected, they would retain a charter they were comfortable

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[105] Couso, *supra* note 57.

[106] Republicans did not sign the December 12, 2022, political agreement that led to the current constituent process, and later voted against the constitutional amendment that implemented said agreement. *Id. See* Larrain et. al., *supra* note 44, at 242.

[107] Couso, *supra* note 57.

[108] *See* Larrain et. al., *supra* note 44, at 242; *Chilean Congress approves bill to launch new constituent process*, *supra* note 84.

[109] See Couso, J., "Tides of Change: Analyzing the Power Shift in Chile's Constitutional Process" Constitutionnet, 14 May 2023. Available at the web site: https://constitutionnet.org/news/tides-change-analyzing-power-shift-chiles-constitutional-process

[110] *See* Couso, *supra* note 57.

with.[111] One alternative scenario was that, in a surprising display of constitutional responsibility, Republicanos and their traditional right-wing partners adopted a non-partisan approach and reached an agreement with the left for a charter that all parties could live with, thereby addressing Chile's constitutional plight. [112] Such a statesmanlike attitude would have recognized that only a year before almost forty per cent of the population supported a constitutional proposal radically different from the 1980 charter. [113] While in the weeks following the Council's election there was some optimism that such a virtuous scenario might take place, this in the end did not materialize. [114] To the contrary, both *Republicanos* and the majority of the traditional right members of the Council, showed a partisan attitude that eventually led to a draft that was impossible to accept to both the left and center-left parties, who then called to reject it in the exit referendum.[115]

CONCLUSION

Looking back at Chile's attempt to get a new constitution in the four years since the social uprising in October 2019, the panorama is highly frustrating. While it cannot be denied that the agreement on a constituent process reached in November 2019 (amidst violent riots that seemed to put Chile's democracy at risk) provided an institutional way out to what at the time seemed an impossible state of affairs.[116] However, the failure of two consecutive constituent processes represents a very disappointing outcome for a country with a long and proud constitutional tradition which was interrupted by a military regime that imposed a charter that Chileans still live with. The surprising electoral outcomes (one skewed to the left, the other to the right) that occurred in the first and second constituent processes, gave control to partisan groups that could not resist taking advantage of the circumstantial majorities they had in order to impose a draft on the minority with clauses that the latter could not live with.[117]

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See Chilean Congress approves bill to launch new constituent process*, *supra* note 84; Larrain et. al., *supra* note 44, at 235.
[117] *See* Fuentes, *supra* note 81; Larrain et. al., *supra* note 44, at 236-46.

Chile's constituent experience would no doubt provide much food for thought regarding the dynamics of democratic constitution making in years to come but, at this point, there are some relevant lessons that can be immediately drawn from this country's failed attempts to get a democratically-enacted charter.[118] First, as anticipated in the Introduction to this piece, it is naive to expect that when the political stakes are as high as they are in constitution making, the polarization that characterizes much of the democratic world in this era would be somehow suspended when a country enters into a constituent process. Second, despite its virtues, participatory processes that take place during constitution making often lead to distortions, because the segment of the population which mobilizes for that purpose might have utterly different interests and values than those of the –much larger— portion of the electorate that only participates in the ratifying referendum. Furthermore, Chile's experience sounds the alarm regarding the preconditions for the viability of the appealing notion that the legitimacy of a constitution making process requires it to be done through an especially elected body. Finally, Chile's two failed attempts to get a new charter approved in a ratifying referendum, poses the question of the inadequacy of such mechanism to conclude a constitution making effort.

[118] *REACTION: Chile's New Constitutional Roadmap*, *supra* note 82.

BUILDING A SHIP IN TROUBLED AND UNCHARTED WATERS: REFLECTIONS ON THE CHILEAN CONSTITUTION-MAKING PROCESS, 2019-2023

Lisa Hilbink**

INTRODUCTION

As I write these lines, we are approaching the four-year anniversary of the start of the "social uprising" in Chile, which set off a tumultuous process of constitution writing that, if current predictions prove accurate, may well end on a highly ironic note, with the same political forces that rose up to demand a new social compact casting ballots, on December 17, 2023, to keep the institutional design of the dictatorship in place.[1] In this brief comment, I seek to supplement and complement Professor Javier Couso's cogent analysis of how and why the process has unfolded as it has, offering some reflections from my perspective as a political scientist and

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**This piece is a comment on Professor Javier Couso's piece which begins on page one of this journal.

[1] Note from the author and editors: At the time of this issue's publication, these predictions have been confirmed as accurate.

longtime observer of Chile. I will begin in Section II by providing some background on Chile that helps explain why a constitutional rewrite was a key demand of the mass protests of late 2019, and why it initially took the form that it did. Then, I will explain in Section III how and why the very features of the first constitution-making process proved to be its fatal flaws, despite what analysts saw as promising in 2021. In Section IV, I critically engage with Professor Couso regarding the broader lessons he briefly mentions in his piece. My main departure from Professor Couso is in the characterization of Chile as "polarized." Rather than polarization, I submit that the contextual factor that has bedeviled the constitution writing effort in Chile is the affective and organizational chasm between the political establishment and ordinary citizens. In this context, where channels of communication and intermediation between government and citizenry have broken down, institutional mechanisms—whether representative or participatory—don't function properly. We should thus be careful not to conclude that participatory mechanisms or processes are *per se* problematic. As the 2022-23 sequel to the story in Chile suggests, and as I conclude in Section V, the constitutional shipbuilders, whoever they are, will be unlikely to succeed when they work in turbulent and unfamiliar political seas.

I. A BRIEF BACKGROUND

Professor Couso begins his narrative with a brief account of the social uprising (or "*estallido*," "explosion"), noting that a "striking" and "peculiar aspect" of the mass protests in Chile, as compared to other countries, was the call for a new constitution.[2] This did not come out of the blue; scholars, grassroots organizations, and political leaders had been promoting constitutional replacement for years.[3] Between 2015-2017, former President Michelle Bachelet's government led public consultations on reforms, and submitted a draft constitution to Congress, where it languished due to weak support in the legislature and was abandoned after Sebastian Piñera returned to power in 2018.[4] Nonetheless, from an outside perspective, it is rather surprising that constitutional rewrite was a central

[2] Javier Couso, *Chile's Failed Attempt to Get a New Constitution: Or the Challenges of Democratic Constitution Making in a Polarized Era*, 30 SW. J. INT'L L. 1, 4 (2024).

[3] *See* Javier Couso, *Chile's 'Procedurally Regulated' Constitution-Making Process*, 13 HAGUE J. ON THE RULE OF L. 235 (2021).

[4] *See* Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet's Project*, INT'L J. CONST. L. BLOG, Mar. 13, 2018, at 1.

demand of the 2019 mass mobilization, given that the protests were triggered by a hike in public transportation fees and focused on various forms of systemic inequality and injustice, many of which did not directly or immediately derive from the Constitution.

Two factors, in combination, help explain how and why a new constitution became the focal point of the uprising. The first, as Professor Couso mentions, is the well-founded perception that the 1980 Constitution, despite numerous amendments, continues to put significant limits on the policy making of popularly elected majorities.[5] During the thirty-plus years since the transition back to democracy, key aspects of the charter have effectively prevented reforms that would strengthen the public sector and more equitably distribute wealth and power.[6] Many citizens thus viewed the revamping of that illegitimate document as a necessary part of the transition to a more just and democratic social order. Second, and more generally, "seeking to achieve change through institutional and legal means is a longstanding practice in Chile; politics has always been done in the idiom of law, whether under Allende, Pinochet, or in the post-Pinochet era."[7] Meticulous attention to legal forms is part of the country's political history and identity[8] and has always been key to the government's legitimacy.[9]

At the same time, recent years have witnessed a severe erosion in political trust in Chile. The extreme concentration of wealth and power in the hands of a tiny elite, contrasted with the daily struggles and precariousness of middle and lower income people, has led to the widespread public perception that the system is rigged in favor of a privileged few, who are aloof from and indifferent to the lived reality of

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[5] *See* CLAUDIA HEISS, ¿POR QUÉ NECESITAMOS UNA NUEVA CONSTITUCIÓN? (2020).

[6] This was very much the intent of its framers, as Professor Couso documents. Indeed, Pinochet himself borrowed a phrase from Spain's dictator, General Francisco Franco, stating that, through the legal edifice he bequeathed to Chile, he would leave the country "tied up, and well tied up." *See* J. Samuel Valenzuela, *Orígenes y Transformaciones del Sistema de Partidos en Chile*, ESTUDIOS PÚBLICOS, Mar. 1, 1995, at 5.

[7] Lisa Hilbink, *Constitutional Rewrite in Chile: Moving toward a Social and Democratic Rule of Law?*, 13 HAGUE J. ON THE RULE OF L. 223, 225 (2021).

[8] *See* Lisa Hilbink, *The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment*, 62 POL. RSCH. Q. 781 (2009).

[9] *See, e.g.,* GENARO ARRIAGADA HERRERA, DE LA VÍA CHILENA A LA VÍA INSURRECCIONAL (1974); Valenzuela, *supra* note 6, at 26; CARLOS HUNEEUS, THE PINOCHET REGIME (Lake Sagaris trans., 2007).

most of the population.[10] This has been apparent in stagnating levels of confidence in all government institutions in recent years, independent of their performance.[11] As Suárez-Cao[12] notes, for several years before the social uprising, surveys registered historic lows of public trust in political parties and in Congress (both in the single digits), as well as a sustained decline in party identification, from well over fifty percent in 2006 to less than twenty percent in 2019,[13] leading some to diagnose a crisis of representation in the country.[14]

The social uprising was thus characterized by a strong antipathy toward the political class, and not merely toward the sitting (rightwing) government/administration.[15] As several analysts have observed in other countries in the region, similar conditions have resulted in the rise of a radical populist leader, whether from the left or the right.[16] The successful channeling of the "violent energy of [the] social explosion" "into an institutional process, characterized by relative peace" is thus remarkable.[17] However, as Professor Couso highlights, the populist groundswell continued to animate the process, shaping both key procedural decisions and the behavior of many actors in and around the Constitutional Convention. It is these choices that have become the target of critique since the September 2022 defeat of the exit referendum on the Convention's draft.

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[10] *See* Lisa Hilbink et al., *Why People Turn to Institutions They Detest: Institutional Mistrust and Justice System Engagement in Uneven Democratic States*, 55 COMPAR. POL. STUD. 3 (2022).

[11] *See* Andrés Velasco and Robert Funk, *Institutional Vulnerability, Breakdown of Trust: a Model of Social Unrest* in Chile, WORLD BANK (May 2023), https://static.fen.uchile.cl/2023/07/pdf/funk_velasco.pdf.

[12] *See* Julieta Suarez-Cao, *Reconstructing Legitimacy After Crisis: The Chilean Path to a New Constitution*, 13 HAGUE J. ON THE RULE OF L. 253, 255 (2021).

[13] *See* Bargsted M, Maldonado, *Party Identification in an Encapsulated Party System: the Case of Postauthoritarian Chile*, 10 J. POL. LAT. AM. at 29 (2018).

[14] *See* Juan Pablo Luna & David Altman, *Uprooted but Stable: Chilean Parties and the Concept of Party System Institutionalization*, 53 LAT. AM. POL. & SOC'Y 1 (2011); Juan Pablo Luna, *Delegative Democracy Revisited: Chile's Crisis of Representation*, 27 J. OF DEMOCRACY 129 (2016); Peter M. Siavelis, *Crisis of Representation in Chile? The Institutional Connection*, 3 J. OF POL. IN LAT. AM. at 61 (2016).

[15] As observed by the author of this article, this was evident in chants and posters of "They all need to go! (¡*Que se vayan todos*!)" and later, during the Convention, of "¡*El pueblo unido avanza sin partidos!* ("The people united advance without parties!").

[16] *See* Suárez-Cao, *supra* note 12, citing Cristobal Bellolio, *Populismo como democracia illiberal: Una hipotesis sobre el estallido social chileno*, 35 REVISTA DE SOCIOLOGÍA 43 (2020); Cristobal Rovira Kaltwasser, *El Error de Diagnostico de la Derecha Chilena y su Encrucijada Actual*, 158 ESTUDIOS PÚBLICOS 31 (2020).

[17] Tom Ginsburg & Isabel Alvarez, *It's the procedures, stupid: The success and failures of Chile's Constitutional Convention*, GLOB. CONSTITUTIONALISM 1, 3 (2023).

II. FEATURES OF THE FIRST ATTEMPT: FROM ASSETS TO FATAL FLAWS

In 2021, as the Constitutional Convention got underway, analysts were cautiously optimistic that some defining characteristics of Chile's constitutional process, such as "inclusive mechanisms of representation, decision making, and direct citizen involvement,"[18] would "boost legitimacy via descriptive representation" and "help air out the elitist political system."[19] As Professor Couso noted then, non-partisan analysts "celebrated the fact that such a large number of independent candidates got elected" because this "eliminated the risk that regular Chileans" would perceive "that the traditional political parties 'captured' the Convention."[20] Moreover, he and others (rightly, in my view) underscored the importance of having "an assembly bound by preexisting rules,"[21] and "a procedurally regulated constituent process," which would "promote the rule of law."[22] This distinguished the Chilean case from other recent constitution writing experiences in Latin America, most notably Venezuela in 1999, where regulation of the constitutional process "was absent and ad-hoc" and "institutional or legal restrictions [came] second to the 'voice of the people' and Chávez's will as their legitimate leader."[23] Moreover, comparative studies show that these features are associated with successful constitutional replacements in democratic regimes.[24]

Two years on, and with the benefit of hindsight, the very factors that made the scenario seem so promising early on are now those that analysts, including Professor Couso, identify as the fatal flaws of the process. After Chileans voted overwhelmingly to reject the draft charter produced by the Constitutional Convention, several comparative constitutional scholars and political scientists published post-mortem reflections that attribute the failure largely to naïve, uncooperative, and over-reaching behavior on the

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[18] Gabriel L. Negretto, *Deepening Democracy? Promises and challenges of Chile's Road to a New Constitution*, 13 HAGUE J. ON THE RULE OF L. 335, 336 (2021).

[19] Suarez-Cao, *supra* note 12 at 257.

[20] Couso, *supra* note 3, at 247-48; *See* Marcela Rios Tobar, *Chile's Constitutional Convention: a triumph of inclusion*, U.N.D.P. (June 3, 2021), https://www.undp.org/latin-america/blog/chiles-constitutional-convention-triumph-inclusion.

[21] Negretto, *supra* note 18.

[22] Couso, *supra* note 3, at 249.

[23] Carlos Garcia Soto et al., *Winds of Change: Comparing the Early Phases of Constitutional Redrafting in Chile and Venezuela*, 13 HAGUE J. ON THE RULE OF L. 322, 330 (2021).

[24] *See* Negretto, *supra* note 18.

part of the independents that dominated the Convention (103 of 155), incentivized and exacerbated by unfortunate and overly rigid procedural decisions.[25] For example, Larraín, et al. highlight that "Groups of independents lacked organization and consistent reform programs. Most independents were single-issue activists seeking to participate in the Convention as environmentalists, feminists, or traditionalists rather than as agents responsible for negotiating across multiple, complex dimensions."[26] Moreover, they underscore the fact that independent delegates were one-shot players who had no need to build working relationships with other members of the body; on the contrary, they had incentives to use the singular opportunity "to bind future legislators as closely as possible."[27] Ginsburg and Álvarez point out that the decision making by a body predominantly made up of such independent delegates was further complicated by "faulty procedures," specifically a "two-thirds decision rule with a circular voting mechanism for individual norms, with no final vote on the text as a whole."[28] They contend that this convoluted, piecemeal approach, with no mechanism for revisiting prior decisions along the way, further discouraged cooperation within the Convention and produced an incohesive final constitutional draft.[29] Indeed, "the dynamics within the Convention were incredibly adversarial and lacked unity,"[30] and "an extreme commitment to publicity exposed the deficiencies of [the] process,"[31] including "extravagant behaviors that would eventually cause a steep fall in the reputation of the Convention as a whole."[32]

One key procedural error was the mismatch between the voting rule for the Convention elections in May 2021, which was voluntary and garnered only a forty-three percent turnout,[33] and the referendum on the final draft in September 2022, which was compulsory and had an eighty-six percent turnout. All analysts, including Professor Couso, agree that, with only the most motivated, change-seeking voters participating in the former elections, the resulting composition of the Constitutional

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[25] *See* Guillermo Larrain et al., *How not to Write a Constitution: Lessons from Chile*, 194 PUB. CHOICE 233 (2023); Ginsburg & Alvarez, *supra* note 17; Samuel Issacharoff & Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, 78 UNIV. MIA. L. REV. (2023); Couso, *supra* note 2, at 19.

[26] Larrain et al., *supra* note 25, at 241.

[27] *Id.*

[28] Ginsburg & Alvarez, *supra* note 17, at 5.

[29] *See id.* at 7-8; Couso, *supra* note 2.

[30] Ginsburg & Alvarez, *supra* note 17, at 9.

[31] Larrain et al., *supra* note 25, at 243.

[32] Couso, *supra* note 2, at 15.

[33] This was also during the COVID pandemic which disincentivized participation.

Convention anomalously skewed to the political Left, which permitted the exclusion of the Right in deciding most provisions.[34] In the end, this approach proved to be naïve and short-sighted,[35] as some five million voters who had not expressed their preferences at the ballot box in May 2021 were compelled to turn out and offer an up-or-down vote on the end-product of a flawed process conducted by an assembly in which they had not been represented.[36] As Alemán and Navia put it, the final text was "out of sync with Chileans," including those in indigenous and low-income municipalities, where opposition was "particularly pronounced."[37]

A final and related observation shared by these analysts is how the diminished role of political parties, which "reflected the [antiestablishment] sentiment of the moment,"[38] handicapped the process in several ways. As already noted, the independents in the Convention were one-shot players, whereas "party representatives are likely to be present not only in a special body temporarily responsible for drafting the constitution but also in institutions at the post-constitutional stage that will implement the new constitution over time; they [thus would] have a stake in both the design and enforcement of the new constitution."[39] Members of political parties are also more likely to have experience negotiating with opponents and crafting legislation,[40] anticipating challenges and adapting to developments in the context, all of which would have made for more efficient and effective drafting.[41] Finally, political party affiliation would have helped orient voters to the broad ideological and policy stances of Convention candidates, possibly lessening the importance of personal characteristics or single-issue positions at the time of election[42] and "reducing the information costs for voters trying to understand what is at

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[34] *See* Couso, *supra* note 2.

[35] Professor Couso calls it an "utter denial of political realism." *Id.* at 19.

[36] *See* Larrain et al., *supra* note 25, at 246; Samuel Tschorne, *Referendums and Representation in Democratic Constitution Making: Lessons from the Failed Chilean Constitutional Experiment*, KING'S L.J., Aug. 17, 2023, at 4; As Professor Couso notes, the Convention delegates (wrongly) assumed that those who had not turned out to vote shared the preferences of those who did.

[37] Eduardo Aleman & Patricio Navia, *Chile's Failed Constitution: Democracy Wins*, 34 J. OF DEMOCRACY 96, 99 (2023). *See also* Couso, *supra* note 2, at 22.

[38] Ginsburg & Alvarez, *supra* note 17, at 5.

[39] Larrain et al., *supra* note 25, at 241.

[40] *See* Issacharoff & Verdugo, *supra* note 25, at 27.

[41] *See* Couso, *supra* note 2.

[42] *See id.*

stake in the process of constitution formation."[43] It would have also enhanced delegates' capacity to mobilize supporters and allies once the process was complete.[44] However, in a bid to secure greater legitimacy for the process at a moment of deep distrust of the political class, the protagonists of the Chilean Constitutional Convention deliberately eschewed a party-led process and traded away these potential benefits. In retrospect, this may have doomed the endeavor.[45]

III. THE OTHER DIVIDE[46]: NOT POLARIZATION WITHIN THE PUBLIC, BUT BETWEEN THE PUBLIC AND THE POLITICAL ELITES

In my estimation, Professor Couso, along with the other analysts discussed above, accurately identify the main factors that led to failure in the 2021-22 constitutional drafting attempt in Chile. The public clamor for a more inclusive and responsive government was genuine, but specific decisions taken with the goal of boosting the legitimacy of the Convention, on the one hand, and locking in rules to regulate the process, on the other, didn't solve the country's crisis of representation and wound up discouraging the kind of longer-term thinking and behavior necessary to secure broad political buy-in, inside and outside the Convention. As frequently happens in political life, decisions taken to address one set of concerns and risks had unintended, even perverse, consequences when they were implemented.[47]

This law of unintended consequences continues to operate in the second and ongoing attempt at constitution-making in Chile, which, it should be noted, has remained firmly in the hands of political elites. Despite this, and the fact that this "do over" was carefully designed as a staged process intended to bind drafters to a set of twelve principles approved in advance by a Congress equally divided between Left and Right and to ensure that experts played a central role, it has also taken an unexpected turn. As Professor Couso explains, the May 2023 elections for

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[43] Issacharoff & Verdugo, *supra* note 25, at 26-27.

[44] *See* Larrain et al., *supra* note 25, at 241; Aleman & Navia, *supra* note 37, at 94.

[45] *See* Issacharoff & Verdugo, *supra* note 25, at 42.

[46] *See generally* YANNA KRUPNIKOV, & JOHN BARRY RYAN, THE OTHER DIVIDE (Cambridge University Press, 2022) (here, I reference a recent book with this title that makes a slightly different but related point about the U.S.: that polarization only affects the politically engaged, and that there is a large portion of the population that does not have its identity tied up with politics/political parties).

[47] *See* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. ASS'N 894 (1936).

the Constitutional Council produced a "political earthquake" and an "astonishing reversal of fortune" for the (largely left-of-center) forces that championed a constitutional rewrite.[48] A roughly four year old-far-Right party named the Republicanos managed to capitalize on public insecurity and low support for the incumbent (moderate Left) government to win forty-four percent of the seats on the Council. When combined with the seats won by the traditional Right, this enables them to control the content of the new constitutional draft, even overriding any objections raised by the experts in the planned final stages of the process.[49] As noted in the introduction, this turn of events has led some of the sectors that have called for constitutional replacement for years to announce they will vote to reject the new draft and keep the 1980 Constitution.[50] Meanwhile, public opinion polls have shown a consistent, and in some cases increasing, majority intent to reject.[51]

With this in mind, when Professor Couso discusses the lessons that might be drawn from the Chilean experience with constitution-making, he takes a step back from the specifics of the first (2021-22) constitutional rewrite attempt, which have been the focus of the other analyses referenced above, to consider broader contextual factors that have affected both that attempt and the second, very distinct effort. As the title of his article suggests, he first points to political polarization, a characteristic of many contemporary democracies, as a key contributor to the failure of the constitutional process. Second, he calls into question "participatory processes that take place during constitution making" because those who mobilize during constitutional moments may not represent the population as a whole and may thus, in the name of the people, produce a charter that is out-of-step with the "much larger" portion of the electorate. To conclude, Professor Couso indicates that given these conditions and risks,

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[48] Couso, *supra* note 2, at 28.

[49] *Id.* at 23-24.

[50] *See*, *Chilean unions to reject draft Constitution promoted by the right*, PRENSA LATINA, (Sept. 29, 2023), https://www.plenglish.com/news/2023/09/29/chilean-unions-to-reject-draft-constitution-promoted-by-the-right/.

[51] *See* Ignacio Guerra, *Cadem: 54% would vote against in the plebiscite and 41% prefer to reject and continue with the current Constitution*, EMOL, (Oct. 1, 2023), https://www.emol.com/noticias/Nacional/2023/10/01/1108728/cadem-54-contra-plebiscito-constitucion.html; Andrés Cárdenas, *UDP survey reveals that the majority believes that the Constitutional Council is "much worse" than the Convention*, EL MOSTRADOR, (Oct. 6, 2023), https://www.elmostrador.cl/noticias/pais/2023/10/06/encuesta-udp-revela-que-mayoria-opina-que-consejo-constitucional-es-mucho-peor-que-la-convencion/.

constitution making might be better left to experts, and that even ratifying referenda may not be advisable.[52] In the remainder of this comment, I engage and complicate these claims.

I want to begin by problematizing the notion that political polarization undermined the constitutional process in Chile. Polarization is a bimodal sorting, a distribution in which the center is vacated. Under conditions of polarization, there are few to no people in the middle of the distribution, and little ideological overlap between the two sides.[53] In polarized polities, party affiliation is strong and exclusive, and in what McCoy, Rahman, and Somer (2018) call "pernicious polarization," the kind of polarization associated with democratic erosion, political identity becomes a social identity; politics becomes about tribal loyalty.[54] I will not contest the fact that in the campaign for the first exit referendum in August 2022, "Chile exhibited a highly polarized environment,"[55] nor that, in the present moment, political strategists, following effective models from other countries (e.g., the U.S. and Brazil), are seeking to stoke negative emotions (fear, anger, resentment) in Chilean society to vilify opponents and generate electoral support for extremist alternatives. However, I contend that it is off the mark to suggest that Chile's constitutional-making efforts failed due to political polarization.

I offer three reasons to support this contention. First, far from a bimodal sorting (as in the U.S., Brazil, or Venezuela), surveys indicate that the predominant characteristic of the Chilean electorate is a lack of identification with political parties.[56] There is not (yet?) tribal identification with any political party, movement, or particular leader that is driving the kind of zero-sum politics associated with pernicious polarization.[57] Second, surveys consistently show that the Chilean public is not ideologically bimodal either. Indeed, the historically tripartite division of the population on a Left-Right spectrum persists, with over 30% of

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[52] *See* Couso, *supra* note 2, at 32.

[53] *See* EZRA KLEIN, WHY WE'RE POLARIZED (Simon & Schuster ed. 2020); NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW (Oxford Univ. Press ed. 2019).

[54] *Id.*

[55] Couso, *supra* note 2, at 20.

[56] *See* Labcon. Laboratorio Constitucional, *Encuesta sobre Proceso Constituyente*, FEEDBACK RSCH., 71 (Sept. 2023), https://labconstitucional.udp.cl/cms/wp-content/uploads/2023/10/InformeEncuesta-LabConUDP-Feedback.Septiembre-Septiembre-2023.pdf.

[57] *See* Jennifer McCoy and Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT'L PEACE, (Jan. 18, 2022), https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190.

respondents locating themselves at or near the Center 4-6 on a 0-10 scale.[58] Moreover, when asked to locate their values on a 0-10 conservative to liberal scale, a near majority self-identifies as a 7 or above (liberal), about 30% as moderate with a 4-6 rating on the scale, and 20% as strongly conservative (0-3 on the scale).[59] This data, along with supermajority agreement on a number of specific issues that traverse the positions of different political parties,[60] indicate that while the "median voter" may be difficult to locate in Chile, Chileans are not divided into warring political tribes that would make agreement on a new constitution impossible. Indeed, the only issue over which there is such a split is the protection of fetal life,[61] although even there, the July 2023 iteration of the cited survey showed 74% of Chileans opposed the "prohibition of abortion under any circumstances."[62] Third, and notably, these same surveys have shown Chileans to be overwhelmingly in favor of democratic rights, with over 80% supporting the inclusion in the constitution of the right to peaceful demonstrations, as well as for a provision establishing that the armed forces must respect the democratic order and human rights.[63] A similar percentage repeatedly agrees that it is better to "seek common ground with those holding different perspectives in order to reach major agreements" on the content of the new constitution than "to stick firmly to one's principles, without engaging in transactions with other sectors."[64] Given all of this, I disagree with Professor Couso that Chile offers a cautionary tale about constitution-making in polarized contexts.

Nonetheless, Professor Couso is correct that Chile's experience points to lessons about the difficulties of democratic constitution-making in the contemporary era.[65] Rather than polarization, though, I would argue that it

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[58] *See* Labcon., *supra* note 56, at 75.

[59] *Id.* at 74.

[60] For example, over 80% express support for environmental protection and for recognition of caregiving as a form of work, as well as for immediate expulsion of foreigners who have entered the country illegally. *Id.* at 45-47. In addition, well over 80% support either a principal or a shared role for the state in the provision of social services such as education, water, health, and pensions. *Id.* at 41.

[61] *Id.* at 46.

[62] *See id.* at 37.

[63] *See id.* at 47.

[64] *Id.* at 27. *See also* Andrés Cárdenas, *Encuesta UDP revela que mayoría opina que Consejo Constitucional es "mucho peor" que la Convención*, ELMSTRADOR (Oct. 6, 2023), https://www.elmostrador.cl/noticias/pais/2023/10/06/encuesta-udp-revela-que-mayoria-opina-que-consejo-constitucional-es-mucho-peor-que-la-convencion/.

[65] *See genrally* Couso, *supra* note 2.

was the affective and organizational disconnect between government and citizens, the crisis of representation referenced above,[66] that doomed the process. In the words of Tschorne, discussing the 2021-22 process, "the failure of the Chilean constitutional experiment…is, first and foremost, a consequence of the unhealthy and gravely dysfunctional condition of the overall system of democratic representation."[67] The Convention assembled a supra-majority of delegates who were not just unaffiliated with political parties, but were "alienated from (antagonistic even)" to them.[68] Moreover, on the whole, they did not even come out of well-established social movement organizations that might have given them stronger links to civil society; rather, like the social uprising that launched the constitutional process, they were an "atomized assembly without organizations and leadership able to forge or sustain coherent agreements."[69] They were thus detached in their own way from broader society, out of touch with the substantive political preferences of too many Chileans. Consequently, the draft they produced "came to be seen [by the wider population] as unilateral and responding mainly to the aspirations of a relatively narrow composite of particularistic constituencies."[70] However, the rejection of the 2022 draft did not mean that Chileans were ready to entrust the traditional political parties with constitution-making; far from it. In the May 2023 elections for the Constitutional Council, where mandatory voting rules led to 85% turnout, traditional parties garnered only 47% of all the votes cast.[71] The majority of the electorate (nearly 7 million voters) either cast ballots for the new, far Right party, Republicanos (27% of total votes) or the populist Party of the People (4% of total votes), both of which had not signed the congressional accord on the new constitutional process, or they cast blank or spoiled ballots (21% of total votes).[72] This would appear to be another example of what Sazo identifies as a pattern of electoral "preferences based on rejecting specific parties or movements rather than

[66] *See* Suarez-Cao, *supra* note 12.

[67] *See* Tschorne, *supra* note 36, at 16.

[68] *Id.* at 8.

[69] Larrain et al., *supra* note 25, at 240.

[70] Tschorne, *supra* note 36, at 20 (first citing Guillermo Larrain et al., *supra* note 25, at 242; Aleman & Navia, *supra* note 37, at 94-95).

[71] SERVEL, *División Electoral*, ELECCIÓN CONSEJO CONSTITUCIONAL 2023, https://app.powerbi.com/view?r=eyJrIjoiNGVhYmQxNTMtNmFhNS00NGIzLTlmMWMtMTUxMDMyZjBhMTc4IiwidCI6ImVhZjg3OWJkLWQzZWMtNDY1MC1iMTI5LTEzZGZkZjQ4NTlmZSJ9 (last visited Mar. 19, 2024).

[72] *See id.*

on ideological affinity."[73] Yet, just as the Constitutional Convention delegates mistook the outcome of the May 2021 elections to be a mandate for a left-leaning charter, the Constitutional Council delegates seem to have interpreted the May 2023 election results as a call for a fundamental law that is even more rightwing than the (reformed) 1980 disposition.[74]

The fact that the second attempt at constitution writing in Chile, led and controlled by political elites, appears destined to end in a similar defeat at the polls as the first attempt in which parties were marginalized, suggests that pinning the blame on "participatory processes" [75] in general may be unfair, for in a context of a representational crisis, even delegates elected on political party lists may have "constitutional preferences [that are] in sharp contrast with that of electorate's majority."[76] While it is certainly frustrating—even exasperating—that voters appear to send one message in elections to constitution drafting bodies, and another message in referenda asking for their approval or rejection of the texts those bodies produce, the problem is not popular participation *per se*, nor even the specific mechanism of the (exit) referendum.[77] As Tschorne argues, "exit referendums can only perform their constraining role appropriately—i.e., encouraging the constitution-making body to seek an alignment between the contents of the new constitution and the preferences of most citizens and to ensure that it enjoys broad support among the country's main political forces—when the representative capacity of the institutions to which they are structurally coupled…is not too severely compromised."[78] Referendums, and I would add participatory mechanisms of any kind, can "be a useful complement and corrective to representative institutions," but

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[73] Diego Sazo, *Chile 2022: From Great Expectations to Rising Pessimism**, 43 REVISTA DE CIENCIA POLITICA 193, 218 (2023) (first citing Carlos Melendez, *The Post-Partisans: Anti-Partisans, Anti-Establishment Identifiers, and Apartisans in Latin America* (Cambridge Univ. Press ed., 2022); and then citing Rodrigo M. Medel, *Chile, la politica y la calle: Dinamicas de una politizacion antipartidista* (Nueva Sociedad ed., 2023)).

[74] *See Harboe afirma que "centroizquierda por el Rechazo" no apoyara "texto constitucional conservador"*, EL MOSTRADOR (Sept. 22, 2023), https://www.elmostrador.cl/noticias/pais/2023/09/22/harboe-afirma-que-centroizquierda-por-el-rechazo-no-apoyara-texto-constitucional-conservador/.

[75] *See* Couso, *supra* note 2, at 32; Samuel Issacharoff & Sergio Verdugo, *supra* note 25, at 1.

[76] *See* Couso, *supra* note 2, at 3.

[77] Roberto Gargarella, *Why are "Exit Referendums" undesirable?: The Case of Chile (2020-2022)*, 2023 EUR. HUM. RTS. LAW REV. 32.

[78] Tschorne, *supra* note 36, at 23.

they only work well when representative institutions are relatively healthy.[79]

Of course, this leaves Chile, and other countries where "political parties and other instruments of civil society that intermediate between the individual and the state" are in "serious disrepair," with a challenge that goes far beyond this constitutional moment.[80] Feeling alienated from and excluded from a political system whose intermediary institutions "have lost their embeddedness in society and local politics,"[81] ordinary citizens continue to demand a greater voice in politics.[82] They mistrust, even disdain, the political establishment and use the opportunities they have in elections and referendums largely to signal this dissatisfaction. But the solution can neither be to substitute participatory institutions for representative ones,[83] nor to sideline citizens and leave the governing to technocratic experts, which will simply deepen the problem. The only democratic path forward is "to rebuild the connection between elites and civil society and find institutional solutions to address the demands" of the citizenry,[84] improving representation and introducing or enhancing participatory mechanisms that can serve as a "complement and corrective" to those.[85] This is a long-term project that appears exceedingly daunting in an era in which the vast majority of the population say their current mood is best described by "uncertainty" (35.6%), "worry" (30.7%), and "fear" (8%).[86] People feel such a deep sense of insecurity that they "take refuge in their family, in their communities, in their home and in their traditions" and "when they project themselves into the future, they don't think more than three months ahead."[87] Any successful democratic constitutional

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[79] *Id.* at 22.

[80] Issacharoff & Verdugo, *supra* note 25, at 18-19 (citing Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEGAL PROBS. 89, 97 (2020)).

[81] Suarez-Cao, *supra* note 12, at 254.

[82] *See* Rocio Montes, *Encuesta Chile Dice: un 60% piensa que el autoritarismo se justifica en algún caso, pero los chilenos buscan una democracia participativa*, EL PAIS (Aug. 29, 2023, 00:30 AM EDT), https://elpais.com/chile/2023-08-29/encuesta-chile-dice-un-60-piensa-que-el-autoritarismo-se-justifica-en-algun-caso-pero-confian-en-la-democracia.html.

[83] *See* Issacharoff & Verdugo, *supra* note 25, at 24-25.

[84] Sazo, *supra* note 73, at 218.

[85] Tschorne, *supra* note 36, at 22.

[86] Labcon, *supra* note 56, at 10.

[87] *See* Antonieta De La Fuente, *Jaime Bellolio, former Chilean minister: 'The Republican voters never wanted the constitutional process in the first place',* EL PAIS (Sept. 23, 2023, 7:00 PM EDT), https://english.elpais.com/international/2023-09-23/jaime-bellolio-former-chilean-minister-the-republican-voters-never-wanted-the-constitutional-process-in-the-first-place.html (Jaime Bellolio, director of the Institute for Public Policy Studies at Andrés Bello University, summarizing the findings of a recent study from the Institute, in an interview).

refounding, in Chile or beyond, will require being proximate to and working alongside ordinary people to understand and address this insecurity.[88]

CONCLUSION

In most cases, and certainly in democratic settings, designing a constitution is not an insulated, technocratic exercise where drafters are sheltered from the rough and tumble of ordinary politics, but rather, it is like "building a ship at sea."[89] While this does not mean that who the builders are (their qualifications and their dispositions), how they approach their work (collaboratively or antagonistically), and what rules they follow and methods they use do not matter. They all do, of course. However, to roll with the metaphor, regardless of who the constitutional crafters are and how they conduct themselves, what they can achieve will ultimately be affected by the nature of the waters in which they are sailing: How stormy is the sea? What are the prevailing winds? How well-charted are the waters? Upon what shoals might the ship founder?

If we take this perspective, the outlook for success in democratic constitution-making in Chile and many other countries in the contemporary world looks grim. Whether the broader political context is one of polarization as Professor Couso suggests, or an effective and organizational chasm between the political establishment and ordinary citizens, as I have contended, the climatic conditions in which constitution drafters must attempt to do their work are highly unstable and unpredictable. In terms of the maritime metaphor, Chilean constitution writers work in troubled and uncharted waters. Add to this the factors beyond the scope of Professor Couso's article and this brief comment —such as the weakened leverage that regional and international actors have to promote constitutional democracy or to deter authoritarian machinations,[90] or the difficulty of unifying people in the age of social media echo chambers, fake news, and

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[88] *See* ASTRA TAYLOR, THE AGE OF INSECURITY: COMING TOGETHER AS THINGS FALL APART (House of Anansi Press Inc. ed., 2023).

[89] *See* Jon Elster et al., *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge Univ. Press ed. 1998).

[90] *See* David J. Samuels, *The International Context of Democratic Backsliding: Rethinking the Role of Third Wave "Prodemocracy" Global Actors*, 21 PERSPECTIVES ON POL. 1001, 1004-06 (2023).

A.I. trolls[91]—and the outlook grows even darker. As Isacharoff and Verdugo note at the end of their recent analysis of the first (2021-22) attempt, we have "enter[ed] a domain where past is not prologue," and in the contrast between the late 20th century constitutional replacement in South Africa and Chile's experience, "we may be seeing the politics of democratic decline being played out at the constitutional plane."[92]

Rather than ending on a note of despair, however, I instead offer a passage from Astra Taylor's recent book, *The Age of Insecurity*, which seeks to inspire citizens to keep working for the common good, despite the understandable impulse to retreat from the public sphere when the world seems to be crumbling around us: "[H]owever unknowable the future may be, there is no doubt our fortunes will remain interlinked. Risks proliferate, time passes, and things fall apart. But even amid the rubble, we can always reimagine, repair, and rebuild."[93] Chileans are resilient and creative, and their political experimentation has repeatedly excited the international imagination. Perhaps in the coming years they will prove the pessimists wrong.

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[91] *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS. THE POWER AND FRAGILITY OF NETWORKED PROTEST xxix, 161, 238-39, 241 (Yale Univ. Press ed., 2017) (first citing Keith N. Hampton et al*., Social Media and Political Discussion: When Online Presence Silences Offline Conversation*, 20 INFO., COMMC'N. & SOC. 1090, 1090 (2017); Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 POL. SCI. 1130, 1130 (2015); Zeynep Tufekci, *Facebook Said Its Algorithms Do Help Form Echo Chambers, and the Tech Press Missed It*, 32 NEW PERSP. Q. 9, 9 (2015)); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (Princeton Univ. Press, 2018).

[92] Issacharoff & Verdugo, *supra* note 25, at 62-63.

[93] Taylor, *supra* note 88, at 278.

VISUAL ARTISTS BRUSHING WITH THE LAW: INTERNATIONAL LEGAL DIMENSIONS OF PROFESSIONAL PRACTICE

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INTRODUCTION

"Millions of artists create; only a few thousands are discussed or accepted by the spectator and many less again are consecrated by posterity. In the last analysis, the artist may shout from all the rooftops that he is a genius: he will have to wait for the verdict of the spectator in order that his declarations take a social value and that, finally, posterity includes him in the primers of Artist History … and sometimes rehabilitates forgotten artists."

- Marcel Duchamp, (1887-1968)[1]

Seven decades after Duchamp's insightful observations, most living artists throughout the world continue to have little or no bargaining power when dealing with greater power, wealth, and influence of cultural market gatekeepers in the contemporary art ecosystem.[2] Private and public collectors, patrons, and commissioners, plus art market professionals, continue to determine—collectively and individually—cultural and market values of artworks; they do so often, only after an artist's death.

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[1] Marcel Duchamp, lecture at the Convention of the American Federation of Arts: The Creative Act (Jan. 1957) (transcript available at the Alexina and Marcel Duchamp Papers).

[2] *Id.*

Visual artists operate today in a global art ecosystem, devoid of internationally harmonised art and artists' laws and industry standards regulating artists' interaction with much-needed gatekeepers. Moreover, unlike most authors and performers in leading creative industries (music, sound recording, film, and video) who have customarily formed collective associations to negotiate basic business standards with their collective industry gatekeepers, most visual artists are lone practitioners.

Being solo means that to survive—perhaps even thrive—in the contemporary art ecosystem, visual artists ideally need to acquire and apply appropriate tools to secure necessary transactions with individual art world gatekeepers. These artists especially need to exercise skilful use of suitable legal tools—as naturally as a painter uses a brush. Most art schools worldwide offer little or no education or training in such professional practices.

Part 1 of this paper explores artists' engagement with exhibitors and buyers of completed works, commissioners of new works, and agents and dealers representing them in art marketplaces. Opportunities typically arise when using legal tools in the following principal contexts: A) primary sale contracts for still and moving and performative artworks; B) artists' royalty payments on art resales; C) commissions for new artwork; D) artists' representation contracts with art market professionals; E) artists' estate planning for post-mortem administration; F) taxes on importers of artworks; G) AI and IP: authorship and originality; misappropriation and infringement; and H) censorship and freedom of expression.

Part 2 explores notable examples of artists exercising their exclusive right to determine the content of artworks and processes of creativity, especially the use of law as a fundamental element within subject-matter, or as a tool during the creative act. These include:

1. Andy Warhol's unorthodox ways of working in the 60s/70s/80s, which came back to legally bite his estate and foundation post-mortem, to date.
2. Sol LeWitt's authenticity certificates for wall drawings and structures for six decades from the 60s, the status of which was legally challenged, in this century.
3. Christo and Jeanne-Claude's practice of embracing the law for realisation of their site-specific public art projects around the world for six decades, from the 60s to the 20s.
4. Alan Smith's artwork entombing a sum of money in perpetuity, from the 1970s to date.
5. JSG Boggs' hand-drawings representing national currency notes used to pay for goods and services, in the 80s.

6. Carey Young's artworks exploring the relationship between the law and the constitutional identity of individuals, this century.
7. Alison Jackson's artworks exploring the theme of celebrity culture via still and moving images of celebrity lookalikes, from the 90s to date.
8. Banksy's disruption of art's cultural and market values, from the 90s to date.

I. BRUSHING WITH GATEKEEPERS

A. Buyers

i. Art Value Influencers

The cultural sector's valuation of new artwork typically involves "deciphering and interpreting its inner qualifications."[3] This is an alchemistic process of subjective opinions expressed by a motley crew of influencers including fellow artists, art scholars and critics, public-facing art museum and gallery institutions, art biennales, and artist's foundations. Achievement of cultural value does not necessarily translate into market value, which often stimulates cultural influencers to seek out and consider new art and artists causing fiscal fuss.

The market sector's valuation typically involves objectively noting a work's past selling record, if any, and especially the latest price paid, then subjectively guesstimating its likely future resale price range. Market influencers include art advisors and agents, gallery dealers, art fairs, auction houses, private collectors, asset investors, patrons, and commissioners. Achievement of market value does not necessarily translate into cultural value, which often stimulates market influencers to look at new art and artists generating good cultural vibrations.

Why are artists poor?[4] There are many customary reasons: contemporary artists self-fund autonomous work, rarely being commissioned or sponsored to originate, and are usually paid the lowest price when new artwork is first sold (astute purchasers' source and buy directly from artists, rather than pay premiums to art market professional dealers and auction houses). Consider this caustic observation by novelist

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[3] *Id.*

[4] HANS ABBING, WHY ARE ARTISTS POOR? THE EXCEPTIONAL ECONOMY OF THE ARTS (2002).

Kurt Vonnegut: "The paintings by dead men who were poor most of their lives are the most valuable pieces in my collection. And if the artist really wants to jack up the prices of his creations, may I suggest this: suicide."[5] And sardonic comments of Thomas Hoving, Director of New York's Metropolitan Museum of Art 1967/77, "[a]rt is sexy! Art is money-sexy! Art is money-sexy-social-climbing-fantastic!"[6]

Andy Warhol (1928-1987) famously married fine art with commerce, which he proudly and controversially noted: "Being good in business is the most fascinating kind of art . . . [m]aking money is art and working is art and good business is the best art."[7] Warhol did not learn business skills at art college, but serendipitously discovered and uniquely applied them via his mid-twentieth century Manhattan factory. Today's art college students are unlikely to be as fortunate, especially when facing art business challenges in a contemporary art landscape that is now global in its reach—and is largely unregulated.

ii. Wild West Ecosystem

Twentieth-century growth of international trade spawned the development of specific industry-governed and funded regulatory frameworks harmonising standards of trading, transparency, health and safety, and dispute resolution mechanisms. Many such measures have been buttressed by national laws and international agreements, treaties, and conventions.[8] There are now firmly established regulatory frameworks for international industries such as banking, fishing, pharmaceuticals, shipping, transportation, and sports.[9] Is there a need for similar regulation of the international art industry? In other words, is it (as some have put it in recent times) like the old wild west—a self-built society without law enforcement, with just survival of the fittest?[10]

Few if any jurisdictions have enacted laws dealing specifically with art transactions: they are sales of goods, typically treated in law as such, in

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[5] KURT VONNEGUT, BLUEBEARD 48 (1987).

[6] Lynn Barber, *Art Struck*, THE OBSERVER, Mar. 19 2000, https://www.theguardian.com/theobserver/2000/mar/19/life1.lifemagazine9.

[7] ANDY WARHOL, FROM A TO B AND BACK AGAIN 33 (1963).

[8] *See* 1 PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE (2015).

[9] *Id.*

[10] For example, *The Art Market Landscape: Five Essential Insights,* SOTHEBY'S INSTITUTE OF ART (May 31, 2023), https://www.sothebysinstitute.com/news-and-events/news/the-art-market-landscape-five-essential-insights.

most cases second-hand. Accordingly, in locations where art is sold, art business traders are customarily required to comply with general trading laws. There have been few, if any, serious calls from the art industry and its clients to enact art-specific business transaction laws and regulations.

The question of self-regulation and, if not forthcoming, legislatively imposed regulation continues to be the "elephant in the room," stomping through the offices of cultural institutions and art market professionals. Robust evidence has been regularly gathered on this matter in recent years by Deloitte and ArtTactic in their jointly published annual Art & Finance Reports.[11] These institutions conducted qualitative surveys of art market gatekeepers, including their art lawyers, each of which was asked to address issues "that pose the biggest threat to the reputation and functioning of the global art market." There has been a consensus among those surveyed on the need for the art industry to "take self-regulatory action to address … the greatest threats to credibility and trust in the art market," not only in relation to dealings with older art and antiquities, but also with modern and contemporary works.[12] A key threat was highlighted by Karen Sanig, head of art law at Mischon de Reya LLP:

> Reluctance to commit to writing, even a short written agreement, has to some extent enabled the eccentricities of the market to abound. A slightly more rigid approach to doing deals is starting to appear and ought to help solve some of the anomalies of the market that threaten its reputation … [b]uyers and sellers ought now to require certain written warranties in relation to artworks as part of any transaction … [t]he perceived threats to the art market are in many ways surmountable by exercising careful due diligence in art transactions and committing to written agreements … the usual rules applied to the acquisition of large value assets – like checking ownership or the right to transfer ownership – are often forgotten.[13]

In this context, Sanig was referring to the Anglo-American common law contract formation approach, which generally does not require there to be a formally signed and sealed written instrument to create legally enforceable and binding contracts for sales of goods. However, most jurisdictions worldwide follow a Franco-style civil law approach, generally

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[11] DELOITTE & ARTTACTIC, ART & FINANCE REPORT; A CLOSER LOOK AT THE GROWING ART & FINANCE INDUSTRY (4TH ED. 2016), https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artandfinancereport-21042016.pdf.

[12] *Id.*

[13] *Id.* at 146.

requiring some form of written documentation.[14] Sanig was clearly suggesting that art sales conducted in Anglo-American jurisdictions should ideally be at least committed to writing, as would normally be the case in Franco-sphere jurisdictions. This modest and sensible suggestion is one that artists conducting their own first sales would be wise to consider adopting. When artists subsequently enter a contemporary art resale marketplace, which increasingly requires proof of authenticity and provenance, perhaps artists should explain to would-be buyers, who are reluctant to sign a written sale agreement, the benefits of being in possession of an artist-author signed document.[15]

Ignorance by art market professionals of business laws applicable to art transactions is the reasoning behind Sanig's further significant suggestion that "there are few professional and qualification standards imposed on art market professionals … one way to improve the current situation is to invest in educating art market professionals on behaviour that is illegal, and making it a requirement that they should inform themselves on the law."[16] The same could be said for there being such education of students at art colleges.

At the heart of these art market gatekeeper surveys lies the question of whether commonly agreed problems and issues should be tackled through legislative intervention or through self-regulation by the art industry. Most consultees favored self-regulation, but could not agree on how such should be achieved since nothing appears to have been promulgated or planned for the foreseeable future.[17] If the global art world continues to avoid or delay introducing effective self-regulation, governments may consider legislating sooner or later. As Pierre Valentin, head of art and cultural property law at Constantine Cannon LLP, said, "whilst it is difficult to see how an industry-appointed regulator could impose sanctions on industry members, this might be preferable to doing nothing at all."[18]

In the absence of internationally harmonised art rules and regulations, cultural and market transactions between artists and gatekeepers are conducted within general business frameworks operating in applicable

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[14] *See* DUNCAN FAIRGRIEVE, THE INFLUENCE OF THE FRENCH CIVIL CODE ON THE COMMON LAW AND BEYOND (2007).

[15] *See* CLARE MCANDREW, FINE ART AND HIGH FINANCE: EXPERT ADVICE ON THE ECONOMICS OF OWNERSHIP (2010).

[16] DELOITTE AND ARTTACTIC, *supra* note 11, at 20.

[17] *Id.*

[18] *Id.* at 147.

local, regional, state, or national jurisdictions. The next section considers engagement by artists with gatekeepers in a range of common art business transactions.

iii. Key Actors

Artists commonly conclude first sales verbally. In civil law jurisdictions, such transactions may not be legally valid if artists or buyers rely in future disputes only on proverbial "he said/she said" recollections.[19] In common law jurisdictions, verbal transactions may be legally valid if there is sufficient probative evidence that a sale was concluded; but legal and business problems can and do arise from such so-called silent contracts. Consequences of silence can be profoundly damaging to the lives of both artwork and artist through their journeys into the future; to first and successive secondary buyers (and their heirs/estates); to art market professionals involved in transactions; to acquiring museum and gallery institutions; to investors; to authentication experts, researchers, and academics; and to conservators and restorers. However, in recent times artists who are comfortable with digital technology use it to record first sales transactions.

Furthermore, blockchain technology enables transactions to be recorded digitally. A growing number of artists and art market professionals, notably in the U.S., have been attracted to its use for first and subsequent sales of artworks.[20] Advocates of smart blockchain-supported contracts see them as being a unique, secure, and transparent mode of proving an artwork's authenticity, current and future transfers of ownership, and allowing artists to exercise some control over new works they sell. However, in many jurisdictions such contracts may not currently be legally recognised, and therefore, not binding on buyers nor enforceable by artists. Some jurisdictions enacted legislation recognising and regulating smart contracts, but most jurisdictions worldwide have yet to do so. Smart contracts and their successful operation ideally require universal jurisdictional recognition.[21]

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[19] FAIRGRIEVE, *supra* note 14.

[20] Cam Thompson, *Retract Royalties, Reduce Revenue: NFT Creators Are Suffering and so Are Marketplaces*, COINDESK (Nov. 4, 2022), https://www.coindesk.com/web3/2022/11/04/retract-royalties-reduce-revenue-nft-creators-are-suffering-and-so-are-marketplaces/.

[21] *See* Daniel Drummer & Dirk Neumann, *Is code law? Current legal and technical adoption issues and remedies for blockchain-enabled smart contracts*, 35(4) J. OF INFO.TECH. 337 (2020);

iv. Still Physical Artwork

Physical artwork deteriorates over time, especially if made using non-traditional and ephemeral materials. Written sale contracts may provide future restoration/repair and/or replacement of material more efficiently. Separate written guidance for ongoing care and maintenance (including sound environmental conditions) may ideally be provided by artists, including instructions for safe transportation, assembly/disassembly, display, and storage. Silence on such matters at point-of-sale leaves artists and new owners without agreement on the best course of conduct to address future problems and exposes artwork to risks of neglect or inappropriate treatment.

When making first sales, artists sometimes agree to a percentage discount from their normal market price for an artwork (on the basis that a percentage of the purchase price would not be lost as a commission fee paid by artists to selling agents/dealers).[22] And in return, artists may ask buyers to agree to a condition of sale, giving the artist (and/or their estate) first option to buy back the artwork at a fair market value in future. Some artists rely on a belief that they have an automatic legal right to buy-back even where there is no recorded agreement to do so—especially if there is a future rise in resale price. However, no jurisdictions to date appear to have legislated to give artists such automatic buy-back rights.

Myths and misunderstandings about artists' intellectual property rights in artwork are common among first-time buyers, many of whom erroneously believe they are buying not only an artwork, but also the right to reproduce or otherwise merchandise copies of it. It is good practice for artists to include in written contracts of sale "for the avoidance of doubt" provisions that the artist owns and retains copyright and all other intellectual property rights in the artwork, and that the buyer needs the artist's prior written consent for any reproduction or other merchandising of copies of the artwork (or versions of it) in any dimensions or mediums (mechanical or digital).

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see also Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations,* HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2018), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/.

[22] *See* JJ Long, *When To Offer Discounts As An Artist*, JJARTWORKS (Feb. 2, 2019), https://www.jjartworks.com/blog/when-to-offer-discounts-as-an-artist.

The contemporary art world's global reach substantially increases the likelihood that parties in the sale are based in different jurisdictions, in which case their respective interests are best served by including a term in the contract, agreeing to their choice of governing law in the event of future legal disputes and normal business practice in most cross-jurisdiction business transactions in other international industries.[23]

v. Born-Digital Artwork

In 2021, artworks minted via non-fungible tokens (NFT) flooded the contemporary art market.[24] There are two main types of art NFTs: (1) artworks born-digital and minted as NFTs by the original digital author; and (2) physical artworks that are digitally reproduced and minted as NFTs by anyone with access to them.[25] For example, Beeple (1981) was the original author and NFT minter of *Everydays: The First 5000 Days* in 2021;[26] Katsushika Hokusai (1760-1849),[27] was the original author of *The Great* Wave *off Kanagawa*, 1831, a physical print of which was acquired by London's British Museum in 2008, which minted it for sale as an art NFT in 2021.[28] Beeple undoubtedly owns copyright in *Everydays*, with exclusive legal rights to mint his image for sale. Any copyright in Hokusai's artwork fell into the public domain to be freely reproduced and

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[23] *See* Glenn *West, Making Sure Your "Choice-of-Law" Clause Chooses All of the Laws of the Chosen Jurisdiction,* THE HARV. LAW SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2017), https://corpgov.law.harvard.edu/2017/09/18/making-sure-your-choice-of-law-clause-chooses-all-of-the-laws-of-the-chosen-jurisdiction/.

[24] *See* AMMA & Artprice.com, *The Art Market in 2021* (25th ed. 2021), https://www.artprice.com/artprice-reports/the-art-market-in-2021/the-art-market-in-2021.

[25] *See* Josie Thaddeus-Johns*, What Are NFTs, Anyway? One Just Sold for $69 Million,* N. Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html.

[26] Michael Joseph Winkelmann, known professionally as Beeple, is an American digital artist, graphic designer, and animator known for selling NFTs. His *Everydays: the First 5000 Days*, is a collage of images from his "Everydays" series: sold on March 12, 2021, for $69 million in cryptocurrency to an investor in NFTs. It is the first purely non-fungible token to be sold by Christie's. *See* https://onlineonly.christies.com/s/first-open-beeple/beeple-b-1981-1/112924.

[27] *The Great Wave off Kanagawa* is "possibly the most reproduced image in the history of all art … and the most famous artwork in Japanese history," and influenced notable artists including Vincent van Gogh, Claude Monet and Utagawa Hiroshige. *See* Ellen Gamerman, *How Hokusai's The Great Wave Went Viral*, WALL STREET J. (Mar. 18, 2015), https://www.wsj.com/articles/how-hokusais-the-great-wave-went-viral-1426698151.

[28] Bender Grosvenor, *The British Museum Demeans Itself By Selling Its Works as NFTs – and Will Probably Live to Regret It*, THE ART NEWSPAPER (Feb. 09, 2022), https://www.theartnewspaper.com/2022/02/09/the-british-museum-demeans-itself-by-selling-its-works-as-nftsand-will-probably-live-to-regret-it.

used. However, if Hokusai were alive or had recently died, any copyright he owned would still require his licence to reproduce and mint and sell *The Great Wave* as an art NFT.

Buyers may also run risks. They may encounter copyright violation issues if a copyrighted work is minted without a licence. Similarly, they may have failed to appreciate that the acquisition of what they believe to be a unique art NFT does not include owning copyright in the image, which may mean that further versions of it may be minted and marketed by others. Such buyers may have a legal remedy against the online platform through which they first acquired the NFT. Such legal remedy exists for violation of a buyer's sale contract by the seller's failure to disclose or explain such limitations, or for misrepresentation or fraud, such as being misled into buying the NFT that was erroneously created and authenticated by the original artist-author. Art lawyers have warned potential buyers to interrogate the written terms and conditions of sale on NFT selling platforms before bidding and purchasing.[29] These same art lawyers have highlighted the added risk of buyers' NFT accounts being hacked to steal their acquisitions and cite the ICT *caveat* along lines of "if it can be digitised, it can be hacked."[30] Born-digital artworks, first sold via digitally encrypted NFTs, face legal and business issues very different from those typically faced in still physical artwork's first sales. Nevertheless, first sales of both types of work ideally benefit from employing written sale contracts with appropriate terms and conditions.

vi. Film/Video Artwork

Buyers of film/video artworks are usually interested in following the traditional art acquisition practice: buying full ownership of the physical object or digital file carrying film/video data. It is important for both the

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[29] *See NFT Projects – Essential Legal Advice*, SAUNDERS LAW, https://www.saunders.co.U.K./services/media-law/nft-projects-essential- legal-advice/; *see also What Are The Legal Issues Concerning Non-Fungible Tokens (NFTs)?* ART LAW & MORE (July 8, 2021); https://artlawandmore.com/2021/07/08/what-are-the-legal-issues-concerning-non-fungible-tokens-nfts/; Cathrine Zhu & Louis Lehot, *A Checklist Of Legal Considerations For The NFT Marketplace*, CRUNCHBASE NEWS (Nov. 9, 2021), https://news.crunchbase.com/fintech-ecommerce/a-checklist-legal-nft-marketplace/.

[30] Int'l Monetary Fund [IMF], *Finance & Development: The Dark Side of Technology,* vol. 53 (Sept. 2016), https://www.imf.org/external/pubs/ft/fandd/2016/09/wellisz.htm; *see also* Nathan Reiff, *Can Crypto Be Hacked?* (May 31, 2023), https://www.investopedia.com/articles/investing/032615/can-bitcoin-be-hacked.asp.

buyer and artist to clarify at the point of sale the extent to which the buyer is also acquiring any rights/permission to show the work. Conflicts may arise where the artist assumes the buyer wants to own the film/video work only to view it privately, but the collector does not disclose plans to show the work publicly and charge viewers digitally. To avoid these kinds of difficulties, such matters should ideally be discussed before the sale, and be included in a written contract together with any other terms and conditions—as they are customarily dealt with in comprehensive written acquisition contracts by public-facing institutional collectors of artists' film/video works.[31]

A key issue for artists making audio-visual artworks is self-clarification of their creative intentions before negotiating with potential buyers. Whether, for example, the work is to be seen by a unique audience, by limited defined audiences, or by unlimited undefined audiences; and whether physical/digital ownership of a unique master is to be transferred to the buyer, or of only a numbered limited edition of copies of masters, or of an unlimited edition of copies of masters. Ideally, artists should use their self-clarified intentions, to settle with buyers' provisions for viewing, and/or transferring physical/digital ownership. Two areas of law are key considerations: copyright and contract.

International and national copyright laws give authors of film/video exclusive rights to prevent or authorise copying, public communication/performance, renting/leasing, editing, and authorship credits. Duration of film/video copyright varies widely worldwide. Some countries specify fixed years from public release date while others endure for the principal director's lifetime plus 25/50/70 years after death. In some jurisdictions, including the U.K. and E.U. countries, copyright lasts for the lifetime plus 70 years after the death of a last surviving co-author. Copyright laws envisage authors using written contracts for exploitation of their works. Contracts need not, but may, include transfer of ownership of physical/digital material holding the audio-visual data of the film/video, or may restrict a buyer's ownership and/or use of a work by including specific terms and conditions, such as territorial and/or temporal limits of such ownership/use. Selling ownership or granting copyright licences to use

[31] *See* Int'l Council Of Museums [ICOM], *Standards on Accessioning* (2020), https://icom.museum/en/ressource/standards-on-accessioning-of-the-international-council-of-museums/.

film/video can be a lucrative source of capital and income generation for the artist-author/copyright owner.[32]

vii. Performative Artwork

Dematerialisation of contemporary art activity increased significantly in recent times and produced a range of performative art practices.[33] Every work is unique and will ideally require correlative legal and business arrangements constructed and implemented for its acquisition. For example, contracts can explain instructions for performance to ensure that the artist's directions and conditions for a work's performance are respected and adhered to, and that only those contractually authorised to enact the work may do so.[34] Ideally, such contracts work best when they are in a written agreement signed by all concerned parties. Additional contractual terms and conditions of sale may require that ownership is transferred uniquely to a collector/buyer or performance location/venue, meaning that the artist agrees not to sell re-enactment rights of the performative work to others.[35]

International and national laws governing intellectual property rights in performances are complex. Working knowledge and understanding of such rights are alien to most performative visual artists, especially in the early development of their practices.[36] Performers' rights are akin to

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[32] *See The International Documentation on Audiovisual works (IDA) and rights data management in the audiovisual sector,* WIPO (Oct. 26, 2022), https://www.wipo.int/meetings/en/details.jsp?meeting_id=72808.

[33] *See* Philip Barcio, *What Was The Dematerialization of Art Object?,* IDEELART (June 2, 2017), https://www.ideelart.com/magazine/dematerialization-of-art.

[34] For example, Tino Sehgal's (b.1976) 'constructed situations' require enactment of his choreographic instructions and scripted speech by performers – or 'interpreters' – approved and trained by the artist. Sehgal's constructed situations are enacted in real time, and in interaction with an audience inside a museum or a gallery. In contrast to ephemeral works of Performance Art, Sehgal's works are exhibited, like other exhibits found in a gallery or a museum, during the entire opening times of the exhibition's duration. *See also* Anne Midgette, *You Can't Hold It, But You Can Own It*, N. Y. TIMES (Nov. 25, 2023), https://www.nytimes.com/2007/11/25/arts/design/25midg.html.

[35] For example, Public Movement is a performative research body that investigates and stages political actions in public spaces, which in 2011 used a written contract to define the rules for performance of a work and to transfer the exclusive right to perform it in the Netherlands to the Van Abbemuseum for Contemporary ART in Eindhoven. *See also* PUBLIC MOVEMENT, http://www.publicmovement.org/about/.

[36] *See Performers' Rights – Background Brief*, WIPO https://www.wipo.int/pressroom/en/briefs/performers.html; *See also Improving the Status of*

copyright and are automatically given by laws in most jurisdictions. Such laws give performers of all kinds, including performative visual artists, exclusive rights to authorise/deny actions such as recording of their live performances (so-called non-property rights), and making, distributing, renting, and loaning copies of such recordings (so-called property rights).[37]

Performers' rights generally last for at least 50 years from the first public release of an authorised recording. Professional performers in other cultural media (music, dance, film, theatre) customarily give prior authorisation for live recordings of their performances through written contracts. These agreements are with potential producers and/or disseminators of such recordings that deal with the recording itself, any performer's fee, or the performer's share of economic rewards (royalties) that may be earned by future commercial showings, broadcasts, or other commercial communications of those recordings.[38] Performative visual artists could, and ideally should, do likewise, but few do so and thereby miss golden opportunities to generate future revenue.

Moreover, copyright laws in many jurisdictions give authors of performative artworks, who might also be performers, the rights to authorise or deny re-enactments of all or a substantial part of their work, and to restrict the recording, distribution, public performance, and public communication of their work. Such rights typically endure for the author-artist's life plus at least fifty years post-mortem. In this way, the whole of a performative artwork may be copyright-protected via its constituent elements of music, literature, film, choreography, drama, still visual art, and design.[39]

B. Resellers

France's Ministry of Culture is currently researching, "the permanence of artistic royalties through smart contracts and other means, and on how blockchains communicate with each other."[40] It is apt that this research is

Performers: Efforts and Perspectives, WIPO MAGAZINE (Nov. 2009), https://www.wipo.int/wipo_magazine/en/2009/06/article_0003.html.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Dorian Batycka, *Twelve institutions join Web 3.0 fellowship—including Musée d'Orsay and Vienna's Belvedere Museum—to harness the power of blockchain,* THE ART NEWSPAPER (Feb. 17, 2023), https://www.theartnewspaper.com/2023/02/17/global-museums-and-cultural-bodies-join-web-30-fellowship-to-harness-the-power-of-blockchain.

being undertaken by France, where permanent artists' resale royalty rights were conceived just over a century ago. These rights were implemented not by contract law, but by "other means" legislation. Enacted in 1920 as *droit de suite* (right to follow), French citizen-artists were given automatic legal rights to receive payments of royalties each time their works were resold in France's art market.[41] Over eighty nations developed and enacted versions of this law over the past century to benefit their artist-citizens, including common law jurisdictions[42] where *droit de suite* usually translates as the artist's resale right (ARR). In the U.S., ARR legislative proposals have been repeatedly rejected.[43]

Before considering the U.S., it is valuable to reflect on why many other nations enacted ARR. Most artists first enter the marketplace in weak bargaining positions where it is hard to find interested buyers, and even harder to persuade willing buyers to also accept a contractual condition of sale requiring them to pay artists a share of proceeds of a subsequent resale. What is even more difficult than all of that is for artists to muster the courage and resources to enforce compliance with contractual resale conditions by defaulting resellers. Moreover, even if first buyers agree to resale conditions, contract laws in many jurisdictions do not give artists (or their estates after death) the right to enforce resale royalty compliance by second and subsequent buyers who are not a contracting party to the first sale—a legal difficulty often exacerbated by the location in foreign jurisdictions of first and subsequent resellers.[44]

Such contractual shortcomings may be overcome by ARR legislation. Artists are automatically given ARR as an inalienable economic intellectual property right, so that they cannot sell, donate, or waive its enforceability. ARR endures this protection throughout an artist's life plus decades after death (enforceable by their estates). Royalty rates are standardised around four or five percent of the resale price, up to maximum rate cap. Private resales are excluded so that only art market professionals

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[41] United Nations Educ., Sci. and Cultural Org. [UNESCO], *The Resale Rights of Artists ("Droit De Suite")*, IGC(1971)/XI/4 (Apr. 9, 1997), https://unesdoc.unesco.org/ark:/48223/pf0000111551.

[42] Notably: Australia, India, Ireland, Malta, New Zealand, and U.K.. *See generally,* Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists,* CISAC (June 2015), https://www.cisac.org/media/3953/download.

[43] OFF. OF THE REGISTER OF COPYRIGHTS, RESALE ROYALTIES: AN UPDATED ANALYSIS, (Dec. 2013).

[44] *See* Sam Ricketson, *Toolkit on Artist's Resale Right,* WIPO (Mar. 8, 2023), https://www.wipo.int/meetings/en/docdetails.jsp?doc_id=602473.

involved in resales are required to pay royalties, which may be recouped from buyers. National non-profit collecting entities receive royalties and remit them to their artist-members. Art market professionals may be judicially sanctioned for non-compliance.[45] ARR nations may sign reciprocal enforcement treaties with other nations operating similar ARR legislative frameworks. Treaty nations agree to collect the resale royalties from the works created by citizen-artists of other treaty nations and national collecting organisations remit receipts of foreign artists' royalties to each other accordingly.[46]

Furthermore, national ARR legislation overcomes a widely recognised imbalance between the economies of visual artists and other creative authors. Visual artists, for example, do not typically derive principal income from selling reproductions of their artworks, but from sale of unique or limited-edition works to single first buyers—prices for which are usually lower than achieved by subsequent resellers. By contrast, most other creative authors (of original music, literature, photography, choreography, moving images, and so on) derive principal income from selling reproduction and dissemination of multiple copies of works to a hoped-for mass market. Accordingly, advocates for ARR contend that such innate economic imbalance is best redressed by national legislation.[47]

ARR in the U.S. has been explored by federal and state legislators many times since the 1970s, but (with one notable exception) has always been strongly resisted. Legislation was considered by Congress in 1978, 1986, 1987, 2011, 2014, 2015, 2018 and 2019, where each proposal failed.[48] Several U.S. state legislatures have also considered ARR proposals, but only California legislated via its California Resale Royalties Act in 1976 (CRRA). However, in 2018, a federal appeals court nullified the CRRA on the basis that its provisions were incompatible with federal law.[49] Amogst other things, the court cited the U.S.' longstanding federal "first-sale" legal doctrine which permits the owner of an artwork to resell it as they see fit without hindrance from the original artist-owner. This

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[45] *e.g.,* Anny Shaw, *Artist resale rights organisations launch U.K. High Court action against multi-millionaire art dealer and collector Ivor Braka,* THE ART NEWSPAPER (Mar. 18, 2022), https://www.theartnewspaper.com/2022/03/18/artist-resale-rights-organisations-sue-art-dealer-collector-ivor-braka.

[46] Ricketson, *supra* note 44, at 58.

[47] *Id.* at 10.

[48] OFF. OF THE REGISTER OF COPYRIGHTS, *supra* note 43, at 6-8.

[49] Close v. Sotheby's, Inc., 894 F.3d 1061, 1076 (9th Cir. 2018).

judicial precedent effectively confirmed that individual states cannot enact their own ARR framework.

Following this 2018 decision, U.S.-based artists and their lawyers searched for ways of achieving ARR by non-legislative means. They eventually focused on using blockchain technology to create NFT smart contracts with resale royalty conditions when first selling their works. Such first sale practices have flourished in the U.S. over the past year or so. However, recent reliable reports suggest increasing numbers of U.S.-based artists and their blockchain market platforms have begun to curtail the practice.[50] Given the apparent weaknesses of contractual resale royalty rights, champions of ARR favor a multilateral ARR treaty currently being proposed at the United Nations' World Intellectual Property Organisation.[51] This proposal has gained support from current ARR legislative nations and others considering the idea.[52] If such a universal ARR instrument achieved the agreement of most nations, perhaps the U.S. would subscribe to it, thereby giving U.S. citizen-artists inalienable rights to potential royalties from resales of their artworks around the global art market.

C. Commissioners

An ideal starting point, for successful realisation of commissions for new artwork, is the establishment of a mutual trust bond between artist and commissioner. Such bond is best embodied in a written agreement reflecting the inevitably unique nature of the work and its execution processes. Mutual understanding is of paramount importance and such an agreement need not be viewed as a legalistic straitjacket. Instead, the agreement should be viewed as a jointly constructed *aide-mémoire* and project management checklist to guide the parties through their respective responsibilities and rights during the commission process. There is no customary one-size-fits-all commission model contract.

A key challenge is often the tension between artists' confidence that they will be paid for delivering their artistic skill and labour, versus commissioners' confidence that they have a right to reject new work. Such

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[50] Louis Jebb, *Blockchain platforms promise resale royalties and provenance tracking for physical artworks,* THE ART NEWSPAPER (June 13, 2023), https://www.theartnewspaper.com/2023/06/13/blockchain-platforms-promise-resale-royalties-and-provenance-tracking-for-physical-artworks.

[51] Ricketson, *supra* note 42.

[52] Ricketson, *supra* note 44.

a dichotomy may be reconciled through artists' and commissioners' agreement provisions specifying an overall project timescale with key staging points, such as artists receiving interim payments for work done and expenditure made (and contingent provisions for slippages and/or variations). At each stage payment, commissioners should have opportunities to view completed work, make constructive suggestions, and approve progress to the next stage or terminate the remainder of the commission.

Artists and commissioners should ideally anticipate and discuss an artwork's potential future uses or abuses and make appropriate provisions accordingly. After a commissioned work's completion and full payment to the artist, problems may arise when commissioners decide a work should be modified and/or relocated. Respective rights and responsibilities of both the artist and commissioner in this situation should be provided for beforehand. For example, artists need clarification on who would be the owner of the work after execution, whether it is the artist, commissioner, funder, maintenance trust, or site owner. Additionally, artists need clarification on whether ownership transfers would revert back to the original artist if, in future, the work changes or relocates.

Artists' rights, over future uses of commissioned works they no longer own, may be strengthened by national and international intellectual property laws, most of which allow artists to exercise such rights through contracts in advance of new creations. Nevertheless, it is prudent to include provisions confirming an artist's statutory copyrights, moral rights, and resale rights over the work—perhaps with any agreed variations or licences. Virgin commissioners often misunderstand that commissioning and owning new work does not automatically buy rights to reproduce or otherwise commercially exploit the work or authorise others to do so.

A landmark case concerned Richard Serra's (b.1938) *Tilted Arc*, 1981: a large steel sculpture commissioned by the U.S. General Services Administration (GSA) and sited in Federal Plaza in New York City, several years after which GSA decided to remove it. Serra strongly objected and filed a lawsuit in 1986, claiming the sculpture was site-specific and removal would destroy its artistic integrity.[53] His lawsuit failed and the sculpture was removed. U.S. federal law did not then, but since 1991, does give U.S. artists the statutory moral right to prevent any intentional or grossly negligent destruction of their work, if it is of recognised stature.[54]

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[53] Serra v. U.S. General Services Admin., 667 F. Supp. 1042, 1045 (S.D.N.Y. 1987).
[54] Visual Rights Act (VARA) of 1990, 17 U.S.C. § 106A.

D. Representatives

In Central and Eastern Europe and Russia, artists and gallery dealers did not rush into each other's arms following the collapse of Communism in the 1990s, and the development of free market economies. Artists in such countries were, and still are, mostly reluctant to have gallery dealers as their representatives. Instead, artists preferred to sell new work directly or consign to auction houses. In these ways, such artists seek to guard against what they see as the real risk of dealers influencing the content and form of their new work, to be more marketable, and to avoid paying up to fifty percent commission fees to dealers. Auction houses in such countries charge sellers consignment fees of less than ten percent of the hammer price. A conventional artist/gallery business deal is hard to find in such countries.

In India and South-East Asia, as economies have grown, so have their art markets. Newfound wealth of individuals and businesses in such territories has stimulated buying contemporary art, where the resales have achieved profitable returns.[55] Such new art markets have yet to establish customary trading practices or norms for artists and art market professionals including artist/gallery business deals. The situation is similar in other growing contemporary art markets, such as Greater China, Latin America, and parts of Africa.[56]

Australia experienced a vibrant market for contemporary art, especially for work by indigenous peoples.[57] In particular, collaborations between indigenous artists and non-indigenous dealers have resulted in the establishment of a thriving market for a range of contemporary indigenous works sold in major cities. City dealers regularly visit indigenous artists in the outback to supply canvases and paints, where most live communally in relative poverty and generally poor conditions. Indigenous artists are often paid comparatively low fees for works they produce for dealers, who then

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[55] *See* Jennifer Scally, *The art market in Asia: vibrant, dynamic and flourishing,* AXA XL (Apr. 24 2022), https://axaxl.com/fast-fast-forward/articles/the-art-market-in-asia.

[56] *See* CLARE MCANDREW, A SURVEY OF GLOBAL COLLECTING IN 2022, (2022), https://d2u3kfwd92fzu7.cloudfront.net/A_Survey_of_Global_Collecting_in_2022.pdf.

[57] *See* Briar Williams, *Gold rush – it's boom times in the Australia art market,* BUSINESS DECK (Feb. 6, 2023), https://businessdesk.co.nz/article/the-life/gold-rush-its-boom-times-in-the-australia-art-market.

ship them to cities for sale at comparatively higher prices.[58] Likened by many critics of such practices to slave labour, their prevalence led to the Parliament of Australia enacting the Resale Royalty Right for Visual Artists Act in 2009.[59] Non-indigenous contemporary artists also benefited from this Act, even though their relationship with gallery dealers tends to follow the typical framework now firmly established in the northern hemisphere.

Artist/gallery business frameworks in Western Europe and North America have been long-established.[60] They traditionally require galleries to actively promote their artists through exhibitions, brokering first sales of new works and commissions, and sharing the proceeds of sales (often, though not always, equally). Artists may appoint more than one dealer to represent them exclusively or non-exclusively, in one territory or worldwide. Dealers rarely represent a single artist, except perhaps at the start of their dealing career, and most act for a stable number of artists. There is no ideal model contract for artist/gallery representation contracts and certainly no customary art industry standards or rules; every such relationship is unique.

Successful artist/dealer relationships are often likened to a marriage. The success of which need not be founded on the initial legal joining in wedlock, but on sustained mutual trust. The artist trusts that the gallery believes in the work, sales can be achieved at the right price, and the gallery regards the relationship as being long term to develop both the artist's market and cultural recognition. Moreover, artists rely on the gallery's greater knowledge and experience of the art worlds, both market

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[58] *See* Tom McIlroy, *How some dealer exploit indigenous artists for big money,* FINANCIAL REVIEW (Dec. 2022), https://www.afr.com/politics/federal/how-some-dealers-exploit-indigenous-artists-for-big-money-20221212-p5c5ja.

[59] *Resale Royalty Right Act 2009* no. 125 (Austl.).

[60] *See generally* FRISCO LAMMERTSE & JAAP VAN DER VEEN, UYLENBURGH & SON: ART AND COMMERCE FROM REMBRANDT TO DE LAIRESSE 1625–1675, (Waanders Publishers in conjunction with the Rembrandthuis, Amsterdam 2006) (explaining that artist/gallery representation began in Western Europe around 400 years ago, and developed by trial and error through to today, as a business relationship fundamentally based on mutual trust). Rembrandt van Rijn (1606-1669) is often cited as a progenitor of modern and contemporary artist/dealer representation. As a young unknown artist, Rembrandt relocated from his hometown of Leiden in the then Dutch Republic (now the Netherlands) to the business and trade capital city of Amsterdam, to live in the house of an art dealer. The pair made a business arrangement whereby the dealer would broker sales and commissions for the artist, who in turn would work using a studio in the dealer's house, and would also tutor students-cum-assistants. This arrangement delivered the artist's only source of income for four years: 1631 to 1635. The dealer was Hendrick van Uylenburgh (1587-1661).

and cultural, that many artists do not possess and in many cases, actively do not wish to acquire. The gallery trusts that the artist is professionally committed to producing quality work that will achieve sales and critical acclaim, and that their business and artistic advice will be welcomed by the artist.[61] At risk of stretching the matrimonial analogy too far, artist/gallery representation agreements can be compared to pre-nuptial contracts contemplating the division of assets in the event of future divorce. In other words, written artist/gallery contracts could and should ideally make provisions for settling outstanding mutual rights and obligations at the point of their future "divorce," in addition to provisions framing ways in which the business relationship should operate when still viable. As with successful intimate relationships, challenges and conflicts arise and should ideally be faced and worked through. Artist/dealer agreements can facilitate doing so by anticipating and providing for typical rubbing points.

Artists and dealers often worry about how to end their business relationship. Artists want the option to quit a gallery's exclusive representation if the relationship is not working out as expected, or in the event they have a better offer of exclusive representation. Galleries do not want exclusively represented artists to quit, especially if they achieve significant market and cultural recognition. Poaching of such artists by "mega-galleries" is an occupational hazard for relatively smaller galleries.[62] In this context, artists and galleries may be reassured to understand that in many jurisdictions, contracts for the performance of personal services may not be legally enforceable, even though the non-performing party may be legally required to compensate the other party for quantifiable financial loss or damage caused by such non-performance. Sound solutions for both parties may be provided via contract, such as either party may terminate the contract at will by serving written notice on the other party, giving a specified period for outstanding mutual (and any third party) rights and obligations being fulfilled. Such a notice provision may also apply if the artist dies while under contract.

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[61] *See, e.g.,* GALLERY DEALS-THE ARTIST/GALLERY RELATIONSHIP (ART LAW TV *June* 20, 2011).

[62] *See* Gareth Harris, *Global mega-galleries are putting the squeeze on smaller operators,* THE ART NEWSPAPER (Nov. 4, 2013), https://www.theartnewspaper.com/2013/11/05/global-mega-galleries-are-putting-the-squeeze-on-smaller-operators.

Further issues may arise when galleries have cash-flow problems, perhaps leading to insolvency.[63] In such circumstances, artists may be owed their agreed shares of full purchase prices received by galleries for sold works. In this case, monies due to artists may be safeguarded by provisions in terms that the galleries hold such monies in trust for, and as agent of, artists. They cannot mix such funds into their own bank accounts for use to meet their expenditure commitments. A similar provision may provide that unsold consigned works are not owned as stock by galleries but are held in trust as the artist's agent. Such provisions are especially important when galleries' assets are audited in insolvency or bankruptcy proceedings. In these respects, a few jurisdictions have enacted legislation giving such protection automatically to artists and their estates, represented by dealers notably in New York state.[64]

E. Inheritors

There has been significant recent growth in representation by art market professionals of the estates of artists who died in recent times. Such activity is fast becoming an established business specialism within the contemporary art ecosystem.[65] Agents and dealers offer art market skills and services to artists' heirs and successors, who frequently need professional help to handle artworks they have inherited. Such business relationships are likely to require long-term investment of resources by art market professionals before they achieve profitable returns from sales, which is perhaps why so-called mega-galleries are leading this new niche sector of the art world. Alongside such art industry developments, a growing number of initiatives have arisen focusing on artists' estates—whether from the perspective of living artists planning for posterity, or of heirs and successors inheriting artistic estate management responsibilities, both of which share similar needs for specialist information, knowledge, and skills.

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[63] *See* Laurel Wickersham Salisbury, *The Art of Bankruptcy: Consigned Artworks and Bankrupt Galleries,* CENTER FOR ART LAW (Oct. 24, 2019), https://itsartlaw.org/2019/10/24/the-art-of-bankruptcy-consigned-artworks-and-bankrupt-galleries/.

[64] N.Y. ARTS & CULT. AFF. § 12.01 LAW (McKinney 2012).

[65] *See* Sarah P. Hanson, *The great artists' estates race,* THE ART NEWSPAPER (May 16, 2017), https://www.theartnewspaper.com/2017/05/16/the-great-artists-estates-race.

In 2013, the U.K.'s Royal Academy published *The Artist's Legacy: estate planning in the visual arts*.[66] In 2015, the U.K.-based Art360 Foundation was established as an independent charitable entity "to meet the urgent needs of many visual artists and estates who need practical support and advice about managing their archives and legacies at a time of austere cuts to the arts."[67] In 2016, the Germany-based Institute for Artists' Estates was established as a research and management consultancy, together with its companion publication, *The Artist's Estate*, a handbook for artists, executors, and heirs.[68] The U.S.-based Joan Mitchell Foundation initiated its Creating A Living Legacy (CALL) research project a decade or so ago "to provide support to older artists in the areas of studio organisation, archiving, inventory management, and through this work create a comprehensive and usable documentation of their artworks and careers."[69] Thus, in 2018, CALL published an *Estate Planning Workbook for Visual Artists*.[70]

CALL's *Workbook for Attorneys & Executors*, which offers guidance not only for artists' lawyers and executors, but also for artists themselves in planning for posterity.[71] "Ars longa, Vita brevis" is the guide's mantra.[72] Key issues that are explored include wills, trusts, how to establish artist-endowed foundations, and insights from artists about their own practices and views about legacy. The guide is in effect a *vade mecum* that can be dipped into at any point for reference.[73] Illustrations and comments from artists are peppered throughout, such as the introductory quotation from Native American artist Jaune Quick-to-See Smith: "Every artist, young or not so young, needs a will … that allows for change over time and one that

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[66] ROYAL ACADEMY OF ARTS, THE ARTIST'S LEGACY: ESTATE PLANNING IN THE VISUAL ARTS (2013).

[67] ART360Foundation, FACEBOOK (Oct. 18, 2018), https://www.facebook.com/Art360Fdn/photos/a.541246996313971/552974311807906/?paipv=0&eav=AfYTxJ9HV4f_mh7Qz-wpqfwxEmH6CBzQlR1z3I995cYfWg6oWG9ODWkZediacQ62nMk.

[68] LORETTA WÜRTENBURGER, THE ARTIST'S ESTATE: A HANDBOOK FOR ARTISTS, EXECUTORS, AND HEIRS (2016).

[69] JOAN MITCHELL FOUNDATION, ESTATE PLANNING WORKBOOK FOR VISUAL ARTISTS ***5*** (2015), https://www.joanmitchellfoundation.org/uploads/pdf/CALL-EPW-I-2019.pdf.

[70] *Id.*

[71] *Id.*

[72] Latin translation of the ancient Greek aphorism coined by Hippocrates (c.460-370 BCE) in his *Aphorismi*, loosely meaning "skillfulness takes time and life is short." *See* HIPPOCRATES, THE GENUINE WORKS OF HIPPOCRATES, (Frances Adams, trans., Williams and Wood Co., 1946) (1849).

[73] *Vade mecum* translates to "go with me" in English.

gives instructions about where the artwork should go upon the artist's demise. Artwork is different from cash or real estate."[74]

The guide's "Legacy" section explores two contrasting scenarios: one where artists die without having made plans and provisions for their legacy, and the other where an artist is young and emerging with an array of possible future opportunities. The "Artist Client" section offers guidance for any professional adviser, such as getting to know the artist client, framing the artist's legacy, and managing the estate while considering whether the artist's estate will include artwork collected from other artists. The "Estate" section is understandably the largest and includes essential topics such as inventory of works and related archival materials, storage and safeguarding, contractual agreements and relationships, appraisal and valuation, and non-art assets. Overall, this guide contains an abundance of knowledge and skills required for successful artists' estate planning, most of which commonly apply in most jurisdictions where artists are based. However, one complex matter in the guide may apply only to artists and their estates governed by Anglo-American common law jurisdictions. When deceased artists' estates are governed by civil law jurisdictions, freedom of testamentary disposition, which is familiar to the common law, is usually restricted so that blood relations including illegitimate children cannot be wholly excluded from inheriting. Artists' estate planning in such jurisdictions needs to take such statutory obligations into account.[75]

The guide's section on "Copyright" highlights provisions often not understood by U.S. artists and their advisers.[76] This is because U.S. copyright law includes complex mechanisms allowing artists to reclaim their full copyright interests many years after contracting them away, and it is important for estate planning attorneys to know about and plan for this option. U.S. artists' reclamation rights are inalienable. Artists regaining their full copyrights can have great appeal when a U.S. artist has signed away their reproduction and merchandising rights on unfavorable terms (at an earlier stage in their career because back then they needed the money and had little or no bargaining power). U.S. copyright laws give such artists a five-year window during which they can terminate the rights they signed away in prior years.[77] Because the legal formula for calculating the

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[74] JOAN MITCHELL FOUNDATION, ESTATE PLANNING FOR VISUAL ARTISTS: A WORKBOOK FOR ATTORNEYS & EXECUTORS (2018), at 9, https://www.joanmitchellfoundation.org/estate-planning-for-visual-artists-attorneys-executors.

[75] JOAN MITCHELL FOUNDATION, *supra* note 69.

[76] *Id.* at 29.

[77] Copyright Act of 1976, 17 U.S.C. § 203.

termination window is complex, termination and regaining rights are often overlooked by artists and occasionally by their advisers. Nevertheless, U.S. artists' estate planning ideally should explore whether termination and acquisition of full copyrights should be exercised, and the right time to do so. For example, the guide explains that if an artist gave or sold publishing rights to a publisher on or after January 1, 1978, a five-year termination window to reclaim those rights begins forty years after the publication date.[78] U.S. artists' copyright lasts for life plus seventy years post-mortem, and can therefore run for decades after reclamation.[79] These provisions are unique to the U.S.

Copyright reclamation and reversion rights are also present in the legislation of fifty-five percent of the member states of the United Nations, most commonly as "use it or lose it" clauses, enabling creators to rescind the transfer of copyright if their work is not being issued or being made available to the public.[80] Following the implementation of the E.U.'s Digital Single Market Directive 2019, a use it or lose it measure is currently being enacted in the national legislation of all E.U. member states.[81] The strongest form of this type of legislation is time-based reversion rights, which apply to all copyright works regardless of whether they are being used by the rights' holders. Such measures are most prevalent in common law countries, including the U.S., and are currently being legislatively proposed in the U.K..[82]

With aims and objectives like CALL, Art360 Foundation recently launched a free app designed "to make archiving and cultural preservation skills available to all," which was pilot-tested working with artists and their estates to research, identify, and meet their estate planning and management needs.[83] The app delivers a tool that is "simple to use and breaks the process of archiving into manageable stages."[84] A step-by-step

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[78] *See id.*; *See also* JOAN MITCHELL FOUNDATION**,** *supra* note 69, at 29.

[79] 17 U.S.C. § 203.

[80] Joshua Yuvaraj, *Reversion laws: what's happening elsewhere in the world?* THE AUTHOR'S INTEREST (Apr. 4, 2019), https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/.

[81] Council Directive 96/9, 2001/29, art. 53(1), 62, 114, 2019 O.J. (L 130) (EC).

[82] *Rights reversion and contract adjustment,* U.K. INTELLECTUAL PROPERTY OFFICE (Feb. 6, 2023), https://www.gov.uk/government/publications/economics-of-streaming-contract-adjustment-and-rights-reversion/rights-reversion-and-contract-adjustment.

[83] Art360 Foundation, THE NATIONAL ARCHIVES (Feb. 5, 2024), https://webarchive.nationalarchives.gov.uk/ukgwa/+/https://www.nationalarchives.gov.uk/archives-sector/projects-and-programmes/arts-archives/case-studies/art360-foundation/#.

[84] *Id.*

approach is offered for "the effective management of physical and digital assets, with advice on how these can be maintained and protected, enabling artists to determine a method and pace that suits them."[85] Legacy creation and management are sensitive and complex subjects. These initiatives bring them to the fore and offer artists practical help and support.

F. Importers

Import taxes have been featured in civilisation for millennia.[86] Worldwide laws governing border-crossings of foreign-sourced artworks from one tax jurisdiction into another are extensive and complex. The following survey explores key art world jurisdictions.[87] Import tax is normally payable before physical crossings of borders by foreign-sourced artworks. Payment is made directly to border control authorities and is customarily calculated as a percentage of the market value of the artwork, plus the cost of packaging, transport, and transit insurance. Transactional agreements made between trading parties usually specify whether payment will be made by the seller/exporter or buyer/importer, or agents for either of them.

The United States, United Kingdom, and Greater China were the leading countries in the global art market in 2022, together representing eighty percent of the total market value of art sales.[88] The U.S. accounted for forty-five percent, demonstrating its decades-long position as the global art market leader, a status that has undoubtedly been influenced by its generally longstanding exemption of art from import taxes.[89] Greater China accounted for seventeen percent in 2022, operating an art import tax rate of around thirteen percent into its mainland territories.[90] It is noteworthy that

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[85] *Id*.

[86] "No duties are to be paid in our city by anyone either on exported or imported goods. No one is to import frankincense or any other foreign produce of that sort relating to sacrifices to the gods, or purple, or any coloured dyes not produced in the country, or anything associated with any other profession that requires imported goods but serves no necessary purpose." PLATO, LAWS bk. VIII at 847B (D. Horan trans., The Dialogues of Plato - A New Translation by David Horan ed., 2008) (c. 360 B.C.E.), https://www.platonicfoundation.org.

[87] Note: tax regimes and rates cited were those published as operating at the time of writing, and may have changed since.

[88] McAndrew, *supra* note 56.

[89] *Id.*

[90] *Id.*

China's "one country, two systems"[91] current constitutional principle allows Hong Kong and Macau to continue operating with no import tax regimes. Hong Kong's zero art import tax rate has undoubtedly influenced its favoring art marketplace, which closely competed with London as a world-leading art market city in 2022. New York City continues to be the market leader. The U.K. accounted for eighteen percent in 2022, during its second full year outside the European Union.[92] Its art import tax regime continues to operate at the same five percent rate as before Brexit, although now requiring the tax to be paid on art imports from the remaining twenty-seven E.U. member states.[93]

The European Union's twenty-seven member states together accounted for twelve percent of the global art market in 2022 and continues to be a significant global art trading hub.[94] Under the E.U.'s harmonised tax regulations, member states must collect at least five percent import tax if art first enters the E.U. in that state, but may impose higher rates if they wish. The 2023 rates are as follows[95]:

1. 5% Croatia, Cyprus, Malta
2. 5.5% France
3. 6% Belgium, Portugal
4. 7% Germany, Latvia
5. 8% Luxemburg, Poland
6. 9% Bulgaria, Estonia, Lithuania, Netherlands, Romania
7. 9.5% Slovenia
8. 10% Czech Republic, Finland, Italy, Slovakia, Spain
9. 12% Sweden
10. 13% Austria, Greece
11. 13.5% Ireland
12. 18% Hungary
13. 25% Denmark.

No further import tax is payable if art moves between E.U. member states.[96] For example, an artwork located in the U.S. destined for Denmark may first enter the E.U. in neighbouring Germany (where seven percent

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[91] Meg Shen & James Pomfret, *In Hong Kong, Xi says 'one country, two systems' is here to stay,* REUTERS (July 1, 2022), https://www.reuters.com/world/china/hong-kong-deploys-massive-security-xi-set-swear-new-leader-2022-06-30/.

[92] McAndrew, *supra* note 56.

[93] *Id.*

[94] *Id.*

[95] *VAT rules and rates,* EUROPEAN UNION, https://europa.eu/youreurope/business/taxation/vat/vat-rules-rates/ (last visited Feb. 2, 2024).

[96] *Id.*

import tax is payable), then re-transported to Denmark, free from import tax. Like many other tax jurisdictions worldwide, including the U.K., the E.U. import tax regime also has special arrangements for art imported into the E.U. for temporary, not-for-sale exhibiting, and/or touring purposes. For example, no import tax is payable if repatriated within two years of being temporarily imported, and such arrangements facilitate lending of artworks between public-facing cultural institutions worldwide.

Worldwide, a minority of jurisdictions either do not operate import tax laws, or have very low rates.[97] Furthermore, many states/countries operate "special economic zones," where trading laws differ from the rest of the state/country. Import and other taxes are suspended or lowered at a port of entry or a relatively small geographical zone within a jurisdiction. These are variously called a *porto franco*, free port, free zone, foreign-trade zone, bonded area, or a foreign-trade zone. Over the past decade, art market participants increasingly use free ports as an economically efficient way to exhibit to would-be buyers, safely store artwork for an unlimited period at minimal expense, and to complete sales.[98] Service fees for doing so are commonly significantly lower than import and sales taxes that would otherwise be payable. In these ways, artwork physically enters the zone import tax-free, where it can be sold sales-tax free, but buyers may be liable to pay any taxes required for shipping the tax-free purchased art into an art import-tax jurisdiction.[99]

Regular exporters or importers of artworks customarily hire a special international art transporter, who advises and helps them comply with any art import tax liabilities in transit and at final foreign destinations. The most widely used tool for dealing with artworks being transported across jurisdictional tax borders to reach a final foreign destination is the International Carnet-ATA/Admission Temporaire passport. This is a goods/merchandise international customs document permitting tax-free

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[97] Evgeniya Morozova, *14 countries with no income tax: where to move to minimise the tax burden,* IMMIGRANT INVEST (May 1, 2023), https://immigrantinvest.com/blog/tax-free-countries-en.

[98] Graham Bowley & Doreen Carvajal, *One of the World's Greatest Art Collections Hides Behind This Fence,* N.Y. TIMES (May 28, 2016), https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html.

[99] *OECD Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones*, OECD, Oct. 21, 2019, https://www.oecd.org/governance/risk/recommendation-enhancing-transparency-free-trade-zones.htm (Examples of free ports/zones noted for significant art business activity include: Beijing Free Port of Culture and Shanghai Pudong District, China; Delaware Freeport, U.S.; Geneva, Switzerland; Luxembourg; Monaco; and Singapore).

temporary export and import of non-perishable goods moving across most of the world. The ATA Carnet system is a unified customs declaration document that is presented at every territorial border crossing point and can be used throughout seventy-eight countries in multiple trips over its one-year validity period. The scheme is jointly administered by the World Customs Organization and International Chamber of Commerce.[100]

G. Androids

i. AI Art Tools

Commercial use of Artificial Intelligence (AI) in the contemporary art ecosystem became a hot legal topic in 2023.[101] The recent rapid growth and popular use of AI art tools has already prompted several significant legal controversies. In January 2023, an unprecedented lawsuit was filed in the U.S. by three U.S.-based visual artists.[102] It is a class-action against three companies, each alleging that claimants' artworks were used to train an AI visual art tool to power "text-based image creation" – thereby violating each artist's copyright. The three companies the lawsuit are against are: Stability AI, a London-based company offering its Stable Diffusion AI digital tool that enables users to generate "professional-quality images with a simple text prompt," Midjourney, a San Francisco-based company that uses Stable Diffusion to power text-based image creation; and DeviantArt, a Los Angeles-based online community for artists that offers its own Stable Diffusion-powered generator called DreamUp.[103] Within a week of the U.S. class-action's filing, Getty Images filed a lawsuit, also against Stability AI

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[100] *The WCO Joins the International Chamber of Commerce (ICC) to celebrate the 60th Anniversary of the ATA Carnet,* World Customs Org., June 27, 2023, https://www.wcoomd.org/en/media/newsroom/2023/june/the-wco-joins-the-iicc-in-celebrating-the-60th-anniversary-of-the-ata-carnet.aspx?p=1.

[101] *See* Sarah Shaffi, 'It's the opposite of art': why illustrators are furious about AI, THE GUARDIAN (Jan. 23, 2023), https://www.theguardian.com/artanddesign/2023/jan/23/its-the-opposite-of-art-why-illustrators-are-furious-about-ai.

[102] Nicole Clark, *Artists sue AI art generators over copyright infringement*, POLYGON (Jan 17, 2023), https://www.polygon.com/23558946/ai-art-lawsuit-stability-stable-diffusion-deviantart-midjourney, (detailing three copyright infringement cases involving AI generators. Kelly McKernan is one claimant, a fine art practitioner who also creates watercolor and acrylic gouache illustrations for books, comics, and games. Karla Ortiz is second claimant, a fine art practitioner who is also a leading film and entertainment industry concept illustrator. Sarah Anderson is third claimant, a cartoonist and illustrator).

[103] *Id.*

in the U.K..[104] The claim is that Stability AI "unlawfully copied and processed millions of [Getty's] images protected by copyright and the associated metadata"[105] to train its AI model. Responding to these lawsuits, Stability AI's spokesperson said, "[p]lease note that we take these matters seriously. Anyone that believes that this isn't fair use does not understand the technology and misunderstands the law."[106] A fair use copyright violation defense by Stability AI may well feature in the U.S. class-action but is unlikely to be available to defend Getty's separate U.K. lawsuit.

Permitted uses in U.K. and U.S. copyright laws are similar, but not the same, and can potentially produce different judicial results in each trial against Stability Diffusion's AI tool. The U.S. copyright courts use four broad criteria for deciding whether a use is fair, providing flexibility to arrive at a just evaluation of each case.[107] U.K. copyright legislation adopts a more restrictive approach, whereby defendants are required to satisfy copyright courts that their use fits squarely within at least one of several specified "permitted acts." Some acts are only permitted if they are also "fair dealing" for specific purposes, including: private study; criticism, review, quotation, and current news reporting; caricature, parody, or pastiche; educational instruction and examination; and non-commercial research, which is potentially the most relevant for AI.[108] Whether a purpose is fair requires a court to assess whether the dealing damages the copyright-protected work's actual or potential economic market, similar to the United States. Accordingly, in Getty's London lawsuit, Stability AI may encounter difficulty in defending its Stable Diffusion AI tool on the ground of fair dealing "for the purpose of non-commercial research."

However, there is a further permitted act specified by U.K. copyright law that does not require a defendant to prove fair dealing such as text and data mining (TDM), an automatic analysis or process of large amounts of text or data using custom-made scripts looking for patterns and discovering relationships or trends that are not usually visible through normal reading.[109] Under U.K. copyright law, TDM is permitted only "for

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[104] Sam Tobin, *Getty asks London court to stop U.K. sales of Stability AI system*, REUTERS, June 1, 2023, https://www.reuters.com/technology/getty-asks-london-court-stop-uk-sales-stability-ai-system-2023-06-01/; *see also* Matthew Butterick, *We've Filed a Lawsuit Challenging Stable Diffusion, a 21st-Century Collage Tool that Violates the Rights of Artists,* STABLE DIFFUSION LITIGATION (Jan. 13, 2023), https://stablediffusionlitigation.com.

[105] Clark, *supra* note 102.

[106] *Id.*

[107] 17 U.S.C. §107 (West 2015).

[108] Copyright, Designs and Patents Act, (1988) §§ 29 and 30, Current Law, 48 and 49 (Eng.).

[109] *Id.,* § 29A.

the sole purpose of non-commercial research," which is likely again to pose difficulties for Stability AI. In the U.S., copyright law at the time of writing has no such specific TDM defense available, which means that Stability AI and its two co-defendants will most likely rely on the four fair use criteria to defend themselves.[110]

Beyond the U.S., some countries have recently considered amending their own national copyright laws to permit TDM research for commercial purposes without a copyright owner's prior consent—an understandably controversial issue.[111] The E.U., for example, is currently considering changing E.U. copyright law so that copyright owners may "opt out" of commercial (but not scientific or cultural) TDM uses.[112] Against which change E.U. copyright owners argue that an "opt in" to commercial use would be more just and fair. Towards the end of 2022, the U.K. government proposed changing copyright law to permit TDM of digital formats of all creative works, including visual artworks, for commercial purposes without prior consent of authors/copyright owners of such works, but withdrew that proposal in February 2023.[113] There is evidently increasing controversy and ambiguity worldwide about the current legality of commercial data mining of copyright-protected creative works.[114] Legislators and courts will need time to catch up with the rapidly developing AI innovations in order to provide fair and balanced legal certainty that can be applied both nationally and internationally. Meanwhile, the outcomes of the two current lawsuits, by U.S. artists and Getty Images, could prove to be landmark steps towards achieving clarity.

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[110] *See* Krista Cox, *Text and Data Mining and Fair Use in the United States*, ASS'N OF RSCH. LIBR., (June 5, 2015) https://www.arl.org/wp-content/uploads/2015/06/TDM-5JUNE2015.pdf.

[111] *See* Sean M. Fiil-Flynn et al., *Legal Reform to Enhance Global Text and Data Mining Research*, 378 SCIENCE 6623, Dec. 1, 2022, https://www.science.org/doi/pdf/10.1126/science.add6124.

[112] Answer Given by Mr Breton on Behalf of the European Commission, EUR. PARL. DOC. (E-000479/2023(ASW)) (2023), https://www.europarl.europa.eu/doceo/document/E-9-2023-000479-ASW_EN.pdf.

[113] EUR. PARL. DEB**.** (727) (Feb. 1, 2023) 152, https://hansard.parliament.uk/commons/2023-02-01/debates/7CD1D4F9-7805-4CF0-9698-E28ECEFB7177/ArtificialIntelligenceIntellectualPropertyRights (remarks of Sarah Olney and Damian Collins).

[114] *See* Martin Adams, *An Update on our Text and Data Mining: Demonstrating Fair Use Project*, AUTHORS ALLIANCE**,** (April 28, 2023), https://www.authorsalliance.org/2023/04/28/an-update-on-our-text-and-data-mining-demonstrating-fair-use-project/.

ii. AI Art Authorship

Do Androids Dream of Electric Copyright? This allusion to the title of Philip K. Dick's 1968 dystopian novel, on which the 1982 film *Blade Runner* was based, is the playful title of a scholarly paper about authorship of computer-generated art.[115] Published in 2017 and written by Andrés Guadamuz, reader in intellectual property law at the U.K.'s University of Sussex, the discourse prefigures practical concerns now emerging in the contemporary art world surrounding AI.[116] This is further developed by following the March 2023 publication by the U.S. Copyright Office guidance: *Works Containing Material Generated by Artificial Intelligence.*[117]

The guidance clarifies that work containing wholly AI-generated material may not be copyright-protected, if it was not the product of "human authorship," but, where a human selects or arranges or modifies AI-generated material in a sufficiently creative way, "the resulting work as a whole constitutes an original work of authorship" and copyright protection may apply.[118] The U.S. is a world-leader in the development of both AI technology and intellectual property law, and this latest AI copyright guidance is likely to influence the thinking of most other jurisdictions that have yet to address AI copyright authorship.[119] However, several other jurisdictions have already addressed the matter. These jurisdictions include Hong Kong, India, New Zealand, and the Republic of Ireland, each of which jurisdictions followed the U.K.'s pioneering legislative lead.[120]

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[115] *See* Kenneth Turan, *From the Archives: 'Blade Runner' Went From Harrison Ford's 'Miserable' Production to Ridley Scott's Unicorn Scene, Ending as a Cult Classic*, ***LOS ANGELES TIMES*** (Oct. 5, 2017), https://www.latimes.com/entertainment/movies/la-et-mn-blade-runner-2-turan-19920913-story.html.

[116] Andres Guadamuz, *Do Androids Dream of Electronic Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works,* INTELLECTUAL PROPERTY QUARTERLY (2017) 2, https://deliverypdf.ssrn.com/delivery.php?ID=397083094070024090093103085119031025033019063049002037010087019109110122064082003105123000022020108121118069081097102028005120098042069049011113021066093010115100077081066091118090110091115119029084024029121074112016007072068119068076004027068105087&EXT=pdf&INDEX=TRUE.

[117] Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, (March 16, 12023) (to be codified at 37 C.F.R. pt. 202).

[118] *Id.*

[119] *Id.*

[120] Guadamuz, *supra* note 106.

In 1988, the U.K.'s Copyright Designs and Patents Act included then unique provisions dealing with four categories of work:

> In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken … the work is generated by computer in circumstances such that there is no human author of the work.[121]

Accordingly, the copyright owner of a computer-generated artistic work in U.K. law is the undertaker of "the arrangements necessary for the creation of the work."[122] This terminology is precisely the same as how the Act defines a "producer" in the context of determining an author/copyright owner of a film or sound recording.[123]

Even though such U.K. provisions prudently anticipated the need to give special copyright protection to computer-generated works, artificial intelligence technology was not as developed in 1988 as it has become in recent times. It is therefore understandable that legitimate questions are now emerging as to whether such provisions are fit for more sophisticated AI purposes today, thirty-five years after their original enactment. Such questions are of interest and importance not only in the U.K. and four other kindred computer-generated copyright jurisdictions, but also in the U.S. and the wider copyright world that will undoubtedly be looking for appropriate solutions to AI authorship challenges. A key question is whether the U.K.'s special computer-generated copyright provisions are at odds with copyright law's paramount requirement that a literary, dramatic, musical, or artistic work is the original expression of a human mind.[124]

The "human mind" copyright doctrine is featured in most intellectual property regimes worldwide, adherence to which may perhaps explain why so many countries have not been attracted to adopting the U.K.'s arguably non-human approach.[125] In the U.S. for example, the U.S. Supreme Court ruled as early as 1884 that copyright protection excluded works created by "non-humans" (when dismissing a claim that cameras, not photographers, were image-makers), a legal precedent evidently influencing the U.S. Copyright Office's recent guidance.[126] E.U. copyright law adopts the same approach, albeit couched in a different language. The expression of an

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[121] Copyright, Designs and Patents Act, *supra* note 98, § 9(3).

[122] *Id.*

[123] *Id.* § 178.

[124] *See Artificial Intelligence and Copyright,* WIPO MAGAZINE (October 2017), https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

[125] *Id.*

[126] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884).

"author's own intellectual creation reflecting his [sic] personality" is a fundamental requirement for a work's copyright protection.[127] In Spain, "the author of a work is the natural person who creates it"[128] and in Germany, "copyright protects the author in his [sic] intellectual and personal relationships with the work."[129] In Australia, courts have authoritatively declared that works are not covered by copyright if they "lack human authorship."[130]

Guadamuz's scholarly discourse on this complex subject concludes by referring to the central theme of Dick's novel. Artificial entities, which are "replicants" of humans, may have no built-in awareness that they are machines and not sentient beings, yet their actions may manifest human traits, making it difficult or impossible for people to distinguish a human from a replicant. Artistic works wholly generated by AI tools may proliferate into the future and continue to pose problems for the world's copyright law, of which most nations to date have largely rejected, or not yet considered, AI generated works being copyright-protected. Perhaps the U.K.'s 1988 current legislative approach might offer a widely acceptable way forward, if suitably amended to display the human originality copyright requirement for computer-generated artistic works, just as it has already enacted in the case of copyright for films and sound recordings.

H. Censors

Do the laws of freedom of speech apply to images? How do laws recognise cultural differences between different jurisdictions? Should everything be allowed to be publicly exhibited? If not, how do we regulate? How do politics play a part in all of this?[131] Many nations and states are not liberal democracies but are undemocratic authoritarian or totalitarian regimes, whose restrictions on freedom of expression—artistic or otherwise—are often capricious and sometimes brutal. In the post-digital era, artistic works—not only but especially visual images—can be

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[127] *See Artificial Intelligence and Copyright*, *supra* note 112.

[128] *See* Shireen Smith, *The copyright status of AI-generated works*, INTERNET FOR LAW. NEWSL. (Sept. 6, 2022) https://www.infolaw.co.uk/newsletter/2022/09.

[129] Guadamuz, *supra* note 106.

[130] Smith, *supra* note 116.

[131] Key questions addressed at a semi-public panel discussion of visual art censorship at the U.K.'s Royal Society of Arts in 2002, with contributions from Sandy Nairne, Director of Programmes at Tate; James Fitzpatrick of the US law firm Arnold and Porter; Norman Rosenthal, Exhibitions Secretary, Royal Academy of Arts; and artist Jake Chapman. Source: Henry Lydiate's contemporaneous notes.

distributed instantly and worldwide, thus posing far greater risks of censorship than in previous eras. But even in repressive regimes, such as the former Soviet Union (U.S.S.R.) and today's Russian Federation, Middle East, and Far East jurisdictions, artists may find ways and means of exposing politically unacceptable works to the public. However, enormous constraints and even punishments may be imposed on them for delivering the "shock of the new."[132]

Political, economic, social, technological, ethical, and legal factors all influence and affect behavioural norms that may be acceptable within societies during their evolution, but which are nowadays considered repugnant. For instance, the divine right of monarchs to rule, the slave trade, slavery itself, colonisation, subjugation of women, and child labour. However, just as the values of an era change, so does the context in which artistic expressions are received. Classical Greco-Roman artefacts graphically portraying sexual acts, which might normally offend contemporary laws and moral values, are now treasured in the scholarly collections of museum and gallery institutions worldwide. Michelangelo's (1475-1564) large-scale Sistine Chapel fresco, *The Last Judgement*, 1541, graphically depicting the seven deadly sins was subsequently "revised" to cover naked figures that had become unacceptable to different values obtaining only two decades later.[133] Charles Dodgson's (1832-1898, aka Lewis Carroll) photographs of six-years-old Alice Liddell,[134] Balthazar Klossowski's (1908-2001, aka Balthus) portraits of naked or partly naked girls,[135] and Edgar Degas's (1834-1917) sculpture of a 14-years-old girl scantily clad for dance[136] were each subjected to severe adverse public criticism of their chosen subject matter when exhibited respectively in the late nineteenth and early twentieth centuries.

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[132] ROBERT HUGHES, THE SHOCK OF THE NEW: ART AND THE CENTURY OF CHANGE (2d ed. 1991).

[133] *See* Carlo Pietrangeli, et al., THE SISTINE CHAPEL: THE ART, THE HISTORY, AND THE RESTORATION (1986).

[134] *See Lewis Carroll's Haunting Photographs of Young Girls*, PHOTOGRAPHY NEWS (Jan. 2015), http://www.photography-news.com/2015/01/lewis-carrolls-haunting-photographs-of.html.

[135] *See Balthus Show Revives Debate on Lolita-esque Works,* REUTERS (Aug. 13, 2008), https://www.reuters.com/article/us-art-balthus/balthus-show-revives-debate-on-lolita-esque-works-idINL1458011220080813.

[136] Edgar Degas, *The Little Fourteen-Year-Old Dancer* (*La Petite Danseuse de Quatorze Ans*) (sculpture), *at* National Gallery of Art, Washington, D.C., 1879-1881; *see* Anastasiia S. Kirpalov, *Why Did Edgar Degas' Little Dancer Cause Such a Scandal?* THE COLLECTOR (September 17, 2022), https://www.thecollector.com/why-did-edgar-degas-little-dancer-cause-scandal.

In the U.S., there have been longstanding "culture awards" wrangles, involving right wing politicians allied with the religious right to lobby against the freedom of artists to express themselves through their works.[137] The U.S. Constitution's First Amendment guarantees freedom of speech,[138] but does not offer artists the right to financial support or subsidy, nor does the Constitution prevent government officials discriminating against artists (in the giving of financial awards) on the grounds of the "unacceptable" nature of their works.[139] Such conflicts can be set against a lack of any historical tradition in the U.S. of federal funding for the arts—the National Endowment for the Arts (NEA) was established only in 1965.[140] Which brings up another question: should public money be spent on contemporary works of art that the public finds offensive?

In the late 1980s, the NEA contributed funding to a major retrospective of Robert Mapplethorpe's (1946-1989) work, which included the artist's so-called "X files" made up of explicit sexual and homosexual photographs. This incident triggered the "culture wars," in which the appropriateness of exhibiting a range of Mapplethorpe's work dealing with racial and gender issues, and his photographs of children, was fiercely debated.[141] Other artists' works soon became caught in the cross-fire, causing a reportedly "Congressional firestorm," calling for the NEA's abolition.[142] As a result, the NEA was completely re-structured, its federal funding halved, its ability to fund artists directly, severely constrained, and Congress narrowly avoided voting for its abolition.[143] Key takeaways learned from this "ten-years' war" include: recognition that censorship never works because people will always want to see artwork and judge for themselves; censorship "sells" (visitors/newspapers/broadcasts); there is still a powerful religious right in the U.S., of which there remains a long tradition of conservatism, yet an equally strong belief in the freedom of expression; images of gay sex will continue to outrage a significant section

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[137] *See* GRAHAM THOMPSON, AMERICAN CULTURE IN THE 1980S (Martin Halliwell et al. eds., 2007).

[138] U.S. Const. amend. I.

[139] *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES (last reviewed February 8, 2022) https://www.archives.gov/milestone-documents/14th-amendment.

[140] 20 U.S.C §§ 781-790, 951.

[141] *See* Elizabeth Kastor, *Funding Art That Offends*, WASH. POST (June 7, 1989) https://www.washingtonpost.com/archive/lifestyle/1989/06/07/funding-art-that-offends/a8b0755f-fab9-4f7f-a8ef-2ccad7048fe2/.

[142] *See* Margaret Quigley, *The Mapplethorpe Censorship Controversy*, POL. RSCH. ASS'N. (May 1, 1991) https://politicalresearch.org/1991/05/01/mapplethorpe-censorship-controversy.

[143] *Id*.

of the public; so-called "kiddie porn" will continue to be unacceptable to the public generally, courts of law in particular; and let people see work and judge for themselves— in a free society, only individuals should judge what is acceptable.[144]

Context is important when evaluating the appropriateness of exposing images to the public, whether such a judgement is made by artists, arts administrators, or law enforcers. Time and place, contemporary social and moral values, and more are all relevant to contextual judgements, as is the context in which such works are made and offered for public viewing. Other difficult contextual matters may influence those making judgements about the appropriateness of creating or showing such work. Legal considerations may include, for example, the distinction in some jurisdictions between obscenity and indecency. Obscenity may require proof that a viewer of the image is likely to be offended by an image, whereas for indecency, the question may be whether the image is in and of itself indecent.[145] Furthermore, some jurisdictions, particularly in liberal democracies, have provisions enabling a defense to be mounted. In the case of obscenity, it is often a defense to show that the work was possessed or published for the purposes of art, science, learning or other worthy purpose. In the case of indecent images of children, it may be a defense to show that the work was possessed or shown for a "legitimate reason."[146] Thus, in such cases, an established gallery showing work of respected artists may succeed with such defenses. Like the U.S. Constitution's First Amendment, the 1950 European Convention on Human Rights gives artists the legal right to freedom of expression, even in relation to work that is shocking or disturbing.[147] Almost all countries with territories in Europe

[144] Liam Rector & Susan Wyatt, *The Culture Wars*, Ams. FOR THE ARTS (December 1990) https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/the-culture-wars.

[145] *See* FCC, *Obscene, Indecent and Profane Broadcasts,* FCC (2019), https://www.fcc.gov/guides/obscenity-indecency-and-profanity.

[146] *See* Laurence Cuny, *Freedom & Creativity: Defending art, defending diversity*, UNESCO (2020), https://unesdoc.unesco.org/ark:/48223/pf0000373357.locale=fr; The Crown Prosecution Service, *Indecent and Prohibited Images of Children*, THE CROWN PROSECUTION SERVICE (Dec. 20, 2018), https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

[147] European Convention on Human Rights, Nov. 4, 1950, Eur. Ct. H.R. Human Rights (2013).

have acceded to the Convention, with the exceptions of Belarus and Russia.[148]

In more culturally enlightened jurisdictions, legislation may exclude public-facing art galleries and museums from prosecution for displaying criminally offensive images so long as they are "visible only from within."[149] In such cases, an important and difficult responsibility falls upon gallery directors to strike an appropriate balance between their right to show work they consider worthy of public exposition and their duty to society not to cause offence or harm.[150] Given the increasing reliance by most of the world on digital technology for communications, social media platforms have become essential for supporting the practices of artists and related art-world professionals. When using such platforms, it may be difficult for artists to navigate rules, policies, and practices of such platforms that unilaterally censor communication of their images, which explains why Don't Delete Art (DDA) published a guide in 2021, to help artists mitigate and/or avoid online censorship impositions.[151]

DDA is a 2020, New York City-based, coalition of arts and free expression dedicated to fighting against "digital gatekeepers controlling the world's largest social media platforms that have enormous power to determine what content can freely circulate and what should be banned or pushed into the digital margins."[152] In particular, "not only is content removed because of overly restrictive and sometimes unclear community guidelines, but, unbeknownst to users, material vaguely defined as objectionable is made to disappear from search and/or explore functions, and hashtags."[153] DDA contends that such censorship has a dire effect on the work of emerging artists, those living in repressive regimes and, in general, on all those artists who have no museum or gallery representation. Thus, there is a high risk that their artwork be erroneously removed, and whole accounts deleted with thousands of followers lost. With no possibility of appeal, artists are fearful, powerless, and opted to censor themselves. DDA recently published an Art and Law guide, which is

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[148] Alice Donald & Joelle Grogan, *What is the European Convention on Human Rights?* U.K. IN A CHANGING EUROPE (June 24, 2022), https://ukandeu.ac.uk/explainers/the-european-convention-on-human-rights.

[149] *E.g.* Indecent Displays (Control) Act 1981, C. 42 (U.K.).

[150] Int'l Council of Museums, *Museums do not need to be neutral, they need to be independent*, ICOM (January 6, 2019), https://icom.museum/en/news/museums-do-not-need-to-be-neutral-they-need-to-be-independent/.

[151] Don't Delete Art, *Manifesto*, DON'T DELETE ART (2023), https://www.dontdelete.art.

[152] *Id.*

[153] *Id.*

founded on key principles and practices that should ideally be adopted by all social media platforms.[154]

Publicly sited physical artwork will continue to engage and sometimes outrage spectators. The law is not responsible for that dialogue and has no part in it, except when freedoms of the society in which the art is placed are threatened by it. Over time, publicly viewed artwork may fall out of step with the society in which it exists and causes public comment, discussion, and debate. The latter can take the form of new artistic expression, which itself could be new publicly sited artwork. Removing artwork that challenges or inflames any public sensibilities also obliterates the catalyst for continuing engagement with those issues. The law should ideally protect the public and artwork from violent disagreement and vandalism, but the freedom to protest and respond, artistically or otherwise, is not for the law to prohibit any more than it is for opponents of arguments to prohibit, silence, or cancel.

II. CREATING WITH LEGAL BRUSHES

A. Anti-Retinal Fountain-Head

Genius. Anti-artist. Charlatan. Impostor! Since 1914, Marcel Duchamp has been called all of these. No artist of the twentieth century has aroused more passion and controversy, nor exerted a greater influence on art, the very nature of which Duchamp challenged and redefined as concept rather than product by questioning its traditionally privileged optical nature. At the same time, he never ceased to engage, openly or secretly, in provocative activities and works that transformed traditional artmaking procedures.[155]

Henri-Robert-Marcel Duchamp was born in Normandy, France in 1887, which was six years after Pablo Picasso in Spain. Duchamp was a painter, sculptor, chess player, and writer. He is widely regarded as a leader

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[154] *See* Nat'l Coal. Against Censorship, *Don't Delete Art Releases Guidelines for Artists to avoid Social Media Censorship*, NCAC (March 12, 2021), https://ncac.org › dont-delete-art-censorship-resource; Aimee Dawson, *Don't delete art! Project documenting censorship on social media launches manifesto*, THE ART NEWSPAPER (March 3, 2023), https://www.theartnewspaper.com/2023/03/03/dont-delete-art-project-documenting-censorship-on-social-media-launches-manifesto.

[155] *See* DAWN ADES, NEIL COX & DAVID HOPKINS, WORLD OF ART: MARCEL DUCHAMP (2021).

of revolutionary developments in the visual arts from the first decades of the twentieth century, to date. By the start of the First World War in 1914, he had rejected the work of many of his fellow artists such as Picasso and Henri Matisse (1869-1954) and deemed their work as "retinal," intended only to please the eye. He wanted art to engage with the intellect. His idea was not welcomed by his peers in France, so he decided to emigrate to the U.S. where he believed his views would be better received.[156]

Duchamp created *Fountain* (1917)[157] over a century ago, which was chosen by prominent artists and art historians as the most influential artwork of the 20th century.[158] It is a porcelain urinal (*pissoir*) inscribed with "R. Mutt 1917," and was sent for exhibition in response to an open invitation to any artist who paid the entry fee of one dollar. The exhibition was put on by the newly formed New York City-based Society of Independent Artists, of which Duchamp was a board director (which is why he inscribed a pseudonym on the piece to hide his true identity). There was no jury to decide which works were worthy of being shown. Over two thousand works were submitted. After much debate about whether *Fountain* was or was not art, the society's board of directors voted against showing the piece and hid it from public view during the show.

Duchamp immediately resigned from the society's board. Since then, *Fountain* has raised controversial questions about creativity, authorship, originality, and the very nature of visual art and what it could be. It swept away the traditional boundaries of what art had been until 1917.[159]

B. Intellectual Engagement

Duchamp's first and last live television interview was broadcasted four months before he died in October 1968. The interview was conducted by the BBC's then doyenne of U.K. cultural broadcasting, Joan Bakewell. She recalled the encounter fifty years later:

> He was very good company. He was clearly incredibly intelligent. He was full of smiles. He was quite flirty; he was very French; he had the charm of a Frenchman. He wasn't in a hurry, he

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[156] *Id.*

[157] *See* Nell Frizzell, *Duchamp and the pissoir-taking sexual politics of the art world*, THE GUARDIAN (November 7, 2014), https://www.theguardian.com/commentisfree/2014/nov/07/duchamp-elsa-freytag-loringhoven-urinal-sexual-politics-art.

[158] *See* BBC News, *Duchamp's urinal tops art survey*, BBC NEWS (December 1, 2004), http://news.bbc.co.uk/2/hi/entertainment/4059997.stm.

[159] *See* ADES ET AL., *supra* note 142.

didn't try to sell you an idea, he wasn't pitching his outlook or anything; he was just there to share things with you, and I found that very welcoming.[160]

Q and A excerpts from a transcript of the unique event are illuminating and instructive[161]:

Q. You attacked what you called "retinal" painting. Can you define it?

A. Yes, of course. Everything since [Gustave] Courbet [1819-1887][162] has been retinal. That is, you look at a painting for what you see, what comes on your retina. You'd add nothing intellectual about it… A psychoanalytical analysis of painting was absolutely anathema then. You should only look and register what your eyes would see. That's why I call them retinal: since Courbet, all the Impressionists[163] were retinal, all the Fauvists[164] were retinal, the Cubists[165] were retinal. The Surrealists[166] did change a bit of that, and Dada[167] also, by saying: "Why should we be only interested in the visual side of the painting? There may be something else."

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[160] Ben Luke, *What was it like to conduct Marcel Duchamp's only live television interview*, THE ART NEWSPAPER (June 8, 2018), https://www.theartnewspaper.com/2018/06/08/what-was-it-like-to-conduct-marcel-duchamps-only-live-television-interview.

[161] *Id.*

[162] Jean Désiré Gustave Courbet was a French painter who led the Realism movement in 19th-century French painting. Committed to painting only what he could see, he rejected academic convention and the Romanticism of the previous generation of visual artists. *See* JAIME JAMES, THE GLAMOUR OF STRANGENESS: ARTISTS AND THE LAST AGE OF THE EXOTIC (2016).

[163] The seminal Impressionists were notably young, and included: Frédéric Bazille (22), Armand Guillaumin (22), Pierre-Auguste Renoir (22), Claude Monet (23), Paul Cézanne (24), Alfred Sisley (24), Édouard Manet (31), and Camille Pissarro (33). *See* Thames & Hudson, *World of Art* (2020), https://issuu.com/thamesandhudson/docs/spring2020worldofart.

[164] Notable Fauvists: André Derain, Raoul Dufy, Henri Matisse, Jean Puy, and Georges Rouault. *See id.*

[165] Pablo Picasso, Diego Rivera, and Max Weber. Also notably, Cubist works were first exhibited in the United States in 1913 at the landmark Armory Show in New York City. *See id.*

[166] Notable Surrealists: Giorgio de Chirico, Max Ernst, Joan Miró, Francis Picabia, Salvador Dalí, Luis Buñuel, Alberto Giacometti, and René Magritte. *See id.*

[167] "Dada is the groundwork to abstract art and sound poetry, a starting point for performance art, a prelude to postmodernism, an influence on pop art, a celebration of anti-art to be later embraced for anarcho-political uses in the 1960s and the movement that lay the foundation for Surrealism." *See* FRANCIS PICABIA, I AM A BEAUTIFUL MONSTER: POETRY, PROSE, AND PROVOCATION (Marc Lowenthal trans., 2012).

Q. Perhaps the most famous work of yours is the work *The Large Glass*[168] on which you spent eight years, and some years prior to that thinking about it. This was bringing an intellectual approach into a work of art which no one had seen for many years. There is in fact a published text, which was published sometime after the Glass was not finished, but was abandoned.[169] Do you wish the Large Glass to be appreciated with the text, to inform it?

A. Yes, that's where the difficulty comes in, because you cannot ask a member of the public to look at something with a book in his hand and follow the diagrammatic explanation of what he can see on the glass. So, it's a little difficult for the public to come in, to understand it, to accept it. But I don't mind that, or I don't care, because I did it with great pleasure; it took me eight years to do part of it at least, and the writing and so forth. And it is for me an expression, really, that I had not taken from anywhere else, from anybody or any movement or anything, and that's why I like it very much. But don't forget that it never had any success until lately.

Q. The anti-art movement of Dada was proved to be in the interest of art, because it regenerated and revived and freshened people's attitude to it. Do you anticipate that your own contribution when the final reckoning comes will have in fact contributed to something called art?

A. I did in spite of myself, if you wish to say… But at the same time, if I had abandoned art, I would completely have been not even noticed… There are probably 100 people like that who have given up art and condemned it and proved to themselves that art is no more necessary than religion and so forth. And who cares for them? Nobody.

Q. In terms of the activities of the Dada group other than painting, the sort of happenings that they devised are in fact happening again: they are called "happenings" today. Do you ever see or engage in these events or feel any fellow feelings about them?

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[168] Marcel Duchamp, *The Bride Stripped Bare by Her Bachelors, Even (The Large Glass)* (sculpture), PHILADELPHIA MUSEUM OF ART (1915-1923), https://philamuseum.org/collection/object/54149.

[169] Duchamp intended the *Large Glass* to be accompanied by a book, in order to prevent purely visual responses to it. His notes for the book describe that his "hilarious picture" is intended to depict the erotic encounter between the "Bride," in the upper panel, and her nine "Bachelors" gathered timidly below in an abundance of mysterious mechanical apparatus in the lower panel. *See* CALVIN TOMKINS, DUCHAMP: A BIOGRAPHY (1996).

A. I love the happenings; I know Allan Kaprow[170]… and it's always amusing. And the point that they have brought out so well, an interesting one, is that they play for you a play of boredom… It's very interesting to have used boredom as an aim to attract the public. In other words, the public comes to a happening not to be amused but to be bored. And that's quite a contribution to new ideas, isn't it?

Q. When you set out to challenge all the established values, your means were shock. You shocked the Cubists, you shocked the public, you shocked the buying public. Do you think the public can be shocked anymore by anything?

A: No, it's finished, that's over. You cannot shock the public, at least with the same means. To shock the public, we would have to do I don't know what. Even that thing with the happenings, boring the public, doesn't prevent them from coming - the public comes and sees anything that Kaprow does, or Oldenburg[171] and all these people. And I have been there, and I go there every time. You accept boredom as an aim, an intention.

Q. Do you regret the loss of shock or do you think it's the artists' fault that the public simply always expect to be shocked?

A. No, but the shock would be of a different character… probably the shock will come from something entirely different - as I say, non-art, "anart", no art at all, and yet something would be produced. Because after all, the word art etymologically means to do, not even to make, but to do—and the minute you do something you are an artist. In other words, you don't sell your work, but you do the action. Art means action, means activity of any kind.

Q. So, everyone…?

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[170] Allan Kaprow (1927-2006) was an American painter, assemblagist and a pioneer in establishing the concepts of performance art. *See* The Art Story, Allan Kaprow, THE ART STORY, (last visited May 3, 2024) https://www.theartstory.org/artist/kaprow-allan/

[171] Claes Oldenburg (1929-2022) was a Swedish-born American sculptor best known for his public art installations, typically featuring large replicas of everyday objects. *See* Charles Darwent, *Claes Oldenburg obituary*, THE GUARDIAN (July 18, 2022), https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary.

> A. Everyone. But we in our society have decided to make a group we call artists and a group we call doctors, which is purely artificial.
>
> Q. In the 1920s, you proclaimed art is dead. It isn't, is it?
>
> A. Yes, well, that is what I meant by that. I meant that it's dead by the fact that instead of being singularised, in a little box - so many artists in so many square feet - it would be universal, it would be a human factor in anyone's life; to be an artist, but not noticed as an artist.

Duchamp is buried in Normandy, France, with the epitaph:"*D'ailleurs, c'est toujours les autres qui meurent*" (Besides, it's always the others who die).[172] The annual *Prix Marcel Duchamp* was established in 2000, and is awarded to a young France-based artist by the Association for the International Dissemination of French Art.[173]

C. Notable Examples

Duchamp's influence has grown exponentially since his death. The 1960s generation of art college students, many of whom were tutored and mentored by Duchamp's fellow artists and friends,[174] embraced his

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[172] *See* Tomkins, *supra* note 168.

[173] The Marcel Duchamp Prize aims to highlight the creative abundance of the French scene at the beginning of the twenty-first century and to support artists in their international career. The prize distinguishes one laureate among four French artists or artists living in France, working in the field of plastic and visual arts: installation, video, painting, photography, sculpture, performance and so on. Like the important artist who lends his name to it – and with the complicity of the Marcel Duchamp Association, which supports this initiative – it distinguishes the most significant artists of the French scene of their generation and encourages all new artistic forms that stimulate creation. *See* Ass'n for the Int'l Diffusion of French Art (ADIAF), *The Marcel Duchamp Prize*, ADIAF, https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary (last visited Sept. 2, 2023).

[174] Such as U.K. artist Richard Hamilton (1922-2011), who held a teaching post in the Fine Art Department of Durham University at Newcastle Upon Tyne, U.K., from 1953 to 1966. Among the students Hamilton tutored in this period were Rita Donagh, Mark Lancaster, Tim Head, Roxy Music founder Bryan Ferry, and Ferry's visual collaborator Nicholas de Ville (who became Professor of Fine Art at Goldsmiths College University of London, where among his students was Damien Hirst – currently the highest paid living U.K. artist). Hamilton's influence can be found in the visual styling and approach of Roxy Music. He described Ferry as "his greatest creation". Ferry repaid the compliment, naming him in 2010 as the living person he most admired, saying "he greatly influenced my ways of seeing art and the world." Hamilton curated the first British retrospective of Duchamp's work, for which he made a copy of The Large Glass and other glass works too fragile to travel from the U.S. The exhibition was shown at the Tate

removal of traditional boundaries of visual art. Not only did the sixties generation develop their art practices with such non-traditional thinking in mind, but they also became tutors and mentors of subsequent generations of art college students[175] around the art world.[176] In these ways, Duchamp's baton has been handed on, and is likely to continue being passed on in art's relay race towards unbounded creative acts. Notable examples are now explored.

1. Andy Warhol

Warhol toyed with U.S. copyright law throughout his fine art practice. He almost always avoided infringing copyright law by securing prior permission for his use of other people's photographs from their copyright owner, but not always.[177] In 2023, a landmark court decision addressed the lawfulness of artists appropriating into their works other artists' pre-existing images. The U.S. Supreme Court decided the case brought by the Andy Warhol Foundation for The Visual Arts (AWF). It concerned one of a series of silkscreen prints, *Orange Prince*, 1984, made by Warhol using a photograph of the musician Prince taken in 1981, by Lynn Goldsmith. Key facts were not disputed.[178]

Gallery in 1966. *See* Norbert Lynton, *Richard Hamilton obituary*, THE GUARDIAN (Sept. 13, 2011), https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary.

[175] *Id.*

[176] Notably, for example, China-born Ai Weiwei (b.1957), who lived in the U.S. from 1981 to 1993, where he was exposed to and greatly influenced by the works of Marcel Duchamp and Andy Warhol, and began creating conceptual art by altering readymade objects. He is arguably the most well-known living contemporary artist originating from China. *See* Vanessa Thorpe, *Ai Weiwei on China, free speech – and a message for London*, THE GUARDIAN (Oct. 4, 2020), https://www.theguardian.com/a rtanddesign/2020/oct/04/ai-weiwei-on-china-free-speech-and-a-message-for-london.

[177] Barabara Hoffman "Claims for unauthorized use and copyright infringement were made by photographers Henri Dauman, Charles Moore, and Patricia Caulfield against Andy Warhol for appropriating their photographs without paying to license the images in 1963, and 1968 respectively. Fair use existed as judge-made law before fair use was codified, and before *Campbell v. Acuff-Rose Music, Inc*. Thus, Warhol's settlement of these claims of copyright infringement occurred before the standard of transformative use and during a time when there was a presumption that any commercial use was unfair. However, given the collage nature and subject matter, it's hard to say that it might not be considered fair use, even at that time." *See* The Hoffman Law Firm, *The Art Lawyer's Diary June 2023*, THE HOFFMAN LAW FIRM (June 12, 2023), https://www.hoffmanlawfirm.org/the-art-lawyers-diary.

[178] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (U.S. May 18, 2023).

In 1981, Goldsmith was commissioned by *Newsweek* magazine to photograph the then-emerging musician Prince Rogers Nelson to accompany its article, "The Naughty Prince of Rock." Goldsmith's photograph of Prince, in which Goldsmith owns the copyright for, was the subject of the case. In 1984, Goldsmith licensed that photograph to *Vanity Fair* to serve as an "artist reference for an illustration … to be published in *Vanity Fair*, November 1984 issue. It can appear one-time full page and one-time under one quarter page. No other usage right granted."[179] Goldsmith was paid $400. *Vanity Fair* commissioned and paid Warhol to execute the illustration. Using Goldsmith's photograph, Warhol created a purple silkscreen portrait of Prince's head. The image accompanied an article entitled "Purple Fame," crediting Goldsmith as the "source" photographer.

Beyond executing the single illustration authorised by Goldsmith's copyright licence to *Vanity Fair*, Warhol created further works based on Goldsmith's photograph: 13 silkscreen prints and two pencil drawings, known collectively as the *Prince Series*, 1984. After Warhol's death in 1987, AWF inherited most of Warhol's unsold works and their copyrights including the Prince Series. When Prince died in 2016, Condé Nast obtained a copyright licence from AWF to reproduce *Orange Prince* in its tribute publication entitled *The Genius of Prince*, *1958–2016*. Condé Nast paid AWF $10,000 for the licence. Goldsmith received no fee or photographic source credit. Goldsmith did not know about the 1984 Prince Series until 2016, when she first saw *Orange Prince* reproduced on the cover of the Condé Nast tribute. Goldsmith immediately recognised her image and notified AWF of her belief that it had infringed her copyright. In response, AWF sued Goldsmith for a declaratory court judgment of non-infringement of copyright or, in the alternative, a fair use copyright defense. Goldsmith counterclaimed for copyright infringement.

In 2019, those lawsuits decided in AWF's favor were reversed on appeal in 2021 by Goldsmith, after which result AWF appealed to the U.S. Supreme Court, hence the final appeal.[180] The U.S. Supreme Court comprised of nine Justices heard the case. Written analyses and reasons were given by two Justices, with whom the other seven variously agreed. Justice Elena Kagan's opinion was delivered using examples and analogies evidently aimed at engaging non-legal readers – visual artists were probably in mind. Kagan dwelled more on art and the creative act, rather

[179] *Id.* at 3.
[180] *Id.*

than on the U.S. Copyright Act. Kagan viewed *Orange Prince* as an example of Warhol's art of reframing and reformulating iconic images of popular culture first created by others, connecting the traditions of fine art with mass culture, which "earned his conspicuous place in every college's Art History."[181] Copyright law's core purpose was to foster creativity, which is why it permitted fair use of copyrighted material to allow artists to build creatively on the work of other artists: "let's be honest, artists don't create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others."[182]

Fair use required four factors to be considered, the first of which lay at the heart of AWF's case. Kagan opined fair use to be "the purpose and character of the use," made of a pre-existing copyright work, including whether such use is of a commercial nature.[183] A user's purpose required a court to look at whether the original image was used as raw material that was "transformed in the creation of new information, new aesthetics, new insights – a judicial enquiry that matters profoundly."[184] In concluding her extensive discourse, Kagan asked, "[i]f Warhol does not get credit for transformative copying, who will?"[185] Chief Justice John G. Roberts Jr. was the only other member of the Court to concur with Kagan.

The other six Court members concurred with Justice Sonia Sotomayor, who delivered the Court's majority judgment**.** Sotomayor's opinion focused more on the U.S. Copyright Act than on the creative act, more on law than on art. Sotomayor stressed that AWF did not challenge whether Goldsmith's photograph and the Prince Series works were substantially similar. The only question was whether the "purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes" weighed in Goldsmith's favor.[186] AWF contended that the purpose and character of its use of Goldsmith's photograph weighed in favor of fair use because Warhol's silkscreen image of the photograph had a new meaning or message that made the use transformative in the fair use sense. However, in Sotomayor's opinion, whether a work was transformative did not turn merely on the stated or perceived intent of the artist, nor on the meaning or impression that a critic

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[181] *Id.* at 559 (Kagan, J. dissenting).
[182] *Id.* at 560 (Kagan, J. dissenting).
[183] *Id.* at 558 (Kagan, J. dissenting).
[184] *Id.* at 570 (Kagan, J. dissenting).
[185] *Id.* at 593 (Kagan, J. dissenting).
[186] *Id.* at 550.

or a judge drew from the work. Otherwise, copyright law might recognise any alteration as transformative.

Sotomayor concluded that the purpose and character of AWF's use of Goldsmith's photograph, in commercially licensing *Orange Prince* to Condé Nast's special edition magazine devoted to Prince, did not favor AWF's fair use defense to copyright infringement. AWF's use was not transformative, being for substantially the same purpose as Goldsmith's original photo. Goldsmith's original works, like those of other photographers, were entitled to copyright protection even against famous artists. Accordingly, the Court denied AWF's appeal. The Court's comprehensive reasoning, together with Kagan's extensive dissenting opinion, will doubtless be considered by—perhaps even influence—not only jurists worldwide, but also appropriation art practitioners such as Jeff Koons,[187] Sherrie Levine,[188] Richard Prince,[189] and perhaps even in civil law jurisdictions.

The doctrine of fair use is rooted in the Anglo-American common law tradition of judge-made rulings creating legal precedents, where many are codified into legislation. In civil law jurisdictions, judicial precedents are traditionally much less possible and prevalent, and fair use has been an alien doctrine.[190] However, some civil law courts have begun to consider, and in some cases apply, what amounts to a fair use copyright defense. A revolutionary ruling by the Supreme Court in France—traditionally the exemplar of civil law reasoning in copyright cases—could signal a change of judicial approach that other civil law jurisdictions may follow in *Klasen*

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[187] Jeff Koons (b.1955) is an American artist recognized for his work dealing with popular culture, and his sculptures depicting everyday objects. His works have sold for substantial sums, including at least two record auction prices for a work by a living artist: $58.4 million for Balloon Dog (Orange) in 2013 and $91.1 million for Rabbit in 2019. Koons has been sued several times for copyright infringement over his use of pre-existing images, the original works of others, in his work. *See* Andrew Anthony, *The Jeff Koons Show*, THE GUARDIAN (Oct. 15, 2011), https://www.theguardian.com/artanddesign/2011/oct/16/jeff-koons-art-custody-son.

[188] Sherrie Levine (b.1947) is an American photographer, painter, and conceptual artist. Some of her work consists of exact photographic reproductions of the work of other photographers such as Walker Evans, Eliot Porter and Edward Weston. *See* Kristine McKenna, *Sherrie Levine and the Art of the Remake*, L.A. TIMES (Nov. 17, 1996), https://www.latimes.com/archives/la-xpm-1996-11-17-ca-65436-story.html.

[189] Richard Prince (b. 1949) is an American painter, photographer and re-photographer. His image, *Untitled (Cowboy)*, a rephotographing of a photograph by Sam Abell and appropriated from a Marlboro cigarette advertisement, was the first rephotograph to be sold for more than $1 million at auction at Christie's New York in 2005. *See* GLENN O'BRIEN & JACK BANKOWSKY, RICHARD PRINCE (2007).

[190] *See* Paul *Geller, ed., International Copyright Law and Practice (2009).*

v Malka.[191] A Paris-based artist, Peter Klasen, included in his paintings photographic images of a model appropriated from a fashion magazine, which he painted blue. Aix Malka, a France-born photographer, sued for violation of his photographic copyright by Klasen. The lawsuit processed through lower courts and appeals in France, ending at the supreme court. Eventually ruling in Klasen's favor and to override claims of copyright infringement, the supreme court applied Article 10 of the 1953 European Convention on Human Rights—the fundamental right to artistic freedom of expression.[192]

2. Sol LeWitt

Sol LeWitt (1928-2007) was a U.S.-based artist linked to various movements, including conceptual art, and became prominent in the late 1960s for his wall drawings.[193] A lawsuit filed in 2012 at New York County Supreme Court concerned LeWitt's *Wall Drawing #448*, 1985, for a private residence in Massachusetts.[194] The document signed by LeWitt had written instructions for drawing the mural and attested that the resulting work would be LeWitt's original: his authenticity certificate. A typical LeWitt certificate is headed, "This is to certify that the Sol LeWitt wall drawing number … evidenced by this certificate is authentic."[195] It then specifies any lines, shapes, forms, configurations, colours, and the place and date of first "installation." After which it states, "[t]his certification is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred."[196] Finally, it is signed and dated.[197]

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[191] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., May 15, 2015, Bull. Civ. 1, No. 13/27391 (Fr.).

[192] EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 135.

[193] LeWitt's wall drawings are usually executed by people other than the artist himself, and used teams of assistants to create such works. Writing about making wall drawings, LeWitt himself observed in 1971 that "each person draws a line differently and each person understands words differently". The wall drawings, executed on-site, generally exist for the duration of an exhibition; they are then destroyed, giving the work in its physical form an ephemeral quality. They can be installed, removed, and then reinstalled in another location, as many times as required for exhibition purposes. *See* Holland Cotter, *Now in Residence: Walls of Luscious Austerity*, N.Y. TIMES (Dec. 4, 2008), https://www.nytimes.com/2008/12/05/arts/design/05lewi.html.

[194] Complaint, at 1, Steinkamp v. Hoffman, No. 0651770 (N.Y. Sup. Ct. filed May 22, 2012) 2012 WL 1941149.

[195] *Id.* at 3.

[196] *Id.* at 2.

The lawsuit claimant was Roderic Steinkamp, a contemporary art collector and dealer.[198] The respondent was the Chicago-based Rhona Hoffman Gallery, which specialised in "international contemporary art in all media," and art that is conceptually, formally, or socio-politically based.[199] Steinkamp owned LeWitt's *Wall Drawing #448* and authenticity certificate, which he consigned to the gallery for resale in 2008 via a signed contract in which the gallery agreed to be liable for "all loss, damage or deterioration."[200] In 2011, the gallery notified Steinkamp that the certificate had become "lost and irretrievable."[201] The gallery claimed for the loss on its insurance policy, but the insurers declined to pay and so did the gallery, hence the lawsuit.[202]

Steinkamp claimed:

> The original certificate, issued and signed by the artist who is now deceased, is a unique and irreplaceable document that cannot be generated anew or replaced. There is no substitute for the original certificate entrusted to the care, custody, and control of the defendants … Since the wall drawings do not constitute freestanding, portable works of art like a framed canvas or a sculpture on a podium, documentation of the work is key to transmitting it or selling it to a collector or institution … The original certificate is required for the sale of the wall drawing.[203]

He sought judgment for damages of at least $350,000 for each of four alleged breaches of contract, bailment, negligence, and conversion.[204] These claims raised challenging art and law issues. All are interrelated and based on the same set of circumstances: the existence of the certificate and its physical consignment to, and unexplained disappearance from, the gallery. Should any of these claims have succeeded, the claimant would then have been required to prove to the court that he had suffered quantifiable financial loss—and that is where market and cultural values would have become key issues.

The key criterion for establishing market value is not the estimated or asking price, but what has already been paid. LeWitt originated 1,259 wall

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[197] *See* Sol LeWitt, *Certificate for Wall Drawing #128 (Ten Thousand Random Not Straight Lines)*, HARVARD ART MUSEUMS (1972), https://harvardartmuseums.org/collections/object/171166.

[198] Complaint, *supra* note 194, at 1.

[199] *Id.*

[200] *Id.* at 3.

[201] *Id.*

[202] *Id.* at 3-4.

[203] *See id*. at 2-4.

[204] *Id.* at 5-8.

drawings between 1968 and his death in 2007.[205] Independent evidence existed about LeWitt's works in the market, showing that auction prices ranged from $35,250 for *Wall Drawing #767*, 1994, sold at Christie's New York in 2001, to $254,500 for *Wall Drawing #41*, 1970, sold at Phillips de Pury New York in 2009.[206] Such sales were of physical works with their authenticity certificates. There appeared to be no evidence of sales without such certificates, nor of sales of certificates alone. Therein was the greatest challenge: whether Steinkamp's art lawyers could prove to the court that a LeWitt certificate was an intrinsic element of the market value of the wall drawing it authenticated. In this respect, it was self-evident that the LeWitt-signed lost certificate was unique and could not be replaced. Moreover, the gallery was a specialist in conceptual artwork, in which case, the gallery should ideally have tried to overturn the rejection of its insurance claim. The rejection most likely occurred because the insurer had less understanding of the conceptual and legal significance of LeWitt's certificates. In the event, this was perhaps what transpired because the lawsuit was eventually settled out of court on an undisclosed confidential basis.[207]

3. Christo & Jeanne-Claude

During October 2021, a live stream from Paris, France, showed the Arc de Triomphe entirely wrapped in fabric: a project conceived by artists Christo and Jeanne-Claude over 60 years ago, which they developed and financed, but were unable to execute before their deaths in 2020 and 2010 respectively.[208] This is a fitting fulfilment of a remarkable practice, demonstrating special knowledge and skills needed to achieve their conceptual environmental installations. Realisation of their projects was effectively a legal and business obstacle course: to execute artwork that intentionally embraced the law as a tool for its creation, especially navigation of intellectual property laws operating both within the U.S.,

[205] *See Now in Residence: Walls of Luscious* Austerity, *N.Y. Times* (December 4, 2008).

[206] *Sol LeWitt: Auction Results*, MUTUALART, https://www.mutualart.com/Artist/Sol-LeWitt/5D1F862F0381BF32/AuctionResults (last visited Feb. 5, 2024).

[207] Dr. Derek Fincham, How Law Defines Art, 14 J. MARSHALL REV. INTELL. PROP. L. 314, 322 (2015).

[208] Christo Vladimirov Javacheff died on 31 May 2020 in New York City, a decade after his spouse Jeanne-Claude Denat de Guillebon also died there: they were astrological twins (both born June 13, 1935). For obituary, *see* Charles Darwent, *Christo obituary*, THE GUARDIAN (June 1, 2020), https://www.theguardian.com/artanddesign/2020/jun/01/christo-obituary.

their adopted home, and countries beyond. From the outset of their practice in the 1960s, Christo and Jeanne-Claude developed the art of self-financing their projects through creative use of copyright.

They understood that there is no copyright ownership of ideas. This meant copyright law could not protect their ideas to, for example, erect a fabric fence across 24 miles of California ranch land, *Running Fence*, 1972–76; wrap the Reichstag at Berlin, Germany, in polypropylene fabric covered with silvery aluminium, *Wrapped Reichstag*, 1971–95; wrap the Pont-Neuf in Paris, France, with sand-coloured polyamide fabric, *The Pont Neuf, Wrapped*, 1975–85; install 7,503 sixteen feet-high gates of saffron-coloured fabric on paths in Central Park, New York City, *The Gates, Central Park, New York*, 1979–2005; or indeed to wrap the Arc de Triomphe in 25,000 square metres of recyclable polypropylene fabric in silvery blue, anchored with 3,000 metres of red rope, *L'Arc de Triomphe, Wrapped, Project for Paris since 1961,* 2021.[209] Anyone is legally free to copy such ideas and do likewise, but this evidently did not concern Christo and Jeanne-Claude because the world soon acknowledged them as progenitors of their unique public environment wrapping concept.

However, there can be copyright law protection for expressions of ideas in fixed media/forms that can be seen, heard, and/or read. This idea-expression dichotomy, or distinction, was evidently well-understood by the artists who shaped their practice accordingly.[210]

"Do you know that I don't have any artworks that exist?" Christo said, "[t]hey all go away when they're finished. Only the preparatory drawings and collages are left, giving my works an almost legendary character. I think it takes much greater courage to create things to be gone than to create things that will remain."[211]

More pragmatically, Jeanne-Claude said:

> The only way to work in total freedom is to pay for it. When you accept outside money, someone wants to tell you what to do. So, we fund each of our projects with our own money – through sales of Christo's preparatory drawings, collages, and early works. But we never know if they will sell fast enough to meet the expenses.[212]

Accordingly, over six decades they created and owned copyright in volumes of preparatory project artwork. Such creations and ownerships

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[209] *Realized Projects*, CHRISTO AND JEANNE-CLAUDE, https://christojeanneclaude.net/artworks/realized-projects/ (last visited Feb. 5, 2024).

[210] *See* SHIVNATH TRIPATHI, IDEA EXPRESSION DICHOTOMY UNDER COPYRIGHT LAW (2018).

[211] MARK GETLEIN, LIVING WITH ART 264 (11th ed. 2015).

[212] *Id.*

included two-dimensional plans, technical drawings, watercolours, paintings, prints and related three-dimensional artefacts. Some of these works they sold as unique or limited-edition objects, others they reproduced and merchandised themselves, or licensed others to do so. Such monetisation of their creative artwork was only one way to finance realisation of their projects. They also understood that films and photographs of their public art projects, used for commercial purposes without their consent, were not permitted by laws in many jurisdictions worldwide. This was made clear in the 1980s, following realisation of *The Pont Neuf, Wrapped* in Paris in 1985, when the artists successfully sued two companies in France for violating their copyright via commercial use of films and photographs of their installation without their permission.[213]

4. Alan Smith

Alan Smith (1941-2019) was a Scottish artist, who originated an artwork of significance in the development of Scotland's contemporary art in the last quarter of the twentieth century: *£1512, 1977*.[214] *The work is manifest as* a locked briefcase, containing investment certificates to the value of the remaining assets of a then recently liquidated artists' workshop entity. *£1512* is an ongoing and open-ended conceptual artwork. Its sardonicism of is founded on toying with the usually restricting laws at the time, although occasionally permitting for exceptional purposes, perpetuities, and accumulations of capital assets.

In 1974, Smith was a trustee of the non-profit Ceramic Workshop Edinburgh, which he and fellow artists founded in 1969 to provide artists with ceramic, screen-printing, darkroom, and exhibition facilities. Despite their success, the workshop was forced to close in 1974 due to lack of external funding. After ceasing activities and paying its debts, the trustees agreed to a proposal Smith made to convert remaining funds into an artwork. There was an *"uncomfortable" provision in the trust's constitution saying in terms that if it ceased operating, it must donate any remaining assets to another organisation with similar aims. Smith suggested not surrendering such funds but changing the trust's constitution to allow it to*

[213] CA Paris, 13 mars 1986, Gaz. Pal. JP 239; Véronique Laroche-Signorile, *Christo Emballe le Pont-Neuf*, Le Figaro, Sep. 22, 1985.

[214] Henry Lydiate was consulted by Alan Smith and his fellow workshop trustees for the realisation of *£1512*, and the text is based on recollections and contemporaneous notes of conversations between Henry Lydiate and Alan Smith from 1976 to 2019.

invest them, so that the investment would be an artwork and the workshop would continue to exist as that artwork.

Accordingly, in 1977, the trust was converted into an investment artwork with the title *£1512*. The money was entombed in perpetuity, and tax-free interest from the investment would feed back to rejoin the original capital sum at a rate that doubled its value every five years. Smith estimated that by the end of its first century of investment/entombment, the original *£1512* would have a value of £410.7 million. Further, by the nature of its expansion, *£1512* would become a work of art that "in concept at least" had the potential through its absorption of capital to "own the world."

The material manifestation of the conceptual artwork was first exhibited in 1977 at the Roxburgh Hotel in Edinburgh, Scotland. In 1978, it was shown at the Stadtisches Kunsthalle in Dusseldorf, Germany, and in 1979, at the Centre Pompidou in Paris, France. Critical reviews of *£1512 at that time, and since then, have* included discussions about the social exchange of money, the economic base of art and of *time*. Scottish contemporary art expert and scholar Professor Craig Richardson regards *£1512* as "a metaphor for the Scottish visual arts in the 1970's," and cites Duchamp's immense influence on Smith's creative activities.[215]

5. JSG Boggs

JSG Boggs (1955-2017)[216] was in a Chicago diner in 1984,

> …having a doughnut and coffee and doodling on this napkin … sketching a numeral 1, and gradually began embellishing it. The waitress kept refilling [his] cup and [he] kept right on drawing, and the thing grew into a very abstracted one-dollar bill.[217]

The waitress offered to buy the napkin work, but Boggs refused. He then asked for his bill—90 cents—and suggested "I'll pay you for my doughnut and coffee with this drawing." The deal was done and as he was

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[215] CRAIG RICHARDSON, SCOTTISH ART SINCE 1960: HISTORICAL REFLECTIONS AND CONTEMPORARY OVERVIEWS 94 (2011).

[216] James Stephen George Boggs was born in New Jersey, U.S., in 1955. He dropped out of an accountancy course to attend art schools in Florida and New York. *See* Brian O'Neill, *Obituary: J.S.G. Boggs / Artist who drew money and government attention*, Pittsburgh Post-Gazette (Jan. 27, 2017), https://www.post-gazette.com/news/obituaries/2017/01/28/Obituary-J-S-G-Boggs-Artist-who-drew-money-and-government-attention/stories/201701270049.

[217] This and all subsequent quotations from Boggs are taken from direct conversations in 1986 and 1987 with Henry Lydiate, who was a member of Boggs' defense team. Interview with JSG Boggs, in London, Eng. (1986-1987).

leaving, the waitress called out, "[w]ait a minute. You're forgetting your change," and gave him a dime. For Boggs this was a "lightbulb" moment, which inspired him to pursue his artistic practice in this art-bartering manner for the foreseeable future. Boggs practised many such exchanges over the next two years as payment for his basic expenses including his rent, and determined that drawings of currency alone were not his artwork, rather that the whole bartering transaction, including the receipt of legal currency as change, was the complete artwork.

In 1986, Boggs was living in London and successfully pursuing his art-bartering practice, when he was arrested and indicted for reproducing Bank of England currency notes without authorisation.[218] At his jury trial, Boggs pleaded not guilty to four counts, alleging reproduction of £10, £5, and two £1 notes, each being a hand-drawn image of one side of a Bank of England currency.[219] If the jury determined that Boggs had indeed reproduced the notes, he would be found guilty. These were absolute offences not requiring the prosecution to prove any *mens rea*. The prosecution stressed the fact that the accused was an artist whose only intention was to create art, which was not relevant and was in anticipation of the defense.

The nature and flavor of Boggs's defense were captured in his counsel's opening address stating,

> The Mona Lisa is not a reproduction of an Italian woman, and Van Gogh did not reproduce sunflowers … Boggs is not an artist of that calibre—and being an artist would in any case be no [defense] in itself—but if you just look at his drawings you will see that they are not reproductions . . . but an artist's impression, objects of contemplation . . . they had never been passed off as real currency . . . and not even a moron in a hurry would mistake these drawings for the real thing, they are obviously drawings … Boggs is no mere reproducer, he's an artist. You may or may not like what he does. You may find what he does of value. You may feel that a Boggs isn't worth the paper it's drawn on … but that's not the point. The point is that these are original works of art and not reproductions at all.[220]

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[218] Regina v. Boggs, Unreported (Cent. Crim. Ct. London 1987).

[219] "It is an offence for any person, unless the relevant authority has previously consented in writing, to reproduce on any substance whatsoever, and whether or not on the correct scale, any British currency note or any part of a British currency note." Forgery and Counterfeiting Act, (1981) § 18(1), 1981 C. 45, (U.K).

[220] *See* GEOFFREY ROBERTSON, THE JUSTICE GAME (1999); LAWRENCE WESCHLER, BOGGS, A COMEDY OF VALUES (1999); Henry Lydiate, *The Courtroom as Gallery: The Jury as Spectators*, *in* THE TRIALS OF ART (2007).

The trial judge directed the jury to ignore defense submissions and convict. English juries fiercely resent being told by trial judges what to decide. They returned a unanimous verdict of not guilty on all counts, within fifteen minutes. In the street outside the courthouse, members of the jury came out to shake Boggs' hand and said, "It was the correct verdict. We loved your work." The case earned Boggs a worldwide reputation as the artist who created his own currency, which pre-dated by three decades the advent of Bitcoin around 2008. Boggs is revered by many today as the "Patron Saint of Cryptocurrency."[221]

6. Carey Young

Carey Young (b.1970) is a London-based artist. Young's "Law Works" use the law as an artistic medium, inviting the spectator to experience "both the performative and the conceptual dimension of the law to explore its limits and to destabilise its language."[222] An early work, for example, is *Disclaimer Series*, 2005, a suite of three text-based panels presenting "playful but legally-credible terms to renounce their ontological status as artworks and their relationship to the viewer, artist, and any gallery or sales context."[223] Young explains her creative intentions for such artworks was "to throw the viewer off balance by completely undermining the validity of the content of the show."[224]

Mutual Release, 2008, poses the question "an the legal contract be a form of art?" through a series of six artworks "which invite the viewer to enter into, or be privy to contractual relationships based on viewing, owning and collecting art."[225] The law is treated as an artistic medium,

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[221] Richard Whiddington, *J.S.G. Boggs's Estate Has Minted the Late Artist's Drawings of Banknotes, Which Questioned the Value of Money, as NFTs*, ARTNET (Oct. 25, 2022), https://news.artnet.com/market/jsg-boggs-money-talks-nft-lacollection-2198530#:~:text=In%20death%2C%20his%20estate%20is,dip%20a%20toe%20in%20Web3.

[222] Henry Lydiate, *Being an Artist's Lawyer,* 434 ART MONTHLY 44, 45 (Mar. 2020). *See also* Carey Young, *Law Works* (series of artworks), CAREY YOUNG, https://www.careyyoung.com/law-works (last visited May. 5, 2024).

[223] Carey Young, Letter the Editor, 286 ART MONTHLY 18, (May. 2005). *See also* Henry Lydiate, *Being an Artist's Lawyer,* 285 ART MONTHLY 40 (Apr. 2005); Carey Young, *Disclaimer Series* (series of photographs), CAREY YOUNG, https://www.careyyoung.com/works#/disclaimer-reality (last visited May. 5, 2024).

[224] Lydiate, *supra* note 223, at 40.

[225] Carey Young, *Mutual Release* (series of artworks), *in* solo show at Thomas Dane Project Space, London (Nov. 20 2008–Dec. 15, 2008), CAREY YOUNG, https://www.careyyoung.com/mutual-release-thomas-dane-project-space (last visited May. 5, 2024).

allowing the viewer to experience the otherwise abstract space of the contract. When first exhibited at a London gallery, visitors were offered a free work, which acquired the status of an artwork only when it had been signed by them. From then on, the owners and artist entered a contract that ended only with the death of the artist and/or the owner. In a text work, the artist and the gallery also entered a contract that offered each "complete mutual release." In a video work, an actor interpreted legal terms from a commercial contract as a form of acting exercise. Through Mutual Release, the artist further developed her interest in both the performative and the conceptual dimension of the law to explore its limits and to destabilise its language. Over the past 20 years or so, Young has constantly developed her "Law Works" with titles that intrigue jurists, such as: *Terms and Conditions,* 2004; *Consideration*, 2004-5; *Artistic License,* 2005*; Declared Void,* 2005*; Counter Offer,* 2008*;* and *Before the Law Series,* 2017.[226]

The video work *Appearance,* 2023, is a silent film portrait of fifteen serving U.K. female judges in their judicial robes looking straight at the camera.[227] Young describes how "almost forensic" close-ups of hair, shoes, jewellery and regalia, the camera plays off the judges' roles as powerful, self-possessed public intellectuals against their varied physical presence and the quirks of individual personalities. Poised between painting and photography, the piece takes inspiration from Andy Warhol's Screen Tests, which were themselves inspired by "most wanted" ads of the New York Police Department. Whilst countering the familiar patriarchal culture of law, *Appearance* places the viewer in the dock, and centres on ideas of judgement between viewer and judge, on judging as performance, and on the power relations between judge and camera.[228]

Critical reviews of *Appearance* have been positive, including "[Young's] enduring fascination with justice and the law has yielded an outstanding new film in a riveting retrospective."[229] Another states:

> The effect is uncanny. These women are accustomed to embodying legal authority and to listening and deliberating with a certain gravitas. Seeing them express their own forms distinct of

[226] Young, *supra* note 222.

[227] *See* Carey Young, *Appearance* (silent film), in solo exhibition at Modern Art Oxford (Mar. 25 -July 2, 2023), CAREY YOUNG, https://www.careyyoung.com/works#/appearance (last visited May. 5, 2024).

[228] *Id*.

[229] Laura Cumming, *Carey Young: Appearance review – the faces of female justice*, THE GUARDIAN (Mar. 26, 2023), https://www.theguardian.com/artanddesign/2023/mar/26/carey-young-appearance-review-the-faces-of-female-justice.

> composure—and concomitant hints of humor, playfulness, inscrutability, or imperturbability—while gazing into the camera and then gradually moving in to study the pulse behind their ears gives new dimensions to the old maxim, justice must be seen to be done, and to our understanding of female power.[230]

7. Alison Jackson

Alison Jackson (b.1960) is a London-based artist. She gained public attention in 1999, when she published her lookalike photographs of celebrities in compromising positions. She developed these into BBC television's broadcast series, *Double Take*, for which she won a British Academy of Film and Television Arts Award for Best Innovation in 2002.[231] Jackson uses conventional mainstream broadcast media and publishing as both her art form and dissemination medium (as well as exhibiting in art galleries). She works not as a conventional television director, but as an artist with exclusively artistic parameters. Jackson uses media to subvert and question notions of celebrity, and toys with the "it's on television/in print, so it must be true" response by viewers. Jackson says, "[m]y aim is to explore the blurred boundaries between reality and the imaginary—the gap and confusion between the two. I recreate scenes of our greatest fears which we think are documentary but are fiction."[232] Jackson employs skill and judgement in intentionally sailing close to—and to date successfully circumventing— hazardous boundaries of laws relating to confidentiality, defamation, and related celebrity rights.[233]

Laws of confidentiality or privacy exist in most jurisdictions worldwide, aimed at deterring or preventing confidential information (including what a person looks like in private), being acquired (via a still photograph or moving picture image) in confidential circumstances, and being exposed to the public. In Jackson's artworks, there are no actual invasions of privacy, rather the portrayal of imagined invasions. Therefore, there are no breaches of confidentiality. As she says, "I'm depicting what exists in the public imagination, with one foot in fantasy and one foot in

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[230] Toby Kamps, *Carey Young: Appearance*, THE BROOKLYN RAIL (June, 2023), https://brooklynrail.org/2023/06/artseen/Carey-Young-Appearance.

[231] *See* Megan Lane, *That's Blair and Becks! No wait...*, BBC NEWS ONLINE MAGAZINE (Dec. 18, 2003), http://news.bbc.co.uk/2/hi/uk_news/magazine/3309591.stm.

[232] *See generally* Alison Jackson, *Photography*, ALISON JACKSON, https://www.alisonjackson.com/photo-gallery (last visited Feb. 5. 2024).

[233] *Id*.

reality."[234] Defamation generically describes publication of something that damages a person's reputation by causing reasonable people to think less of them. In Jackson's artworks, her targeted celebrities are sometimes objects of satire, possibly ridicule, certainly fun. However, given the nature and range of Jackson's artistic credentials and professional standing, and the relatively low risk of the general public, or audiences/fans of celebrity subjects, thinking less of them, it is difficult to envisage defamation actions being taken.

Many jurisdictions worldwide have enacted so-called personality, publicity, or celebrity rights to protect a celebrity's commercial "attributes" that may be a potential trading asset, such as name, signature, or image. Such rights often overlap with trademark legislation.[235] In Jackson's artworks, if violation of such rights were alleged, courts are likely to consider and recognise the artistic nature and intent of her past and current work, her well-established reputation as an artist/director, and the non-commercial nature of many of her projects. Moreover, Jackson's extensive website contextualises her work:

> We live our lives through screens now, whether they are televisions or our computers or our phones, and screens are hugely addictive. There is a gap between the facts, and how the media portrays stuff, and that's what these images fill. I'm especially interested in how we think we know people through imagery – it goes straight from eye to psyche, which makes it very powerful, and very seductive. It also makes it very easy to lie.[236]

8. Banksy

Banksy is the pseudonym and tag of the London-based street artist, political activist, and film director. His birth-date, real name, and identity remain unconfirmed and the subject of worldwide speculation as he reportedly hails from, and attended art college in the west of England city

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[234] Henry Lydiate, *Alison Jackson's Sven*, ART MONTHLY (2006), https://artquest.org.uk/artlaw-article/alison-jacksons-sven/. *See also* Alison Jackson, *Press*, ALISON JACKSON (citing *Fame and Fortune: Alison* Jackson, THE SUNDAY TIMES, (Oct. 17, 2021)), https://www.alisonjackson.com/press (last visited Feb. 5, 2024).

[235] *See* Abbas Mirshekari, *Foundations of Legal Protection of Reputation*, 11 U. TEHRAN COMPAR. L. REV. 339 (2020).

[236] Andrew Mueller, *Putting the Boot in*, THE GUARDIAN, (June 3, 2006), https://www.theguardian.com/media/2006/jun/03/tvandradio.theguide2.

of Bristol, until the late 1990s before moving to London.[237] Initially operating from the early 1990s as a free-hand street graffiti artist, Banksy soon began using stencils to facilitate swifter execution of street work as well as assist him in avoidance of detection and arrest for criminal damage or trespass to other people's property. His career started as an urban guerrilla artist, using the built environment as both his canvas and gallery to convey messages to the general public against war, capitalism, and the establishment, via satirical images often with epigrammatic text. He had no artworks for sale.

Banksy responded to his increasing popularity (and requests from people wanting to somehow own one of his works) by using his stencils to make reproductions of his publicly-sited artworks. Some were printed on paper and offered for sale via eBay; others were printed on canvas and sold, more expensively, to selected collectors.[238] In 2009, he established Pest Control as a separate online legal entity registered in the U.K. as a limited liability company, partly to protect his personal identity, partly to authenticate his site-specific artworks, but mostly to handle the growing commercial dimensions of his practice.[239] In this way, Banksy extended his artistic brand by adopting and adapting mainstream art business practices, creating and selling authorised versions of his works, and occasionally accepting commissions in signed limited editions.

At a sale of several of his works in 2007, Sotheby achieved the following: £96,000 for *Ballerina with Action Man Parts*, 2005, a resin sculpture playfully parodying *The Little Dancer* by Edgar Degas (1834-1917); £72,000 for *Glory*, 2005, a unique print. Both works were sold on the first of two days of sales.[240] By the start of Sotheby's second sale day, Banksy had updated his website with a new image of people bidding at

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[237] *See* STEVE WRIGHT, BANKSY'S BRISTOL: HOME SWEET HOME (2007).

[238] From Henry Lydiate's notes of conversations with Steve Lazarides in 2004, shortly after Lazarides opened his gallery in London's Soho, where he acted as Banksy's agent and dealer. Lazarides worked with Banksy for 11 years, initially documenting the artist at work in 1997, then becoming his agent, strategist and minder. Interview with Steve Lazarides, in London, Eng. (2004); *See also* Stuart Jeffries, *'We were lawless!' Banksy's photographer reveals their scams and scrapes*, THE GUARDIAN (Dec. 16, 2019), https://www.theguardian.com/artanddesign/2019/dec/16/banksy-captured-steve-lazarides-photographer.

[239] *Pest Control: Parent/Legal guardian for the artist Banksy*, PEST CONTROL OFFICE, https://pestcontroloffice.com/.

[240] *Ballerina with Action Man parts, 2005*, BANKSY EXPLAINED, https://banksyexplained.com/ballerina-with-action-man-parts-2005/; *Banksy Auction Results*, Sotheby's, https://www.sothebys.com/en/search?query=banksy&timeframe=&tab=objects.

auction with title, *I Can't Believe You Morons Actually Buy This Shit.*[241] Later that year London's Bonhams hammered for £288,000 his *Space Girl & Bird*, 2003, spray-paint on steel.[242]

Perhaps the most memorable and widely-known of all Banksy's legal and business creative art activities was his *Girl with Balloon*, 2006, shredding incident at Sotheby's London in 2018.[243] Banksy's work has always been generative in the Duchampian sense, that its key concern has been for an image (alone or coupled with epigrammatic text) to stimulate intellectual engagement of the spectator—perhaps to think about their environment, and especially the location specifically chosen by the artist. In this case, the site-specific location for the key performative element of Banksy's auto-destructive conceptual work in 2018 was a live public auction room in a world-leading auction house, and in an art market capital city. The shredding occurred during a prestigious week in the contemporary art market's calendar and was timed to shred on the fall of the hammer confirming the highest bid of £1 million. An unidentified seller had consigned the work for sale to Sotheby's, whose sale catalogue entry stated:

> Description
>
> Banksy
> Girl with Balloon
> signed and dedicated on the reverse
> spray paint and acrylic on canvas, mounted on board, in artist's frame
> 101 by 78 by 18 cm. 39 3/4 by 30 3/4 by 7 in.
> Executed in 2006, this work is unique.
>
> Provenance

Acquired directly from the artist by the present owner in 2006.[244]

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[241] *See Morons, 2006-2007*, BANKSY EXPLAINED, https://banksyexplained.com/morons-2006-2007/.

[242] *5 Things to Know About Banksy*, BONHAMS, https://www.bonhams.com/stories/32393/.

[243] Jason Daley, *Watch This $1.4 Million Banksy Painting Shred Itself As Soon As It's Sold*, SMITHSONIAN MAGAZINE (Oct. 8, 2018), https://www.smithsonianmag.com/smart-news/watch-14-million-bansky-painting-shred-itself-soon-it-sold-180970486/.

[244] *See generally Lot #67 Banksy Girl with Balloon*, SOTHEBY'S, https://www.sothebys.com/en/auctions/ecatalogue/2018/contemporary-art-evening-auction-l18024/lot.67.html.

The shredder hidden within the frame could have been installed by the artist when making the work in 2006 and was unknown to the owner who consigned it to auction. Alternatively, it could have been installed by Banksy with the owner's collaborative blessing in preparation for its consignment to Sotheby's. *Shred the Love | the Director's Cut* was a short video posted on Banksy's social media site twelve days after the shredding, including shots of the studio installation of a shredder within the frame of an artwork, and test rehearsal of shredding.[245] In the end, things turned out well for all parties including Banksy, because the highest bidder/buyer decided not to reject the shredded work, but to complete the auction transaction and pay to own it. Banksy promptly re-titled the piece, *Love Is in the Bin*, 2018, with a new authenticity certificate.[246] Sotheby's was swift to capitalise on the incident, issuing a press statement saying, "Banksy didn't destroy an artwork in the auction, he created one … the first artwork in history to have been created live during an auction."[247] Only three years later, in October 2021, the shredded work was resold at Sotheby's London for £18.5 million.[248] Did Banksy perhaps fail in the attempted subversion or disruption of the art and money nexus, and instead demonstrate how the status and value of an artwork can change? Or, did he succeed in metamorphosing from being a secretive street artist to becoming an international cultural icon?[249]

D. *Life After Art School*

Art college education throughout most of the world offers a wide variety of studio-based undergraduate and postgraduate degree courses focusing on visual arts practice. Authorities responsible for validating the delivery of such courses have necessarily developed criteria for assessing

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[245] Daley, *supra* note 213.

[246] *See* Julia Halperin, *Banksy's Famed Shredded Artwork, 'Love Is in the Bin,' Sells for a Record $25.4 Million at Sotheby's—18 Times the Non-Shredded Price*, ARTNET NEWS (Oct. 14, 2021), https://news.artnet.com/market/banksy-record-love-is-in-bin-2020706.

[247] Mattha Busby, *Woman who bought shredded Banksy artwork will go through with purchase*, THE GUARDIAN (Oct. 11, 2018), https://www.theguardian.com/artanddesign/2018/oct/11/woman-who-bought-shredded-banksy-artwork-will-go-through-with-sale.

[248] Halperin, *supra* note 216.

[249] *See The Banksy Story*, BBC Radio 4 (July 10, 2023), https://www.bbc.co.uk/sounds/brand/m001nwhs (addressing the questions presented); *BANKSY OPENS "CUT & RUN" IN GLASGOW*, BROOKLYN STREET ART (June 15, 2023), https://www.brooklynstreetart.com/2023/06/15/banksy-opens-cut-run-in-glasgow/.

the performance of students. However, few such institutions have developed criteria for assessing students' performance in areas essential for establishing and maintaining a studio practice: appropriate legal and business knowledge and skills. In the U.K., for example, the 1997 report of the National Committee of Inquiry into Higher Education, commissioned by the U.K. Government, included a major review of art and design education and qualifications. One of its principal recommendations was for holistic embedding into creative arts degree courses as well as the delivery and formal assessment of professional practice, knowledge, and skills.[250]

Professional practice studies—of the commercial dimensions of a creative practice— should ideally include the following[251]:

- The difficult transition from student life to that of a freelance practitioner, including registering for state welfare benefits, and as a sole trader for income tax and possible exemption purposes before moving towards the establishment of an economically sustainable practice;
- Developing income generation skills for achieving grants, awards and prizes, bursaries, residences, sponsorships, and sales;
- Understanding and managing relationships in the global art world, such as how professionals and organisations operate in the commercial art market, and in the museums and galleries sector;
- Global marketing and promotion tactics like raising awareness and critical interest in the media and academic art worlds, and attracting potential collectors and commissioners;
- How to negotiate and secure successful contracts with collectors, commissioners, agents and dealers, museums and galleries—all in a potentially international context;
- A sound working knowledge of international and national laws that give artists intellectual property rights: especially ownership and management of copyright and statutory moral rights, their proactive entrepreneurial use for income generation and their use to resist or deal with infringements and abuses of artworks.

Such studies, although strongly recommended for the U.K. in the 1997 report, did not lead to the enactment of legislation or central government policies making it compulsory for such studies to be delivered and assessed by publicly funded art colleges. Instead, most colleges developed their own

[250] THE NATIONAL COMMITTEE OF INQUIRY INTO HIGHER EDUCATION, THE DEARING REPORT: HIGHER EDUCATION IN THE LEARNING SOCIETY 137 (1997).

[251] *Id*. at 130.

voluntary professional practice programmes, whereby external art business professionals visit to give occasional talks and conduct workshops and seminars to students. These workshops typically discuss subjects such as book-keeping and accounting, self-promotion and marketing, portfolio and curriculum vitae development, pricing of work, and art law. Students' attendance for such visits is normally voluntary, and therefore quite patchy. This is especially true when such sessions are arranged for the end of the academic year, often in the final course year, when students are understandably pre-occupied with completing creative works and projects for summative assessment. Therein lies a real problem: undertaking such professional practice study programmes may not earn students credit units towards their degree awards and may not therefore require students to submit assessed professional practice assignments in order to demonstrate their understanding and working knowledge of professional practice skills. The U.K. is not alone. Most other countries, where studio-based art college courses are delivered, do likewise.

Art colleges and their faculty staff could and ideally should derive substantial benefits from establishing such holistically embedded and assessed professional practice programmes. Colleges could rightly say to potential students, their supporting families, government and other funding bodies, that their studio-based visual arts courses aim, amongst other things, to equip students with the basic knowledge and skills necessary to establish and maintain a professional life after art school. Until this ideal is achieved, artists will continue from time to time to need the services of a lawyer.

CONCLUSION: BEING AN ARTIST'S LAWYER

An artist's lawyer is an attorney on whom visual artists can rely for experienced and knowledgeable advice and help. Lawyers have traditionally developed and offered many fields of specialist practice including law relating to crime, children, finance, sports, music, film, entertainment, media, antiquities, and art. But the area of practice by living artists is perhaps more specialised and demanding than most. This is because of the unusual, challenging, changing and unique nature of contemporary fine art practices. Visual art, as a creative activity, mostly involves autonomous and self-funded generation of artwork, with dissemination following afterwards. The activity is almost entirely product-led rather than market-led - conventional business wisdom turned on its head.

A widely accepted principle of good legal practice is that lawyers should ideally stand inside the shoes of their clients, to try to see and understand from their perspective. This principle requires lawyers first to

step out of their own shoes and their own legal comfort zone, which many find hard to do. If the client is an artist, it can be especially challenging to understand and empathise with the nature of their practice, processes, and intentions in order to assess whether (and, if so, what) legal advice and help is necessary or desirable. An artist's go-to lawyer should ideally be able to demonstrate a sound grasp not only of conventional art practices producing unique or limited-edition works for exhibition and sale, but also of unconventional art practices that sometimes create work only for exposition, with no material for sale. It is axiomatic that every artist's practice is unique, but there are dimensions of most visual artist's practices and processes and intentions with which an artist's lawyer should ideally be familiar. Let us consider examples.

Artists usually expect their go-to lawyer to demonstrate not only knowledge of art's developmental journey through the ages to date, but also understanding of any resonances with their client's particular contemporary art practices, processes, and intentions. Artists strive to create artwork to be self-evidently original, in the sense that it does not slavishly appropriate earlier work of other artists. It is therefore almost always the case that artists have a deep knowledge and understanding of visual art's history—from antiquity to date—not only to avoid conscious or unconscious plagiarism of specific images, compositions, shapes, forms, configurations, and so on, but also to be stimulated by the content of such past works as well as the lives and practices of past works' authors to originate something new and different. Possession of such knowledge of art history perhaps even allows artists to shock spectators with work they have never seen before, but which in time they may come to revisit and eventually value.[252]

Art and artist's history is full of artists' works that challenge conventional artistic norms, but which over time came to be viewed and widely accepted as being ground-breaking and influential on subsequent generations of artists and spectators. For example: Andrea Mantegna's (1431-1506) *Dead Christ*, c.1466; Michelangelo's (1475-1564) *The Last Judgement*, 1536-41; Caravaggio's (1571-1610) *St Matthew and the Angel*, 1602; Édouard Manet's (1832-1883) *Le Déjeuner sur l'herbe*, 1862-63; Gustave Courbet's (1819-1887) *The Origin of the World*, 1866; Marcel Duchamp's *Fountain*, 1917; Pablo Picasso's *Guernica*, 1937; Robert Rauschenberg's (1925-2008) *Erased De Kooning*, 1953; Andy Warhol's

[252] Hughes, *supra* note 132.

Campbell's Soup Cans, 1962; Yoko Ono's (b.1933) *Cut Piece*, 1964; Christo and Jeanne-Claude's *Running Fence*, 1976; Ai Weiwei's (b.1957) *Dropping a Han Dynasty Urn*, 1995; and Maurizio Cattelan's (b.1960) *Comedian*, 2019. Such examples effectively moved the goal posts and established new concepts, principles and propositions. Today's artist's lawyer should have an understanding that it was ever thus: to be ready, willing and able to understand and empathise with artists needing legal help and support for realisation and dissemination of artwork that is experimental, under-recognised, or challenging in nature.

THE WORK OF ART OR THE ART OF WORK? A COMMENTARY ON HENRY LYDIATE'S 'VISUAL ARTISTS BRUSHING WITH THE LAW'

Christopher David Ruiz Cameron*

INTRODUCTION

When I was asked to comment on Henry Lydiate's insightful paper, *Visual Artists Brushing with the Law: International Legal Dimensions of Professional Practice* ("the Paper"), I had the same thought as Wayne Campbell, the lead character in the Mike Myers' film *Wayne's World*:[1] "I'm not worthy!"

After all, Henry is one of the world's leading practitioners of Art Law. Art Law is a field that he practically invented. He seems to know everybody in the art world. This includes not only the lawyers and scholars but also the collectors, critics, and curators. Henry knows the journalists and patrons and sponsors. And of course, he knows so many of the artists themselves.

Once, while teaching in our London Summer Program, I struck up a conversation with Henry during a break between his International Art Law

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[1] *See* Penelope Spheeris, WAYNE'S WORLD (Paramount Pictures Corp. 1992).

class, which had just ended, and my International Sports Law class, which was about to begin.

"Henry, I visited the Tate Modern over the weekend. I saw Richard Serra's *Trip Hammer*. It was amazing! Those humongous slabs of steel! When you think about it, it was silly to travel 3,000 miles to see the work of an American artist whose stuff I could find at home."

"Chris, that's marvelous!" Henry replied. And, without missing a beat, he added, "Of course, I've known Richard for years! I used to be his lawyer! Then his brother went to law school and I've been out of a job ever since."

It took me a second to appreciate that Henry had just dropped two names with one line. Naturally, he was on a first-name basis with one of the planet's most famous large-scale metal sculptors. But when I understood that the unnamed brother who went to law school was none other than Tony Serra, the flamboyant criminal defense lawyer, I knew he had me.

Apparently, Henry really ***does*** know everybody.

Which is why my first reaction was *I'm not worthy* to comment on Henry's scholarship. What do I know about Art Law? And then I read the Paper – and realized that we are in the same business: the study of the law affecting working people.

In Henry's case, the working people happen to be visual artists. In my case, the working people happen to be everyone, whether artists or not. The former is a subgroup of the latter. Their legal troubles may arise in different workplaces, but they are related nevertheless. Like all working people, visual artists struggle to be paid a living wage, to make one's voice heard, and to be treated with dignity and respect.

In my scholarship and teaching, I take the position that most legal regimes affecting the rights to be paid a living wage, to make one's voice heard, and to be treated with dignity and respect can be categorized as falling into one or more of the following models of workplace governance: Individualism, Co-Determination, Government Regulation, and Alternative or Best Practices. Elsewhere, I have described these models in more detail;[2] here, I summarize them.

I. FOUR MODELS OF WORKPLACE GOVERNANCE

Under the Individualism Model, the prevailing philosophy of workplace governance is that wages, hours, and other terms and conditions of employment should be left unregulated; instead, employment terms should be set by the forces of the free market. In theory, a worker gets – or fails to

[2] *See* Christopher David Ruiz Cameron, *All Over But the Shouting? Some Thoughts on Amending the NLRA by Adjudication Rather than Legislation*, 26 BERKELEY J. EMP. & LAB. L. 275, 284-91 (2005).

get – whatever pay and benefits that her individual bargaining power permits her to negotiate. In practice, except for certain elites, the worker gets whatever the employer is willing to offer, usually on a take-it-or-leave it basis. The hallmark of the Individualism Model is state contracts law, including its signature legal principle: the at-will rule. The at-will rule permits the employer to act unilaterally; it holds that a contract for employment of indefinite duration is presumed to be terminable at the will of either employer or employee, for a good reason, a bad reason, or no reason at all.[3] Of course, there are exceptions to this rule, but the burden of proving any such exception falls on the employee who must bring her claim for wrongful discharge in a court of law or, more commonly these days, in employment arbitration, a forum that has been unilaterally imposed by the employer.

Under the Co-Determination Model, the prevailing philosophy of workplace governance is that employment terms should be negotiated between equal partners in a free market modified by the workers' now having a single voice representing them: their freely-chosen union. The hallmarks of the Co-Determination Model are the just cause principle and the employer's duty to bargain in good faith. As to just cause, the employer can no longer discipline or discharge arbitrarily; they must have a good reason, and the burden of proving such good reason falls on the employer – typically in labor arbitration, a forum that has been negotiated at the bargaining table. As to the duty to bargain, the employer is forbidden to make unilateral changes in wages, hours, or working conditions without first bargaining in good faith to agreement or impasse. A charge filed with an administrative agency, such as the National Labor Relations Board ("NLRB"), or a grievance filed in arbitration, are forums in which the union may vindicate workers' rights.

Under the Government Regulation Model, the prevailing philosophy of workplace governance is that the negotiation of employment terms must be regulated by the setting of certain non-negotiable floors and ceilings, which apply whether or not employment terms are otherwise established under the Individual and/or Co-Determination Model. The hallmarks of the Government Regulation Model are statutes imposing minimum or maximum conditions: anti-discrimination laws outlawing employment decisions based on the employee's membership in a protected classification; occupational health and safety laws; wage and hour laws; and the like. A charge filed with an administrative agency and/or a lawsuit filed in a court of law are typical forums in which workers' rights may be vindicated.

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[3] *See, e.g.*, Cal. Lab. Code § 2922.

Finally, under the Alternative or Best Practices Model, the prevailing philosophy of workplace governance is that the other three models are insufficient to establish robust workers' rights. Something new and out-of-the-box is needed. The key example of the Alternative Model or Best Practices Model that comes to mind in the context of Professor Lydiate's paper is the regime of International Labor Standards ("ILS") articulated by conventions of the International Labor Organization ("ILO"). The four ILS rights considered to be "core" or fundamental rights are freedom of association, including the rights to organize unions and engage in collective bargaining;[4] no forced labor;[5] no child labor;[6] and non-discrimination and equal pay, irrespective of the worker's sex and/or membership in other protected classifications.[7] The hallmark of the ILS regime and other regimes that I would associate with the Alternative or Best Practices Model is that certain employment terms are universal but aspirational; they transcend the individual worker's particular situation, including her country, industry, or status as employee versus independent contractor, but compliance is mostly voluntary and hard to compel. In this respect, workers' rights are human rights.[8] They are enforced not in the courts of law or by agencies of the administrative state, but in the court of public opinion and through diplomacy.

II. DISCUSSION

Which brings me back to the Paper. So many of the shortcomings that Professor Lydiate identifies in the law affecting the rights of visual artists are the same shortcomings, sometimes writ larger, in the law affecting the rights of all workers.

A. Individualism Model

Like other workers governed by the Individualism Model, visual artists are buffeted by the unforgiving winds of the free market. They have little or no control over the "motley crew of influencers" whose subjective opinions establish the value of their work.[9] Unlike banking, fishing, pharmaceuticals,

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[4] ILO Nos. 87 & 98.

[5] ILO Nos. 29 & 105.

[6] ILO Nos. 138 & 182.

[7] ILO Nos. 100 & 111.

[8] *See, e.g.*, WORKERS' RIGHTS AS HUMAN RIGHTS (James A. Gross, ed., 2005); *see also, e.g.*, HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES (James A. Gross & Lance Compa, eds., 2009).

[9] Henry Lydiate, *Visual Artists Brushing with the Law: International Legal Dimensions of Professional Practice,* 30 SW. J. INT'L L. 49, 52 (2024).

shipping, transportation, and so many other international industries, visual art is governed by no particular regulatory framework. Professor Lydiate likens this chaotic situation to that of "the old Wild West."[10]

To ask the Paper's central question, "Why are artists poor?"[11] is to ask why any worker is poor. According to Jesus Christ, "The poor you will always have with you."[12] The data have proved Him to be correct. In 2021, on a list of the 37 industrialized countries having the most poverty,[13] the world's richest country, the United States, ranked No. 10. This was behind No. 1 Costa Rica and No. 2 Bulgaria, but about even with No. 11 Turkey and No. 12 Estonia.[14] With about 15 percent of our population living in poverty, the U.S. compares unfavorably with two countries whose economies are only a fraction the size of America's.

The U.S. is a country in which even people who work full-time are allowed to be poor.[15] The legal reasons for this are not hard to identify. For example, the federal minimum wage for nonexempt employees has stubbornly remained for nearly two decades at just $7.25 per hour.[16] At that rate, someone who works a 40-hour week for 50 weeks per year would earn only $14,500, which is well below the federal poverty line of $25,750 for a family of four. Even in California, where the state's living wage law for nonexempt employees sets a floor of $15.50 per hour,[17] someone who works full-time would earn just $31,000, which is barely above the federal poverty line for a family of four.

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[10] *Id*. at 45.

[11] *Id*. at 44.

[12] *Matthew* 26:11.

[13] Industrialized countries refers to countries affiliated with and/or studied by the Organization for Economic Cooperation and Development ("OECD"), which is referred by some commentators to as a "club of rich countries." *See* What is the OECD?, THE ECONOMIST, Jul. 6, 2017, available at https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd.

[14] Poverty Rates in OECD Countries as of 2021 (downloaded Mar. 8, 2024), available at https://www.statista.com/statistics/233910/poverty-rates-in-oecd-countries/.

[15] *See, e.g.,* ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 2 (2006) ("In the richest country on each, many of us live on the edge, always having to tell the kids there is not enough money, never able to make ends meet, housed in ugly and dangerous buildings and neighborhoods, and with hope for the future beaten out of us.").

[16] *See* U.S. Dep't of Labor, Minimum Wage (downloaded Oct. 15, 2023), available at https://www.dol.gov/general/topic/wages/minimumwage#:~:text=The%20federal%20minimum%20wage%20for,of%20the%20two%20minimum%20wages.

[17] State of Calif. Dep't of Indus. Rel., Minimum Wage (downloaded Oct. 15, 2023), available at https://www.dir.ca.gov/dlse/minimum_wage.htm#:~:text=The%20minimum%20wage%20in%20California,California%20maintained%20by%20UC%20Berkeley.

So, it is no wonder that artists, who have neither minimum nor living wage protection, are poor. According to the Paper, one of the many reasons for this is the lack of a short, written agreement memorializing the terms of a sale. This "reluctance to commit to writing . . . has to some extent enabled the eccentricities of the market to abound."[18]

Of course, the oral contract or handshake deal is part and parcel of the Anglo-American legal system. Most employment contracts of hourly wage workers are not reduced to writing in the U.S. or the U.K. But it is unclear whether switching to a Franco-style, civil law approach requiring such writings would help visual artists. After all, in the U.S., employers commonly write up and unilaterally impose the employee handbook, which is a sort of non-contract that sets forth all the things the employer is ***not*** promising to do, such as granting employee status or just cause protection or even agreeing to litigate employment disputes in the courts (as opposed to arbitration). What would prevent the buyer of an artist's work from doing something similar?

B. Co-Determination Model

In contravention to the aim of the Co-Determination Model, visual artists tend to lack access to the institution of collective bargaining. As the Paper puts it, "[M]ost living artists throughout the world continue to have little or no bargaining power."[19] This makes it all but impossible to exercise the right of freedom of association in dealing with the "gatekeepers," including buyers and exhibitors, who set the price of – and therefore, the compensation for – artwork. The Paper adds:

Visual artists operate today in a global art ecosystem devoid of internationally harmonized art and artist's laws and industry standards regulating artists' interaction with much-needed gatekeepers. Moreover, unlike most authors and performers in leading creative industries (music, sound recording, film, and video) who have customarily formed collective associations to negotiate basic business standards with their collective industry gatekeepers, most visual artists are lone practitioners.[20]

In the eyes of American labor law, most artists would be classified as independent contractors rather than payroll employees.[21] Therefore, in the eyes of American antitrust law, they would be forbidden to form a "collective association" – that is, a labor union – on the ground that to do so

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[18] Lydiate, *supra* note 9, at 54.

[19] *See* Lydiate, *supra* note 9, at 50.

[20] *Id*.

[21] *See, e.g.,* KENNETH G. DAU-SCHMIDT, ROBERTO CORRADA, CHRISTOPHER DAVID RUIZ CAMERON, CÉSAR F. ROSADO MARZÁN, MICHAEL M. OSWALT & RAFAEL GELY, LABOR LAW IN THE CONTEMPORARY WORKPLACE 246-50 (4th ed. 2024).

would constitute an illegal contract, combination, or conspiracy to restrain trade in violation of the Sherman Antitrust Act.[22]

It is unnecessary to use the phony label of "independent contractor" to deny artists access to the institution of collective bargaining. In fact, as I have argued elsewhere, it may violate ILS to do so.[23]

C. Government Regulation Model

In contravention to the aim of the Government Regulation Model, visual artists are sometimes left unprotected by the very legislation – I'm thinking of the copyright laws – that is supposed to ensure their right to control and be compensated for unauthorized use of their work. This state of affairs recalls the many federal and state anti-discrimination statutes that protect the worker's right to be evaluated based on the merits of her performance rather than some harmful stereotype attached to her membership in a protected classification. On paper, these statutes seem to grant workers sweeping protections; in practice, they are denied to workers misclassified as non-employees.

Take the growing use of artificial intelligence ("AI") to generate new artwork from existing artworks. Such use of AI remains largely unregulated, with the notable exception of the copyright laws, including those of the U.S. and the U.K. I do not pretend to be an expert in either. But Professor Lydiate knows something about them. In the Paper, he poses the question whether the U.K.'s special computer-generated copyright provisions "are at odds with copyright law's paramount requirement": that an artistic work be the original expression of a "human mind."[24] (Apparently, copyright laws in the U.S. and most other countries adhere to this "human mind" doctrine.) The answer to the question posed is not necessarily helpful to the artist. In 1988, the U.K.'s Copyright Designs and Patents Act included then-unique provisions dealing with four categories of work: "in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken . . . the work is generated by computer in circumstances such that there is no human author of the work."[25] Accordingly, the author-come-first copyright owner of a computer-

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[22] *See id*. at 1266-68.

[23] *See generally* Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 USF L. REV. 431 (2009).

[24] Lydiate, *supra* note 9, at 81.

[25] *Id*.

generated artistic work under U.K. law is the undertaker of "the arrangements necessary for the creation of the work" – terminology that Professor Lydiate describes as "precisely the same as the Act uses to define a 'producer' in the context of determining an author/copyright owner of a film or sound recording."[26] In other words, the visual artist may be written out of the law and her rights to control and be compensated for her original work vested instead in some non-artist "producer" who has manipulated that work, all thanks to the magic of AI.

If true, this development would recall Kurt Vonnegut's observation, "The paintings by dead men who were poor most of their lives are the most valuable pieces in my collection. And if the artist really wants to jack up the prices of his creations, may I suggest this: suicide."[27] To which I might add: digitize those creations to make sure they're easier for some AI program to digest and recalibrate in some altered state.

D. Alternative or Best Practices Model

Finally, in contravention to the aims of the Alternative or Best Practices Model – or for that matter, any of the other models of workplace governance – visual artists are usually excluded from the conversation about ILS in the workplace.

For example, the nearly 50 million people around the world who suffer from modern forms of slavery, of whom nearly 5 million are women and girls who are trafficked into sex work,[28] are the understandable objects of public hand-wringing by the human rights community. Children and adults who work in the supply chains of industries producing foods such as spices, tea, coffee, cocoa, as well as cotton and tobacco, are at particularly high-risk of forced labor and rightly receive their share of concern.[29]

By contrast, the well-known, almost cliché plight of artists in general and visual artists in particular rarely registers on the public human rights agenda. One of the few exceptions I could find was a report about the exploitation of visual effects artists in Hollywood, 75 percent of whom

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[26] *Id*. at 66.

[27] *Id*. at 45.

[28] *See* International Labour Organization, Forced Labour, Modern Slavery and Human Trafficking (downloaded Mar. 8, 2024), available at https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm.

[29] *See* VinciWorks Group, Which Industries Are Most At Risk of Modern Slavery? (downloaded Mar. 8, 2024), https://vinciworks.com/blog/which-industries-are-most-at-risk-of-modern-slavery/#:~:text=The%20Consumer%20Sector,-The%20consumer%20sector&text=Particularly%20high%20risk%20goods%20include,internationally%20from%20high%20risk%20countries.

reported working uncompensated overtime or meals breaks.[30] Perhaps that is because their exploitation is not as severe as that of modern slaves. But Henry makes the case that it is real nonetheless.

As discussed above, the hallmark of the ILS regime and other regimes that I would associate with the Alternative or Best Practices Model is that certain employment rights are universal but aspirational; they transcend the individual worker's particular situation, including her country, industry, or status as employee versus independent contractor. Compliance with these rights is hard to compel; they are enforced not in the courts of law or by agencies of the administrative state, but in the court of public opinion.

But isn't that the point of Henry's paper – that the working conditions, if not the legacy and reputation, of visual artists are already determined in the court of public opinion? And that public opinion ought to press into service to address their exploitation?

After all, the fortunes of visual artists, like other workers governed mainly by the Individualism Model, are buffeted by the unforgiving winds of the free market. They have little or no control over Henry's "motley crew of influencers" whose subjective opinions establish the value of their work.[31] That is, they are governed by the chaos of what Henry refers to as "the old Wild West."[32]

So, I suggest a modest proposal: to tame at least part of "the old Wild West" by finding ways to apply ILS more generously to everyone. A great place to start would be to address the misclassification of artists, who like many workers are deemed to be independent contractors rather than employees. Because in the U.S., what all four workplace governance models have in common is that the worker must be classified as an "employee" in order to gain any rights.

If an artist is misclassified as an independent contractor, then she doesn't get to play the game. She is stuck in the Individualism Model with its unequal bargaining power favoring the employer. She is forbidden access to either the Co-Determination or Government Regulation models. She is not permitted to form or join a union, sue for employment discrimination, or exercise other rights reserved to "employees."

For good or bad, this is the enduring legacy of the Anglo-American system of jurisprudence as it affects the workplace: in theory, the law of the

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[30] *See* International Alliance of Theatrical and Stage Employees, 2022 VFX Workers Survey: Know Your Worth (downloaded Mar. 7, 2024), https://vfxunion.org/2022-survey-results/#:~:text=On%20average%2C%2070%25%20of%20VFX,and%20rest%20periods%20without%20compensation.

[31] Lydiate, *supra* note 9, at 52.

[32] *Id*. at 53.

workplace is a game awarding the players all manner of rights to fair treatment; in practice, the rules are altered to prevent certain players from even playing the game.

The point I want to make is that it doesn't have to be this way. On the international stage, under the ILS regime, visual artists, like workers generally, are not classified as "employees." In fact, they are not classified at all. They are treated as "workers" or just "persons."

In an article I published some years ago,[33] I explored this idea. I studied eighteen separate international instruments governing the law of the workplace, including:

- Human rights instruments developed by the United Nations and related organizations
- Conventions and other documents elaborated by negotiations among worker, employer, and government representatives at the ILO
- Human rights instruments created by regional government bodies
- Labor rights clauses in international trade agreements
- Certain governing documents of the European Union

The U.S. has accepted obligations under some, but not all, of these instruments. Nonetheless, by virtue of our membership in the ILO, this nation, like the U.K. and other member nations, is bound by the fundamental labor principles codified in the cited ILO instruments, which are similar in spirit if not letter to labor principles codified in the other cited instruments.[34]

What I learned is that the term "employee" is not found in any of the foregoing instruments. Instead, the broader terms "everyone," "[e]very person," or "worker [ ]" are used. Except for one U.N. resolution,[35] the eighteen instruments make no explicit attempt to differentiate between workers based on status as a payroll employee versus independent contractor – or for that matter, as male versus female, transgender versus cis-gendered, documented versus undocumented or regular versus irregular status.

Among other things, this means that the four ILS rights considered to be "core" or fundamental rights are guaranteed to ***everybody***, including visual artists. That is because the rights to freedom of association, to no forced labor, to no child labor, and to non-discrimination and equal pay are recognized and set forth without limitation.

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[33] Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented to Organize Under United States and International Labor Standards*, 44 USF L. REV. 31 (2009).

[34] *See* ILO Declaration of Fundamental Principles and Rights at Work ("DFPRW") (adopted 1998).

[35] *See* Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, U.N. Gen. Assembly Res. No. 40/144 (adopted 1985).

CONCLUSION

In the end, I may not have been worthy to comment on all of Henry Lydiate's insightful Paper. But it has been my privilege to comment on the parts of it addressing the business that we are both in: the study of the law affecting working people, visual artists and non-visual artists alike.

POLITICS OF RECOGNITION AND INDIGENOUS PEOPLES IN BANGLADESH

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ABSTRACT

This paper is an excerpt from one of the chapters of my doctoral dissertation, which inquires about the recognition of Indigenous peoples in Bangladesh. Based on qualitative research, this paper accentuates the current status of Indigenous peoples who claim themselves as Indigenous peoples. In this paper, I analyze how self-identified Indigenous peoples (locally called "Adibasi") articulate and present their claims by raising their voices and other means, but the Government of Bangladesh (GoB) has been rejecting their status as Indigenous peoples. Taking Benedict Kingsbury's 'constructivist approach,' I attempt to define 'Indigenous peoples' which Asian scholars endorse. Kingsbury's constructivist approach means meanings and understandings grow out of social encounters such as interactions, practices, ideas, and beliefs. My interviews with 'Adibasis' give me a solid route to define their status as 'Indigenous peoples,' notwithstanding the state's rejection of recognition as part of the government's politics. The GoB takes only 'historical continuity' to define Indigenous peoples and argues that as 'Bangalees' started living in the land first, they are Indigenous peoples. The insertions of my research participants help me to argue that besides the self-identification of a community, historical continuity, marginalization, recognition by others, distinctive identity, kinship networks, etc. form 'indigeneity.'

INTRODUCTION

The United Nations Economic and Social Council (ESCOR) estimates that there are around 400 million Indigenous peoples situated in 90 countries around the world, (eighty percent of them live in Asia, seven percent in South America, six percent in North America, four percent in Africa, three percent in Australia/Oceania and one-tenth percent in Europe)[1] that makes up five to seven percent of the world population.[2] Roughly, 5,000 Indigenous groups speak over 5,000 languages and are regarded amongst the poorest sections of the world population though they mostly live in rich biodiversity and resource surrounding areas.[3] They maintain their social, cultural, economic, and political aspects themselves, and become distinct from other dominant groups of the societies by practicing their unique traditions. Mostly, Indigenous peoples are considered the descendants of the earliest and original peoples who settled in a country or a geographical region, with new arrivals later becoming dominant through conquest, occupation, oppression, settlement, or other means.[4]

Indigenous peoples are being persecuted systematically around the world by nation-states and multinational and transnational corporations (MNCs and TNCs) in the name of development in their own territories. They are also widely deprived of political and social participation and engagement in various decision-making processes. However, different international legal instruments such as the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169), the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), 2007, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social, and Cultural Rights (ICESCR) have established rights of self-determination so that Indigenous peoples can take a decision over their territories and determine their own identity.[5] Indigenous peoples are defined by the United

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[1] Indigenous People, AMNESTY INT'L https://www.amnesty.org/en/what-we-do/indigenous-peoples/#:~:text=There%20are%20476%20million%20Indigenous%20people%20around%20the,of%20them%20%E2%80%93%2070%25%20%E2%80%93%20live%20in%20Asia.

[2] *Free Prior and Informed Consent An Indigenous Peoples' Right and a Good Practice for Local Communities, Manual for Project Practitioners*, at 4, Food and Agriculture Organization of the U.N. (2015) [hereinafter FAO].

[3] Ulia Popova-Gosart, *Indigenous Peoples: Attempts to Define in* BIOMAPPING INDIGENOUS PEOPLES TOWARDS AN UNDERSTANDING OF THE ISSUES 87, 89 (Gordon Collier & Benedicte Ledent & Geoffrey Davis & Hena Maes-Jelinek eds., 2012).

[4] PAUL CLOSE & DAVID ASKEW, ASIA PACIFIC AND HUMAN RIGHTS: A GLOBAL POLITICAL ECONOMY PERSPECTIVE 167 (Routledge, Ashgate Publishing 2004) (2016).

[5] *See* Intern'l Lab. Org., Convention Concerning Indigenous and Tribal Peoples in Indep. Countries (No. 169), June 27, 1989, 28 I.L.M. 1382 (1989); U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007); Intern'l Covenant on Civil and Pol. Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Intern'l Covenant on Econ., Soc. and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

Nations (UN) as the descendants of the earliest and original peoples who settled in a region and with new arrivals later became dominated and marginalized through conquest, occupation, oppression, settlement, or other means.[6] As a result of 500 years of European imperialism, more than 100 million people, mostly Indigenous peoples, moved away from their homelands and have been increasingly marginalized.[7] Colonizers tried to eradicate the cultural identity of Indigenous peoples through the erasure of their sacred histories, traditional knowledge, customs, and geographies that provide the foundation for Indigenous cultural identities and a sense of self-identification.[8] Despite all these challenges, Indigenous peoples retain social, cultural, economic, and political aspects of governing themselves and have remained distinctive from other dominant groups by practicing their unique traditions, customs, cultures, beliefs, histories, and languages.[9] Before they settled in particular places, they traveled through one hamlet to another hamlet, from one valley to another valley, and encountered the power of assimilationist nation-states, making strong claims for self-determination and legal personality, or for various forms of sovereignty.[10]

One issue that remains a topic of debate when discussing Indigenous peoples is determining the correct terminology in local and national discussions. Bob Joseph, founder of Indigenous Corporate Training Inc., and member of the Gwawaenuk Nation, contends that people should, "[g]o with what [Indigenous peoples] are calling themselves"[11] and as such they can be called different names in their state boundaries according to the group's intentions: for example, Indigenous peoples of Bangladesh and India recognize themselves and are also known as 'Adibasi;' in Canada 'First Nations,' 'Inuit,' and 'Metis;' in the USA 'Native Americans' or 'American Indians;' in Australia 'Aboriginal;' in Latin America 'Indians' and 'Amerindians,' etc. But whenever the communities are discussed in the international forum, they must be called a single term "Indigenous peoples." Thousands of distinct communities have their community names. For example, in Bangladesh, at least forty-five ethnic communities identify themselves as Indigenous peoples or Adibasi.[12] The Indigenous communities

[6] Close & Askew, *supra* note 4, at 167.

[7] BRIAN GOEHRING, INDIGENOUS PEOPLES OF THE WORLD AN INTRODUCTION TO THEIR PART, PRESENT, AND FUTURE 14 (Jane McHughen ed., 1993).

[8] Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resurgences Against Contemporary Colonialism*, 40 GOV'T AND OPPOSITION 597, 598 (2005).

[9] FAO, *supra* note 2, at 4.

[10] James Clifford, *Indigenous Articulations*, 13 CONTEMP. PAC. 468, 469-72 (2001).

[11] Bob Joseph, *Indigenous or Aboriginal: Which is Correct?*, CBC, (Sept. 21, 2016, 5:00 PM) https://www.cbc.ca/news/indigenous/indigenous-aboriginal-which-is-correct-1.3771433.

[12] PHILIP GAIN, SURVIVAL ON THE FRINGE: ADIBASIS OF BANGLADESH, 1 (Phillip Gain ed., 2011).

from Bangladesh's plain lands use the term "Adibasi" and eleven Indigenous communities from the Chittagong Hill Tracts (CHT) use both "Adibasi" and "Jumma," which I found confusing for their proper recognition.[13] These Adibasi groups in Bangladesh have various names such as Santal, Chakma, Marma, Tripura, Khasia, and Garo. They can be called by their community names, as mentioned above, during local and national discussions.

This paper is an excerpt from my doctoral dissertation.[14] I take Adibasi communities or Indigenous peoples of the Phulbari Coal Mine project region, located in northwest Bangladesh, as the "subject" of my research and examine whether they have experienced a lack of recognition, limited or insignificant consultation, and participation in the decision-making process of the project proposal. The study explores and documents how Adibasi communities mobilize arguments based on human rights, compensation, recognition, distributive justice, and procedural justice during their resistance against multinational corporation, GCM Resources Plc (formerly known as Asia Energy). My doctoral research aims to explore the rationale of meaningful integration of the rights of Adibasi communities into development decisions: how affected peoples understand and how they react to a development process conducted by a multinational company. Since Adibasi communities in Bangladesh's mining region are not recognized by the Bangladesh state as "Indigenous peoples," and the government restricts the use of "Indigenous peoples" and "Adibasi" to describe them, national and transnational developmental agencies tend not to include them in their description of activities, as it goes against the government's interest. In this current case, GCM Resources Plc identified only three Adibasi communities as "Indigenous peoples" in their official documents, which they prepared before the government's current recognition politics.[15] However, the corporation disregarded some other communities who claim themselves as Indigenous peoples.

Additionally, this paper evaluates whether Indigenous peoples need to be identified or recognized as "Indigenous peoples" to participate in the decision-making process, and for this, the research examines various approaches developed by scholars to define or identify them. The analysis focuses on some ethnic communities in Bangladesh, who identify

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[13] MESBAH KAMAL, ADIBASI COMMUNITIES, (Mesbah Kamal, et. al. eds., Bangladesh Asiatic Society 2007).

[14] Mohammad Mahmudul Hasan, Mining Conflict, Indigenous Peoples and Environmental Justice: The Case of Phulbari Coal Project in Bangladesh (2020) (Ph.D. Dissertation, Osgoode Hall Law School of York University) (Osgoode Digital Commons), https://digitalcommons.osgoode.yorku.ca/phd/50.

[15] Note: By "recognition politics" I mean to explain how many ethnic communities who identify themselves as Indigenous peoples are denied recognition as such by the Bangladesh Government which instead labels those communities as small ethnic minorities.

themselves as "Adibasi" in the local language and should be identified as Indigenous peoples under international law. Since various ethnic groups around an open-pit mining project area and all through Bangladesh are not perceived as "Adibasi" or "Indigenous peoples" by the government, I observe and report how they frame their issues with a specific end goal to be heard. I examine whether the surrounding ethnic communities could establish their rights and interests according to international legal instruments. Based on my qualitative data, my attempt in this paper is to identify whether Adibasi communities of the open-pit mining region and throughout Bangladesh could establish the definition of Indigenous peoples under international law. As the term "Indigenous peoples" is not constructively used in the local context, throughout the paper I use "Adibasi" to mean Indigenous peoples from a Bangladesh perspective.

I. INDIGENOUS PEOPLES: FROM PAST TO PRESENT

Throughout the process of developing international law, the idea of Indigenous peoples has evolved.[16] Spanish philosopher and theologian, Francisco de Vitoria,[17] stated that nobody could possess the lordship over Indigenous lands even if s/he were an Emperor or Pope because Indigenous peoples own exclusive territorial rights over their lands.[18] Though Vitoria supported the European invaders apprehending Indigenous peoples' lands through his theory of "just war," he suggested that the colonizers should respect certain autonomous powers and land claims of the original inhabitants.[19] The UN agrees that the concept of Indigenous peoples was developed from the colonial experience, in which "original inhabitants" were either deported or marginalized by colonizers through different types of colonialism.[20] The term "colonialism" is broadly used to describe the atrocious experience that Indigenous peoples and original inhabitants faced, but the colonial systems could not fully capture Indigenous peoples' desires, visions, and strategies.[21] Colonizers remap the discursive and physical

[16] *See* Andre Beteille, *The Idea of Indigenous People*, 39 CURRENT ANTHROPOLOGY 187, 188 (1998).

[17] Francisco de Vitoria is considered one of the founding scholars of international law. Charles H. McKenna, *Francisco de Vitoria: Father of International Law*, 21 STUD.: AN IRISH Q. REV. 365, 367 (1932).

[18] *See* J. G. Merrills, *Francisco de Vitoria and the Spanish Conquest of the New World*, 3 IRISH JURIST 187, 191 (1968).

[19] *See id.* at 189-90.

[20] UNDESA, *State of the World's Indigenous Peoples*. Vol. 9, U.N. Secretariat, U.N. Doc. ST/ESA/328, at 6 (2009).

[21] *See* Alfred & Corntassel, *supra* note 8, at 601.

spaces for Indigenous peoples through different policies.[22] Besides, the validity of traditional or customary laws and forms of governance of Indigenous groups were recognized by colonial legacies around the world.[23] For example, in the Bangladesh context, the British colonial system adopted the CHT Regulation of 1900 (Act I 1900) that provides a unique administrative, legal, and judicial system for the CHT that includes Bandarban, Rangamati, and Khagrachhari hill districts.[24] The Regulation associates the functions of traditional chiefs and headmen (head or leader of a tribal village), with executive purposes of state functionaries, based on statutes and local customs, practices, and usages.[25]

Altamirano-Jiménez identifies "settler colonialism" and "extractive colonialism" in her critical contribution to the debate over Indigenous peoples.[26] In settler colonialism, the colonizers evicted Indigenous peoples from their lands and established new settlements for the settlers.[27] Patrick Wolfe termed settler colonialism as "a structure and not an event," based on what he called the "logic of elimination."[28] In most of the British colonies, especially in North America, Indigenous peoples were evicted from their lands for settlement purposes, but "were not killed, driven away, romanticized, assimilated, fenced-in, bred White, and otherwise eliminated as the 'original owners' of the land but as 'Indians.'"[29] Altamirano-Jiménez contrasts this to extractive colonialism that involved practices of reproductive labor, controlling resources, and labor distribution. Spanish colonizers used "extractive colonialism" approaches where they did not expel Indigenous peoples from their land, but instead employed them to reproduce mineral resources for the colonizers' interests.[30] However, these types of colonial experiences are not the same everywhere.

Differences among Indigenous peoples around the world can be observed through their cultures, ethnicities, political-economic situations, and their relationships in some cases with settler societies created by colonizers. Through their long encounter with European settlers and colonizers, Indigenous peoples did not always remain tied to their

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[22] *See* ISABEL ALTAMIRANO-JIMENEZ, INDIGENOUS ENCOUNTERS WITH NEOLIBERALISM PLACE, WOMEN, AND THE ENVIRONMENT IN CANADA AND MEXICO 28 (UBC Press 2013).

[23] Marcus Colchester, *Indigenous Rights and the Collective Conscious*, 18 ANTHROPOLOGY TODAY 1, 2 (2002).

[24] Chittagong Hill Tracts Regul., Act No. I of 1900 (1900) (Bangl.).

[25] Raja Devasish Roy, *The ILO Convention on Indigenous and Tribal Populations, 1957 (No.107) and the Laws of Bangladesh: a Comparative Review*, at 19-20, Int'l Lab. Org. (2009).

[26] Altamirano-Jimenez, *supra* note 22, at 8.

[27] *Id.*

[28] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. OF GENOCIDE RSCH. 387, 388 (2006).

[29] *Id*.

[30] Altamirano-Jiménez, *supra* note 22, at 29-34.

homelands and often had to migrate to different places, holding distinctive languages and cultures.[31] However, Indigenous peoples' struggle to survive as distinct communities is ongoing throughout the world.[32] One reason is the challenge of identifying their status in society. American ethnologists and scholars, Bartholomew Dean and Jerome Levi, investigate the puzzle of why and how the circumstances[33] of Indigenous peoples are improving in some places in the world while their human rights continue to be abused in other places.[34] The authors identify that in postcolonial societies, state actors and their political, intellectual, and development partners marginalized Indigenous peoples for the sake of modernization, development, and economic prosperity within their national territory.[35] Furthermore, contemporary nation-states uphold the colonizers' mandate, not by attempting to uproot the physical presence of Indigenous peoples as "human bodies," but by trying to eradicate their existence as "peoples."[36] Equally, the current state practices corrupt the relationship between Indigenous groups and settlers by the process of assimilation which produces state-sanctioned legal and political definitional approaches to Indigenous identities.[37] Transnational alliances between environmental groups, political parties, human rights organizations, and social movements, as well as Indigenous intellectuals and leaders have used "strategic essentialism"[38] in their efforts to define Indigenous identity, secure the recognition of Indigenous peoples and uphold their distinct cultural traditions.[39]

Again, Indigenous identity should not be exclusively determined according to the history of European colonization.[40] Altamirano-Jimenez's insights on settler colonialism are accurate for the Americas, Russia, the Arctic, and some parts of the Pacific, but are not applicable for all African and Asian countries where European colonizers did not replace whole

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[31] *See id.*

[32] Alfred & Corntassel, *supra* note 8, at 597-98.

[33] Dean and Levi identify the following issues: Indigenous land rights, cultural rights, ownership and exploitation of natural resources, self-determination, environmental degradation and incursion, poverty, health, and discrimination. *See* Bartholomew Dean & Jerome M. Levi, *Introduction* to AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES (Bartholomew Dean & Jerome M. Levi eds., Univ. of Mich. Press, 2003).

[34] *See id.*

[35] *See id.* at 11.

[36] Alfred & Corntassel, *supra* note 8, at 598.

[37] *See id.* at 599.

[38] The presence of essential characteristics distinguishing Indigenous from non-Indigenous identity. See GAYATRI CHAKRAVORTY SPIVAK, THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES AND DIALOGUES (Sarah Harasym ed., Routledge 1990) (showing examples of 'strategic essentialism').

[39] *See* Dean & Levi, *supra* note 33, at 13-14.

[40] UNDESA, *supra* note 20, at 6.

populations with European settlers.[41] As James Clifford argues, Indigenous movements are positioned concerning their experience of dispossession but are not always connected to European or other imperialist influences.[42] The UN recognizes that it was not only European rulers and settlers but also existing dominant groups that marginalized Indigenous peoples and displaced them from their lands.[43] Nevertheless, many Asian state governments, such as India, Bangladesh, China, and Myanmar in the UN system, argue that as there was no large-scale European settler colonialism in many Asian and African countries, "there can be no Indigenous peoples in a given country and, therefore, there can be no distinction between the original inhabitants and newcomers."[44] Scholars in opposition of colonization argue that in the context of European colonization, Africans are Indigenous to Africa, and Asians are Indigenous to Asia.[45] But, some contend that colonial rule had destroyed the earlier territorial boundaries and communal mapping of the region by creating new administrative units, which led to increasing dispossession of marginalized communities.[46]

As part of exercising their rights to self-determination, freedom of expression, and participation in decision-making processes under international law, environmental and climate justice scholars, Robert Bullard and Glen Johnson, argue that Indigenous peoples and grassroots groups necessarily organize themselves, educate themselves, empower themselves, and resist in their communities.[47] These rights necessarily entail the ability of Indigenous peoples to pursue their own initiatives for resource extraction within their territories if they choose. Concerning struggles over the environmental and ecological impacts of mining activities on the lands of Indigenous peoples, Canadian scholars in mining, Arn Keeling and John Sandlos, illustrate that the efforts not only manifest themselves as local conflicts but also as global settings of capital accumulation, profit maximization, and neo-colonialism.[48] Indigenous communities and their leaders observe that the operation on their lands is a direct assault against

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[41] *Id.*

[42] Clifford, *supra* note 11, at 472.

[43] UNDESA, *supra* note 20, at 6.

[44] *Id.*

[45] *See id.*

[46] Kawser Ahmed, *Defining 'Indigenous' in Bangladesh: International Law in Domestic Context*, 17 INT'L J. ON MINORITY AND GRP. RTS. 47, 71 (2010).

[47] *See* Robert D. Bullard & Glenn S. Johnson*, Environmentalism and public policy: Environmental justice: Grassroots activism and its impact on public policy decision making*, 56 J. OF SOC. ISSUES 555 (2000); *see also* James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMPAR. L. 7 (2005).

[48] Arn Keeling & John Sandlos, *Environmental Justice Goes Underground? Historical Notes from Canada's Northern Mining Frontier*, ENV'T JUST., Sept. 2009, at 117, 122.

their people as well as their cultural practices and beliefs.[49] Brosius argues that Indigenous campaigners have frequently found support outside national borders, as the rights of Indigenous peoples have become a global concern. Such groups, legitimately concerned about local issues, refer to global discourses and are increasingly brought into transnational advocacy networks.[50] Moreover, the solidarity sectors of the global North support the self-development of Indigenous peoples to gain a degree of self-determination to control their lands and economic conditions.[51]

Indigenous identity adheres to the groups, whose identity as distinct peoples necessitates a certain lifestyle, threatened by nation-states or by corporations to Indigenous political and economic structures[52] where each person conforms to collectivity as a member of people, community, ethnicity, tribe, or nation.[53] The evolution of using the term "Indigenous peoples" has a long history in Europe and became popular during the process of decolonization.[54] Groups who are struggling for their identity as Indigenous peoples find that any recognition of their rights by a state will not be achieved easily.[55] Through their continuous struggle, Indigenous peoples are now realizing that they have the power to establish their identity and rights in society.[56] In this way, the identities of Indigenous peoples are often delimited within the dominating systems of their states, although sometimes they constitute a majority of the population.[57]

According to Altamirano-Jimenez, "the concept of articulation is useful in characterizing the diversity of peoples making Indigeneity claims and multi-scalar production of Indigeneity politics."[58] One of the most important issues in the "articulation of Indigeneity" is the question of "who is included and who is excluded." This process of inclusion and exclusion of Indigenous identity has been shaped through colonial and post-colonial encounters with Indigenous peoples.[59] Altamirano-Jiménez shows how colonial powers,

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[49] David Schlosberg & David Carruthers, *Indigenous Struggles, Environmental Justice, and Community Capabilities*, GLOB. ENV'T POL., Nov. 2010, at 12, 18.

[50] J. Peter Brosius, Univ. Ga., Address to Plenary Session on "Integrating Local and Indigenous Perspectives into Assessments and Conventions," at conference *Bridging Scales and Knowledge Systems: Concepts and Applications in Ecosystem Assessment*, (March 17-20, 2004).

[51] Pedro Garcia Hierro, *Reflections on Indigenous Self-Development*, *in* INDIGENOUS PEOPLES, ENV'T & DEV. 269, 284 (Silvia Büchi et. al. eds., 1997).

[52] Popova-Gosart, *supra* note 3, at 87.

[53] Andrew Gray, *Who Are Indigenous Peoples?, in* INDIGENOUS PEOPLES, ENVIRONMENT AND DEVELOPMENT 15, 16 (Silvia Büchi et. al. eds., 1997).

[54] Dean & Levi, *supra* note 33, at 5.

[55] Gray *supra* note 53, at 18.

[56] Goehring, *supra* note 7, at 51.

[57] Popova-Gosart, *supra* note 3, at 87.

[58] Altamirano-Jimenez, *supra* note 22, at 4.

[59] *Id.* at 20.

networks, host-states, and international agencies have developed and imposed their narrow and exclusionary definitions of Indigenous peoples. Contemporary nation-states use this strategy of forming exclusionary definitions to deny the existence of Indigenous peoples in their territory.[60]

One example of such exclusionary definition of Indigenous peoples is Professor Daes' definition which declares Indigenous peoples as being the descendants of the original inhabitants of conquered territories possessing a minority culture and recognizing themselves as such.[61] Considering the international context, James Anaya more narrowly identifies and defines Indigenous peoples as distinct communities with extensive kinship networks that clearly distinguish them from minority groups by highlighting the continued colonial domination of homelands as well as the ancestral roots of the "pre-invasion inhabitants."[62] Wiessner contemplates Daes's suggested factors of Indigenous peoples' voluntary distinctiveness, self-identification, and recognition, as well as their experience of oppression, as the "narrowly empirical" definition.[63] Moreover, he suggests adding Indigenous peoples' "strong ties" to their ancestral lands, whether they can reside on these territories or not, as an additional factor to the definition.[64] Therefore, Indigeneity is reconstructed and reshaped through every process of colonial arrangement and actively enacted by Indigenous peoples when they fight against state oppression and external interference.[65]

In my research, I adopt Benedict Kingsbury's constructivist approach by engaging empirically with community members to determine how they identify themselves in society and what they think about the government's non-recognition policy. Kingsbury, in his article "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy," describes the current patterns in Asia as attempts to define Indigenous peoples.[66] Kingsbury rejects the "strict" historical test, which he terms a "positivist approach" often taken by Western scholars, NGOs, and intergovernmental organizations.[67] Hence, to avoid excluding peoples in Asia and other regions from claiming Indigenous status, Kingsbury suggests

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[60] *Id.* at 21.

[61] Erica-Irene A. Daes (Chairperson-Rapporteur of UN Working Group on Indigenous Populations), *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: The Concept of 'Indigenous Peoples'*, UN Doc E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996).

[62] *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3-5 (2d ed. 2004).

[63] Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, (1999) 12 HARV. HUM. RTS. J., at 115.

[64] *Id.*

[65] Alfred & Corntassel, *supra* note 8, at 612.

[66] *See* Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 419-20 (1998).

[67] *See id.* at 420.

a flexible "constructive approach" with four essential elements: a) self-identification as a distinct ethnic group; b) historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; c) long connection with the region; and d) the wish to retain a distinct identity.[68] Jeff Corntassel supports each of Kingsbury's four essential indicators as being a reasonable basis for inclusion because Indigenous representatives stressed all four indicators as aspects of their distinct identity.[69] Kingsbury argues that a constructivist approach makes a global concept of "Indigenous peoples" possible while allowing functional specificity to meet diverse social circumstances and institutional requirements.[70] However, Kingsbury's constructivist approach means that understandings grow out of social encounters such as interactions, practices, ideas, and beliefs. As part of the approach, Kingsbury includes close natural affinity, "'non-dominance,' 'historical continuity,' 'socio-economic and socio-cultural differences,' [distinct] characteristics such as language, race,'" etc., and being "regarded as Indigenous by others" as strong additional indicators in his definition.[71] I apply these essential characteristics for the construction of being "Indigenous" in the following sub-sections. My argument is that if any community is regarded as an Indigenous people, they need to fulfill the elements Kingsbury posed in his approach which is much more flexible than a strict definitional approach.

II. METHODOLOGY

As mentioned above, this research is an excerpt from my doctoral research conducted in April 2015, hence, it involves human participants and maintains the ethical standards of conduct required by the Research Ethics Review Board of York University. Before going to Bangladesh in December 2015, I finalized my interview questionnaires and the scope of interviews with the consultation of my doctoral supervisor. This research primarily utilizes a case study approach to facilitate an advanced understanding of the characteristics or features of being Indigenous.

I use both primary and secondary sources in developing the case study. I focused my fieldwork primarily on key informant interviews with Adibasi communities and some Bangalees of the study area in Bangladesh (a mining development area). Interviews with Adibasi members gave me a basic idea about whether they have or seek recognition as Indigenous peoples and

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[68] *See id.* at 453-55.

[69] Jeff Corntassel, *Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity*, 9 NATIONALISM ETHNIC POL. 75, 81 (2003).

[70] Kingsbury, *supra* note 66, at 420-21.

[71] Corntassel, *supra* note 69, at 81.

whether their voices are heard. I also completed a document review, including the analysis of reports and policy documents.

For my doctoral research, I conducted forty-two semi-structured and open-ended interviews during my field activities in the Phulbari mining area and Dhaka, Bangladesh. I interviewed Adibasi elders (mostly from the Santal community, as they are the majority among Adibasis in that region including Adibasi people from the Munda, Karmakar, and Robidas), farmers, and teachers; Adibasi leaders and activists; local government representatives; local Bangalee people; local and national activists, civil society members; experts, and NGO spokespersons. Out of forty-two interviews, twenty interviews were conducted in ten Adibasi hamlets of Khanpur Union of Dinajpur Districts which I am using for this research. Out of twenty Adibasi interviewees, fourteen are from the Santal community, six from the Munda community, one from the Karmakar community, and one from the Robidas community. Interviewees included eight farmers and four women (one interviewee was elderly, one was a local government representative, and two of them were farmers), two schoolteachers, four *Mandal*[72] of *Manjhi Parishad*[73] from four hamlets, one Adibasi representative in a government institute, one college student, and one national leader. I also interviewed two representatives from Adibasi NGOs. I interviewed two local government heads—the Chairman of Khanpur Union Council of Birampur Sub-District and the Chairman of Phulbari Sub-district Council. Both of them are Bangalees. I interviewed five Bangalee farmers, including a woman in the Phulbari mining region.

Most of the Adibasi interviewees gave interviews in the Bangla language. In many instances, I could understand their Santal and Bangla mixed dialects, but my research assistant helped me to understand the meanings. Most of the interviews were transcribed. All participants in my research were informed in plain language about the nature of the project, condition, duration, topic of conversations, foreseeable risk, the

[72] The heads of the traditional institution of the Santal and Munda are called "Mandal."

[73] Santals have Pargana Parishads (Circle councils). It is called Manjhi Parishad. Manjhi Parishad is the traditional governance institution of Santal people of Bangladesh and India. Through this institution, Santals practice their customary laws to govern the people in a hamlet. It has twelve members including a woman. Santals are known as Manjhi as well. There are four stages such as hamlet pargana hamlet circle), Union pargana (union circle), Upazilla Pargana (sub-district circle) and Zilla Pargana (district circle). In hamlets, the committee consists of 12 people under the leadership of a Mandal (chief). Mandal is responsible for all matters (land conflict, family matters, and other societal issues, small criminal matters) to resolve by discussing with other members. Santals governance system introduced to include women members in pargana system. According to their new rule, a woman can be a Mandal too. If the hamlet pargana is unable to resolve the issue, Union pargana, that also consists of 12 members under a Mandal. The issue would pass to sub-district level and then district level.

methodology to be used, and potential benefits that may arise from research participation. I recorded most of the interviews by simple notetaking and an audio tape recorder (subject to the consent of each participant). They were allowed to ask questions before and after each interview. Each interview ranged in length from forty-five minutes to three hours depending on the situation. I selected a key informant first who had extensive knowledge about the Adibasi lifestyle. He helped me to identify the key people to be interviewed. But I also identified many interviewees during interview procedures.

I collected writings, data information, and other related documents on Indigenous peoples from a Bangladesh perspective to supplement my own empirical data in my research. The materials include government policy directives, national legislation, reports, environmental impact studies, press releases, company reports, leaflets, newspaper articles, television reports, NGO reports, and academic publications. To support the understanding of the rights of Indigenous peoples, I examined some international instruments. I examined domestic and international legal and policy instruments concerning Indigenous peoples.

III. WHO ARE INDIGENOUS PEOPLES

A. Debates over Identifying and Defining Indigenous Peoples

The debates over defining and identifying Indigenous peoples have gained enormous concern in the international legal arena. As a result, various non-governmental and inter-governmental organizations[74] have attempted to institutionalize their own definitions of Indigenous peoples, bringing the category within contemporary international human rights discourse and practices.[75] However, little progress has been made and nation-states and Indigenous communities are still unclear on how to identify Indigenousness. To further complicate this picture, scholars and policymakers sometimes find themselves struggling to identify who ought to have the authority to define "Indigenous peoples." Definitions by scholars, policymakers, and legal instruments have considered the circumstances, geographies,

[74] *See, e.g.*, International Labour Organization (ILO) in the Indigenous and Tribal Peoples Convention No. 169 (ILO Convention 169); the World Council for Indigenous Peoples (WCIP); United Nations Permanent Forum on Indigenous Issues (PFII); Working Groups on Indigenous Peoples (WGIP); the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP).

[75] Douglas E. Sanders, *Indigenous Peoples: Issues of Definition*, 8 INT'L J. CULTURAL PROP. 4, 11 (1999).

distinctiveness, and diversity of peoples or communities or groups to identify them as Indigenous peoples.[76]

The continuing colonial process pulls Indigenous peoples away from their self-constructed identity towards 'Aboriginal,' 'Indian,' 'Scheduled Tribe,' 'Scheduled Caste,' 'Tribal,' 'Native American,' or 'Ethnic Minority,' which is an authoritative assault on Indigenous identity.[77] Bob Joseph, the founder of Indigenous Corporate Training Inc., and a member of the Gwawaenuk Nation states that the term 'Native' is considered to be uncivil and rarely used in respectful conversations. He added, "[u]sage of the word 'Indian' in Canada is decreasing due to its incorrect origin and connections to colonizer policies and departments such as the Indian Act, the Indian Department (precursor to Indigenous and Northern Affairs Canada), Indian Agent, Indian residential schools, etc."[78] Although the term Aboriginal peoples was a new step, there has been resistance from many groups as they argue that the root meaning of the word 'ab' is a Latin prefix that means 'away from' or 'not.' And so Aboriginal can mean 'not original.'[79]

There are places where various terms such as 'Native Americans' (the USA), 'Aboriginal peoples' (Australia), Maori (New Zealand), Scheduled tribes (India), and Tribal peoples (Bangladesh) are used officially at the country level. However, countries who accepted the UNDRIP started using the term 'Indigenous peoples.' For example, the Canadian government started using the 'Indigenous peoples' term officially in 2018 instead of 'Aboriginal peoples' as part of their commitment towards implementing UNDRIP nationally.[80] The United Nations Permanent Forum on Indigenous Issues (UNPFII) states that the term 'Indigenous' has prevailed as a generic term for many years.[81] In some countries, there may be a preference for other

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[76] *See generally id.*

[77] Alfred & Corntassel, *supra* note 8, at 599.

[78] Joseph, *supra* note 11.

[79] Don Marks, *What's in a name: Indian, Native, Aboriginal or Indigenous?* YAHOO NEWS (Oct. 2, 2014), https://ca.news.yahoo.com/whats-name-indian-native-aboriginal-101500776.html.

[80] Although Canada marks the 22nd National Indigenous Peoples Day, 21st June of 2018 is the first instance the day is officially called and celebrated as 'National Indigenous Peoples Day' as part of the commitment made in international forum to implement UNDRIP. Starting in 1996, it was originally called 'National Aboriginal Day'. Moreover, while celebrating the 'National Aboriginal Day' on 21st June 2017, Prime Minister has pledged to rename to 'National Indigenous Peoples Day' starting from 2018 to be consistent with the terminology used by the UNDRIP. Moreover, part of NDP's mandate to make National Indigenous Peoples Day as a statutory holiday, one of the party's MPs Georgina Jolibois tabled a bill in the parliament, which was endorsed by the Ontario Public Service Employees Union (OPSEU). Julie Payette, *Proclamation renaming "National Aboriginal Day" held on June 21 of each year as "National Indigenous Peoples Day*," 152 CANADA GAZETTE (July 25, 2018), https://gazette.gc.ca/rp-pr/p2/2018/2018-07-25/html/si-tr55-eng.html.

[81] U.N. ESCOR, Rep. on Permanent Forum on Indigenous Issues, 5th Sess., U.N. Doc. E/C.19/2006/11 (May 15-26, 2006).

terms, including Tribes, First peoples/nations, Aboriginals, Ethnic groups, Adibasi/Adivasi, and Janajati, but they should be treated equally in international and national law.[82] Occupational and geographical terms like hunter-gatherers, nomads, peasants, hill people, etc., also exist and for all practical purposes, can be used interchangeably with 'Indigenous peoples.'[83]

Furthermore, Indigenous peoples want to be recognized as 'peoples' not 'people.' They find the 's' distinction is crucial, which symbolizes the basic human rights as well as land, territorial, and collective rights.[84] Whenever we mean an Indigenous group, nation, or community, we would use 'people,' e.g., Chakma people, Santal people, Inuit people, etc. However, the whole Indigenous community in a country should be called the 'Indigenous peoples' of the country. Again, there should only be one name or term by which the world population can easily identify the community groups collectively. For example, the term 'Indigenous peoples' is used and accepted in international law to understand those community groups. There should not be any debate about the universally accepted term. The debate between 'Tribal' and 'Indigenous peoples' terms should be stopped, as it creates confusion when recognizing and identifying a marginalized group of people as a distinct group. As international law (both hard law and soft law) has provided certain rights and opportunities for fighting their vulnerabilities, they may get access to those rights and benefits by asserting their Indigenous identity.

The UN has continued to use 'Indigenous' alone, although ILO has regularly suggested to the UN that it refers to both Indigenous and tribal peoples in its work, following the usage of ILO.[85] The ILO Convention No. 169 is treated as a central feature of international law's contemporary treatment of Indigenous peoples' demands[86] that include an additional criterion of 'tribal peoples' along with an emphasis on 'historical continuity' in its legal definition of 'Indigenous peoples,' which will be applicable in all member states.[87] The ILO Convention No. 169 refers to 'peoples' and not to 'populations.' It refers to 'tribal peoples' but not to 'semi-tribal' peoples.

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[82] *Id.*

[83] *Id.*

[84] IUCN INTER-COMM'N TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY: CASES AND ACTIONS 28-9 (Ultrecht, Int'l Books ed., 1997).

[85] The ILO shows the reason of using both tribal peoples and Indigenous peoples as: The two terms 'Indigenous peoples' and 'tribal peoples' are used by the ILO because there are tribal peoples who are not 'indigenous' in the literal sense in the countries in which they live, but who nevertheless live in a similar situation – an example would be Afro-descended tribal peoples in Central America; or tribal peoples in Africa such as the San or Maasai who may not have lived in the region they inhabit longer than other population groups. *See also* U.N. ESCOR, *supra* note 81.

[86] Anaya, *supra* note 62, at 58.

[87] Kingsbury, *supra* note 66, at 420.

However, there are regions of the globe where the tribal population is the Indigenous population, and this can be established by historical evidence.[88]

The World Bank Operational Directive 4.20 definition used broader criteria to identify Indigenous peoples where both the much-debated terms 'Tribal' and 'Indigenous peoples' were used expressly to mean certain distinct groups.[89] However, the directive preferred to use 'Indigenous peoples' to understand all groups. Paragraph 3 of a new Operational Policy 4.10 of the World Bank provides the identification of Indigenous peoples which states:

> Because of the varied and changing contexts in which Indigenous peoples live and because there is no universally accepted definition of 'Indigenous peoples,' this policy does not define the term. Indigenous peoples may be referred to in different countries by such terms as "indigenous ethnic minorities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," or "tribal groups."

Therefore, OP 4.10 does not differentiate among 'Indigenous peoples,' 'tribal population,' and other terms used by states to mean distinct ethnic communities or tribal populations in various countries. In this regard, most of the ethnic groups who are claiming themselves as 'Indigenous peoples' but recognized by their governments as different names, can be identified as Indigenous peoples if we follow the World Bank's directives and policies.

Observers from various Indigenous organizations at the Working Group of the Commission on Human Rights[90] (hereinafter the Working Group) in 1996 took a common position and rejected the idea of a 'formal' definition of Indigenous peoples adopted by the state agencies.[91] Governmental delegations from different countries expressed the view that it was neither desirable nor necessary to elaborate a universal definition of Indigenous peoples.[92] Finally, the Working Group, at its fifteenth session in 1997, concluded that "a definition of 'Indigenous peoples' at the global level was not possible at that time, and indeed not necessary for the adoption of the United Nations Draft Declaration on the Rights of Indigenous Peoples."[93] Neizen argues that a "rigorous definition of Indigenous peoples would be premature and ultimately futile. Debates over the problem of definition are more interesting than any definition in and of itself,"[94] which I believe is

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[88] Beteille, *supra* note 16, at 188.

[89] Sia Spiliopoulou Akarmark, *The Word Bank and Indigenous Peoples, in* MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 93, 100 (2005).

[90] U.N. ESCOR, 48th Sess., 14th plen. mtg. at 5, U.N. Doc. E/CN.4/Sub.2 (Aug. 16, 1996).

[91] Wiessner *supra* note 63, at 112-13.

[92] ESCOR, *supra* note 90, para. 153.

[93] *Id*. paras. 33, 45.

[94] RONALD NIEZEN, THE ORIGIN OF INDIGENISM: HUMAN RIGHTS AND POLITICS OF IDENTITY 19 (Univ. of Cal. Press eds., 2003).

justifiable because the debates about setting a standard and universally accepted definition of Indigenous peoples have arisen both by Indigenous groups/nations and state authorities. Therefore, the definition or identification of Indigenous peoples and other minority groups is contested, inadequate, and incomplete.

Altamirano-Jiménez observes that the formation of strict definitional standards in international and national laws excludes some Indigenous groups who need protection.[95] Taking into consideration the set of rights vested in the communities, they can benefit from adopting Indigenous political identities.[96] It is also observed that an inadequate universal definition of 'Indigenous peoples' gives many state governments a chance to repudiate the existence of Indigenous peoples within their national borders.[97] The pressure continued from some states such as Bangladesh, India, and Nigeria for a universal definition.[98] The Bangladeshi observer in the Working Group stated that a definition could be an essential step for safeguarding the rights of Indigenous peoples.[99] He said, "ambiguity or absence of criteria could be a convenient cover for states to deny or grant recognition of Indigenous status since there would be no international standard to go by."[100] Both India and Bangladesh took the chance of the non-existence of any formal definition of Indigenous peoples.

Since the Indian government classified 'all ethnic communities into 'scheduled tribes,' 'scheduled castes or forward castes,' and 'other backward classes' in the Constitution, India is motivated to gain support for its position that 'no category of people in India can be singled out as 'Indigenous peoples.'[101] Indian Courts on different occasions use both 'Scheduled Tribes' and 'Adibasi' terms interchangeably to mean Indigenous peoples, however, the communities are not recognized by the Indian government as Indigenous peoples or Adibasis.[102] According to Pooja Parmar, "though Adibasis could certainly be protected by the constitutional recognition of their status as 'backward section of peoples,' that recognition would not include a fundamental right not to be alienated from the lands they lived on."[103] Following the Indian government's position of recognizing Indigenous peoples, the Bangladesh government outright rejects the

[95] Altamirano-Jiménez, *supra* note 22, at 20.
[96] *Id.* at 35-37.
[97] Colchester, *supra* note 23, at 2.
[98] ESCOR, *supra* note 90, para. 34.
[99] *Id.*
[100] *Id.*
[101] Pooja Parmar, *Undoing Historical Wrongs: Law and Indigeneity in India*, 49 OSGOODE HALL LAW J. 491, 496-97 (2011).
[102] *Id.* at 496-98.
[103] *Id.* at 512.

existence of Indigenous peoples or Adibasi in Bangladesh; instead, the government in 2011, through the 15th Amendment of the constitution, identified them as 'the tribes, minor races, ethnic sects and communities'[104] and 'small ethnic minority.'[105]

Given the circumstances, Indigenous leaders and organizations often advocate for the direct endorsement of the accepted international definition of Indigenous peoples and reject any reference to national laws in identifying Indigenous peoples.[106] As Indigenous leaders in the fourteenth session of the Working Group announced in 1996, "We categorically reject any attempts that governments or states define Indigenous peoples."[107] They argue that states should comply with international legal instruments in this regard and implement them in national legislation.[108] Their apprehension is that national laws may exclude some population groups (who are Indigenous peoples) from the definition of Indigenous peoples, which would adversely affect their rights.[109] They demand only Indigenous peoples can define 'Indigenous peoples.'[110]

The Food and Agriculture Organization (FAO) claims, "The recognition or identification of certain collectivities as 'Indigenous Peoples' shall not be dependent on whether a national government has recognized them as such."[111] Indigenous grassroots groups demand that only Indigenous peoples can define 'Indigenous peoples,' and believe that this right of 'self-definition' derives from international human rights instruments such as ICESCR and ICCPR. Article 1 of both instruments reveal, "All peoples have the right of self-determination. By that right, they freely determine their political status and freely pursue their economic, social, and cultural development." Thus, while Wiessner argues that the search for the definition becomes tainted if interpretations are sought to exclude specific communities from the application of international instruments,[112] others argue that formal definitions might help to protect Indigenous peoples against governments' positions of denial.[113] The UN has acknowledged that

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[104] The Constitution of the People's Republic of Bangladesh Nov. 4, 1972, art 23A. ("The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects, and communities").

[105] The Small Ethnic Groups Cultural Institution Act 2010, (Bangladesh).

[106] Corntassel, *supra* note 69, at 75-76.

[107] ESCOR, *supra* note 90, para. 31.

[108] Indira Simbolon, *Law Reform and Recognition of Indigenous Peoples' Communal Rights in Cambodia*, *in* LAND AND CULTURAL SURVIVAL: THE COMMUNAL LAND RIGHTS OF INDIGENOUS PEOPLES IN ASIA 63, 65 (Jayantha Perera ed., Asian Development Bank 2009).

[109] *Id.* at 65-66.

[110] *Id.* at 65.

[111] FAO, *supra* note 2, at 12.

[112] Wiessner, *supra* note 63, at 113.

[113] *Id.*

"no formal universal definition of the term is necessary, given that a single definition will inevitably be either over or under-inclusive, making sense in some societies but not in others."[114] In my analysis throughout this paper, I attempt to identify the status/recognition of Indigenous peoples in Bangladesh by analyzing various international instruments and scholarships.

B. Defining Indigenous Peoples under International Law

Though there are various contentions of identification or definition of Indigenous peoples, international legal instruments provide guidance on what criteria constitute Indigenous peoples globally.[115] However, its global legal status remains unambiguous. The following part of the paper examines some features of 'becoming Indigenous'[116] by analyzing various working definitions and approaches to identify Indigenous peoples provided by international instruments and scholars.

One of the most cited working definitions of Indigenous 'communities,' 'peoples,' and 'nations' was given by José R. Martínez Cobo[117] in 1982, which was endorsed by Indigenous representatives in the 1996 Working Group report. The working definition reads as follows:

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the presence of one or more of the following factors:
>
> a. Occupation of ancestral lands, or at least of part of them
> b. Common ancestry with the original occupants of these lands
> c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)

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[114] UNDESA, *supra* note 20, at 6-7.

[115] Patrick Macklem, *Indigenous Recognition In International Law: Theoretical Observations*, 30 MICH J. OF INT'L L. 177, 178 (2008).

[116] Corntassel, *supra* note 69.

[117] U.N. ESCOR, 35th Sess., at 1, PFII/2004'WS/1/3 (June. 20, 1982).

> d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family or as the main, preferred habitual, general, or normal language)
> e. Residence in certain parts of the country, or in certain regions of the world
> f. Other relevant factors.
>
> On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).
>
> This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.]118

Indigenous peoples' representatives have advocated the significance of Martínez Cobo's 'self-identification,' as the essential element for identifying Indigenous peoples.[119] Taking Cobo's definition into consideration, Wiessner categorizes Indigenous peoples as: "peoples with historical continuity suffering from invasion or colonization; self-identification as distinct from other groups of the society; a present non-dominant status; and the determination to preserve the groups' ancestral land."[120] However, Kingsbury takes a different position regarding the working definition of Martinez Cobo. According to him, "this definition takes potentially a limited and controversial view of Indigenous peoples by requiring 'historical continuity' with pre-invasion and pre-colonial societies that developed on their territories."[121]

The ILO was the first international agency that addressed Indigenous issues. ILO has been working to protect Indigenous and tribal peoples' rights since the 1920s. The Indigenous and Tribal Populations Convention of 1957 (ILO Convention No. 107) defines both the 'Indigenous population' and 'tribal population' as populations that has experienced conquest or colonization in the past.[122] It also explains the term 'semi-tribal' as "groups

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[118] U.N. Prevention of Discrimination and Prot. of Minorities, Study of the Problem of Discrimination Against Indigenous Populations 29, E/CN.4/Sub.2/1986/7/Add.4 (1987) (e.g., Jose R. Martinez Cobo (Special Rapporteur)).

[119] ESCOR, *supra* Note 90, para. 31.

[120] Wiessner, *supra* note 63, at 111.

[121] Kingsbury, *supra* note 66, at 420.

[122] Article 1(1) of the Convention states: (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong. *See* Roy, *supra* note 25, at 3.

and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.'"[123] However, the difference between 'Indigenous' and 'Tribal' communities, according to the definition of the ILO Convention No. 107, is minimal since Indigenous peoples are defined as "not only encompassing descendants of the inhabitants of the territory 'at the time of conquest or colonization,' but also descendants of people residing there at the time of 'establishment of present state boundaries.'"[124]

The ILO Convention No. 169 definition ascertains the principle of 'self-identification' to be recognized as 'Indigenous peoples.'[125] The Convention introduces the concept of 'self-recognition' for protecting Indigenous peoples[126] and provides self-identification as a 'fundamental criterion' for determining the groups to whom the Convention applies.[127] The following definition proposed by the Convention is recognized all over the world. Article 1 of the Convention defines Indigenous and tribal peoples as:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The World Council of Indigenous Peoples (WCIP) has initiated the following definition of 'Indigenous peoples':

> "Population groups who from ancient times have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others."[128]

According to the ILO Convention No. 169 definition, disruptions caused by colonization or by present government actions as a form of imperialism if they continue to struggle, are regarded as elements of a

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[123] *Id.*
[124] Wiessner, *supra* note 63, at 112.
[125] Macklem, *supra* note 115, at 196.
[126] *Id.*
[127] Kingsbury, *supra* note 66, at 440.
[128] IUCN, *supra* note 84; *see also* ESCOR, *supra* note 90, para. 11.

group's identity as 'Indigenous peoples.'[129] Corntassel argues that the definition of the Convention emphasizes the notion of social and cultural distinctiveness based on tradition.[130] It is acknowledged that both the ILO Convention No. 169 and the WCIP definitions ascertain the principle of 'self-identification' to be recognized as Indigenous peoples. UNDRIP did not provide any explicit definition of Indigenous peoples, fearing that a definition would result in harming the actual beneficiaries of the rights of the Declaration. Although the Declaration has no solid definition of Indigenous peoples, there are some defining components there. Paragraph 2 of the Annex of the UNDRIP states: "The General Assembly is affirming that indigenous peoples are equal to all other peoples while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such."[131]

Paragraphs 18 and 19 say:

> The General Assembly is convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.
>
> Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular, those related to human rights, in consultation and cooperation with the peoples concerned.[132]

From the above definitions of Indigenous peoples under international law, I have identified the following common characteristics for 'being Indigenous': self-identification as Indigenous; historical continuity with pre-colonial and/or pre-settler societies; a shared experience of colonialism and oppression; vulnerability in current society; occupation of or a strong link to specific territories; distinct social, economic and political systems; distinct language, culture and beliefs; belonging to non-dominant sectors of society; recognized by others; and resolved to maintain and reproduce their ancestral environments and distinctive identities. Kingsbury's four essential criteria (discussed in the conceptual framework section) are included in this list. In the following section, I examine if Adibasi communities in Bangladesh qualify as Indigenous peoples under international law by relying on these features for testing their identity.

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[129] Corntassel, *supra* note 69, at 86.
[130] *Id.*
[131] G.A Res. 61/295, at 2 (Sep. 13, 2007).
[132] *Id.* at 6.

IV. TEST OF INDIGENEITY IN BANGLADESH

In the previous section, I analyzed various definitions accepted in international law, but there are many countries, including Bangladesh, that are inclined to disregard those definitions; instead, they try to assimilate the communities into dominant groups and their cultures. However, advocates argue that the state-enforced assimilation process ultimately leads to the non-recognition of Indigenous identity.[133] According to the UN, Indigeneity does not depend on government recognition.[134] I have taken Adibasi communities around a mining area as the subject of my research, and as such, my analysis of the debate over the recognition of Adibasis or Indigenous peoples is limited to that specific area, not the whole of Bangladesh. Though the study is limited to one location, there is a discussion of the recognition politics of Adibasis in Bangladesh.

A. Self-Identification and Self-Definition

Most of the definitions put forward by international organizations and prominent scholars highlight the self-identification approach. The significance of Martínez Cobo's 'self-identification,' "as the most crucial component for identifying Indigenous peoples," was advocated by many UN member observers who attended the Working Group in 1996.[135] Furthermore, the definition of the ILO Convention No. 169 ascertains the principle of 'self-identification' to be recognized as Indigenous peoples. Self-identification or self-recognition is a criterion for being Indigenous that prevents states from putting forward a claim of not having Indigenous peoples in a territory by enacting law or policy.[136] Therefore, people who consider themselves as 'Indigenous peoples' must be a self-defined class of people since international law already recognizes this principle of self-identification as one of the essential characteristics of being 'Indigenous.'

Members of the Adibasi communities of my research area in Bangladesh identify themselves as Adibasi. While I was interviewing a Santal farmer, I observed a resilient attitude toward the debate about identifying his community. He said, "I identify myself as an Adibasi from a Santal community. I find no distinction between Santals and Adibasis. If you call me or identify me as a Santal, you have to recognize me as an Adibasi as well."[137] Ram Soren is an Adibasi leader from the Santal community who

[133] Corntassel, *supra* note 69, at 86.
[134] FAO, *supra* note 2.
[135] ESCOR, *supra* Note 90.
[136] Macklem, *supra* note 115, at 196.
[137] Interview with D. Hansda, Lakshipur, Phulbari (March 07, 2016).

was also actively involved in a local resistance movement. He told me that it does not matter to Adibasis whether the government recognizes them as Adibasi or not because the government has no authority to define or identify them. He contended that it is enough if someone regards himself as an Adibasi. He questioned: "Why should the government identify whether any community or group is Indigenous or Adibasi or Bangalee?"[138]

Rob Soren, the president of a national Adibasi NGO and a key activist of the Phulbari movement, claimed during the interview that ethnic groups in the northwest of Bangladesh (where the mining area is located) are always known and called Adibasi. Not only Adibasis themselves, but also local Bangalees and local government bodies use the term 'Adibasi.'[139] Mr. Soren added that he has been called and recognized locally as a Santal and an Adibasi since he was born.[140] Therefore, throughout my interviews, I heard the view that all ethnic and linguistic communities should be recognized in accordance with their wishes.

B. Regarded as Indigenous by Others

Indigenous peoples require themselves not only to be recognized as self-determining agents, but they should also be recognized by another self-conscious group.[141] Therefore, the institutionalization of a liberal regime of reciprocal recognition would enable Indigenous peoples to realize their status as distinct and self-determining actors.[142] The UN has pointed out that the self-identification feature alone cannot contribute to building a specific group for becoming 'Indigenous peoples,' they should have close ties to their lands, with culture and languages distinct from the dominant groups, and be regarded as Indigenous by other communities.[143] During my stay in the township of Phulbari and Birampur sub-districts, I talked, discussed, and interviewed with Bangalee activists, local government representatives, farmers, and teachers about mining, resistance, and Adibasi issues. Local Bangalees' sense of identifying the communities as 'he or she is from an Adibasi village or hamlet.' Bangalees call the self-recognized ethnic communities in the mining area 'Adibasi,' though some people call pointedly as the Santal, Munda/Pahan, Mahili, and Karmakar. Though the term 'small ethnic minority' is being imposed on the self-identified Adibasi communities by the government, nobody in the area uses or refers to them

[138] Interview with Ramai Soren, in Phulbari Bazaar. (March 11, 2016).

[139] The local people disregard government-imposed term *upojati* or *khudro nrigoshthi* or *tribes.*

[140] Interview with Rob Soren, in Dhaka (April 11, 2016).

[141] GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS REJECTING THE COLONIAL POLITICS OF RECOGNITION 28 (Minneapolis: University of Minnesota Press, 2014).

[142] *Id.*

[143] *Id*.

as a 'small ethnic minority' or 'upojati' or 'tribes.'[144]

R. Begum, a Bangalee woman whose family settled in an Adibasi hamlet, contended that she calls the ethnic communities 'Adibasi' because they are Adibasi in nature. She also claimed, "I call them Adibasi because they love to be called Adibasi, and I respect their self-recognition and identification."[145] Her argument explores that all people have their own identity, and they should be regarded as such. She questioned, "if anyone calls me Adibasi, I feel insulted because I am not an Adibasi. Why should someone be called or identified what he/she is not?"[146]

B. Roy, another Bangalee farmer and a rickshaw puller who was shot and severely injured during the Phulbari movement on August 26, 2016, rejected the government's position and stated that the government has to recognize the communities according to their demand and has to take initiatives to stop persecuting them.[147] I also observed that one Adibasi community (such as Santal) recognizes and identifies another Adibasi community (Robidas) through their long-standing understanding of the lifestyle.

Thus, I find that being 'recognized by others' is an important criterion, which can be read with self-recognition or identification. Accordingly, Bangalee respondents of the Phulbari mining area were asked: "what do they think about the people who are identifying themselves as Adibasi but are not regarded as Adibasi by the government?" Most of the respondents, regardless of their race, ethnicity, gender, age, literacy, or occupation, claimed that they are Indigenous peoples, and they must be called either 'Adibasi' or 'Indigenous peoples' because the people want to be called so.

C. Historical Continuity

Many scholars favor the 'historical continuity' criterion arguing that historical continuation is enough for being 'Indigenous.' Macklem claims that Indigenous peoples in international law are communities who maintained historical continuity in occupied and governed territories before colonization.[148] Benedict Kingsbury contests Cobo's working definition of Indigenous peoples and argues that by requiring "'historical continuity' with pre-invasion and pre-colonial societies that developed on their territories," the definition takes potentially a limited and controversial view of

[144] Interview with K. Kisku., in Phulbari (March 07, 2016).
[145] Interview with R. Begum, in Dhontola Hamlet, Birampur (March 3, 2016).
[146] *Id*.
[147] Interview with B. Roy, in Sujapur, Phulbari (March 13, 2016).
[148] Macklem, *supra* note 115, at 189.

Indigenous peoples.[149] Kingsbury observes that this historical continuity may consist of the continuation of reaching into the present.[150] Macklem supports this position of Indigenous peoples in international law and argues that they are the people who maintained 'historical continuity' in occupied and governed territories prior to colonization.[151]

The World Bank takes a criteria-based approach for Asian countries by adding 'historical continuity' and 'colonialism' because some Asian countries such as India, Bangladesh, and Myanmar have argued that Indigenous peoples are descendants of the original inhabitants who have suffered from conquest or invasion from outside.[152] The principle of "being conquered and being dominated by another group is a pre-condition for Indigenous status"[153] implies that European conquest and invasion over Indigenous peoples by the military is necessary,[154] which I find problematic because not all Indigenous peoples were conquered militarily by colonial powers, nor are all Indigenous peoples non-dominant.[155]

All Adibasi communities in my research area have a similar historical and cultural background and belong to the earliest inhabitants of the Indian subcontinent. Adibasi communities are distinct in their way of life, cultures, and languages from dominant Bangalee Muslim and Hindu populations, though they have coexisted with them for a long time. Mezbah Kamal, a Bangladesh historian, argues that since the period of the Mughal in the 15th century, the boundaries of the region had been altered various times and became part of at least three countries. Since the whole region was a part of the Indian sub-continent until 1947, people could migrate from one place to another place, and they could settle anywhere they wanted.[156] Therefore, it cannot be said that "you migrated from India or Pakistan, and as such you are not an Adibasi or Indigenous." After becoming an independent country in 1971, Bangladesh has not experienced much migration into its territory.[157]

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[149] Kingsbury, *supra* note 66, at 420.

[150] *Id.* at 422.

[151] Macklem, *supra* note 115, at 179.

[152] *See* Kingsbury, *supra* note 66, at 434.

[153] Ted Gurr from Minority At Risk (MAR) project defines Indigenous peoples as: "Conquered descendants of earlier inhabitants of a region who live mainly in conformity with traditional social, economic, and cultural customs that are sharply distinct from those of dominant groups…Indigenous peoples who had durable states of their own prior to conquest, such as Tibetans, or who have given sustained support to modern movements aimed at establishing their own state, such as the Kurds, are classified as ethnonationalists, not indigenous peoples. TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 17 (2000); *see also*, Corntassel, *supra* note 69, at 79-80.

[154] Altamirano-Jiménez, *supra* note 22, at 22.

[155] Alfred & Corntassel, *supra* note 8, at 607.

[156] *See* Mesbah Kamal, *Introduction* to CULTURAL SURVEY OF BANGLADESH SERIES: INDIGENOUS COMMUNITIES, at xi, xxi (Mesbah Kamal et. al., 2007).

[157] *See id.* at xxi-xxii.

However, the ethnic groups claiming themselves as Adibasi in Bangladesh have lived in the region since before the independence, and even before the British invasion in 1757.[158]

Therefore, the government's position that 'all people of the country are Indigenous' or 'there are no Indigenous peoples in Bangladesh' is invalid in the sense of 'historical continuity.'[159] Concerning the notion of Indigenous peoples as the 'people who came first,' I support the argument made by the Indian representatives in an international forum that it is impossible to determine 'who came first.' Accordingly, the concept of 'who came first' or 'historical continuity' cannot be applied in the Indian sub-continent context because of its continuous migration, absorption, and differentiation in the following centuries of colonization.[160] Therefore, the question of 'who came first' is illogical in this context. If we take the 'historical continuity' criterion from Bangladesh's perspective, Adibasis pass the test of 'Indigeneity' as well. Therefore, in my analysis, the Adibasis of undivided Bengal are to be treated as Indigenous peoples of independent Bangladesh.

D. A Long Connection with Regions and Kinship Networks

Indigenous peoples are often demanding recognition as Indigenous peoples based on their long connection with regions. They also wish to retain a distinct identity by practicing their traditions, cultures, and strong ties with the lands.[161] The interconnected factors of the relationship to the land, language, and cultural practices appear to have some promises for discussing the adaptability and resurgence of Indigenous communities.[162] Considering the international context, James Anaya identifies 'Indigenous peoples' as distinct communities with extensive kinship networks that clearly distinguish them from 'minority groups' by highlighting the continued colonial domination of homelands as well as the ancestral roots of the 'pre-invasion inhabitants.'[163] Their extensive kinship networks and continually devising cultural traditions also form an Indigenous identity.

The Santals and other Adibasi communities had been living in the mining area before the victims of displacement arrived there. They could have settled comfortably in the region because of their kinship networks.[164] They started clearing the jungle for houses and carried their livelihoods by

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[158] *See id.*at xii
[159] UNDESA, *supra* note 20, at 6.
[160] Kingsbury, *supra* note 66, at 434-35.
[161] *Id.*
[162] Alfred & Corntassel, *supra* note 8, at 606-09.
[163] Anaya, *supra* note 62.
[164] Interview with Cherobin Hembrom, in Dhanjuri Hamlet, Birampur, (April 05, 2016).

hunting, gathering wild foods from the forest, and working as agricultural laborers.[165] However, they now became victims of marginalization and deprivation. A Santal farmer recalled his childhood memories: "the area was full of forest, and now you can barely see the forest. Many Bangalees migrated here lately from different places, cut trees for settling, and created cultivated lands. Now it has become a crowded area with agricultural lands." He added, "If you see any community live close to a forest and if they depend their livelihood on it, you will understand that they are Indigenous peoples."[166]

E. Historical Experience and Vulnerability

Erica-Irene Daes, the UN Chairperson-Rapporteur on the Concept of Indigenous, defines 'Indigenous peoples' as "descendants of the first inhabitants of the lands which today form America, and in order to offset the deficiency in their physical and intellectual development, have a preferential right to the protection of the public authorities."[167] Wiessner contemplates Daes's suggested factors of voluntary distinctiveness, self-identification, and recognition, as well as the experience of oppression as a reasonable functional definition.[168] Kingsbury's 'historical experience of vulnerability, severe disruption, dislocation, oppression or exploitation' of self-identified distinct communities who form non-dominant classes in society is common everywhere in the world. Santals, Mundas, and other Adibasi from plain lands always live in the northern part of Bangladesh and are being persecuted and marginalized from the very beginning of the civilization, getting more intense as time passed.[169] Adibasi people in Bangladesh form the non-dominant sectors of society as against the majority of Bangalees.[170] Their historical situation can be labeled as politically powerless, legally unprotected, economically inferior, numerically inferior, and victims of violence.[171] Their present psychological states also support the 'powerless' class in every aspect of society.

Some of the Adibasi and non-Adibasi respondents of my research confirmed that Bangalees are buying and alienating Adibasi lands through unlawful means. Multiple incidents happened in this area where clever

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[165] *Id.*

[166] Interview with B. Tudu, Letason Hamlet, in Birampur, (February 29, 2016).

[167] *See, e.g.*, Daes, *supra* note 61, paras. 43-44 ("Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands").

[168] Wiessner, *supra* note 63, at 115.

[169] Interview with Cherobin Hembrom, in Dhanjuri Hamlet, Birampur, (April 05, 2016).

[170] Ahmed, *supra* note 46, at 71.

[171] *Id.* at 72.

Bangalees deceived and tempted Adibasis and offered more than existing land prices. As they were unaware of land laws and rights, Adibasis agreed to sell their lands to those Bangalee land grabbers. Adibasis get the agreed prices, but the proerty sizes being sold were written wrong by Bangalees. Most of the Adibasis became poor by losing their lands through illegal processes, and now they are bound to work as day laborers. Adibasis are so frustrated that they stopped going to court because they do not get justice. Judges and government officials help those Bangalees who grab Adibasi lands illegally through corruption.[172] Adibasi communities feel so marginalized due to these ongoing incidents that they think that all their land will eventually be lost.

F. Establishing Non-dominance in the Society

Indigenous peoples around the world are persecuted and discriminated against due to their unbending mindset of not being assimilated with dominant groups. Consequently, they keep themselves isolated. One of the essential features of Indigeneity, as stated in the definition under international law, is establishing non-dominance in society. Adibasi communities in the Phulbari mining area have formed a non-dominant section of people. I have visited at least twelve Adibasi hamlets during my field activities and observed that local Adibasis are dominated by Bangalees. Though Adibasis are the majority in the possible affected mining area, they segregate in the whole area and do not have a mechanism to establish their dominance.

A Santal leader claimed that Bangladesh's quota system, which mandates five percent of the appoint to be made from 'ethnic minorities,' is not maintained accurately. Even if it is maintained, the opportunity is not distributed equally among all Adibasi groups. Some Adibasi groups get more privileges than other groups.[173] The Santal leader also said:

> "We are marginalized among marginalized. I saw many graduates in our community who got no suitable job, as they are working in the garments industry with low wages. Since the Santal people have nobody in the job fields, they would not get a job. Therefore, the Santal people are discouraged from going for higher study."[174]

Cherobin Hembrom expressed his frustration by stating that the majority and dominant Bangalees want to dispossess and displace powerless Adibasis by alienating their lands. Adibasis, in plain lands and hill areas everywhere, are being oppressed by Bangalees and as a whole by the

[172] Interview with S. Baske, in Ratanpur Village, Birampur (Mar. 06, 2016).
[173] Interview with Rob Soren, in Dhaka (Apr. 11, 2016).
[174] *Id.*

government.[175] He claimed that if this continues, Adibasis and other marginalized groups will have to leave their ancestral and motherland.[176]

G. Socio-economic and Cultural Differences

Socio-economic and cultural differences are one of the essential criteria for being Indigenous.[177] I find Indigenous peoples are distinct in geographical territory regarding socio-economic and socio-cultural contexts. They need to maintain their traditional cultural practice and socioeconomic activities in their traditional way. Indigenous peoples can be singled out through their economic events, festivals, rituals, expressions, folklore, and other cultural events. Adibasi communities in the research area are distinct from other ethnic groups considering their socio-cultural differences. An Adibasi respondent contends that their cultures such as traditional dances, songs, histories, arts, crafts, musical instruments, and customary governance, are entirely different from the Bangladeshi majority Bangalee community.[178] He also added that Adibasis observe festivals and rituals following their ancestors' traditions. Adibasi culture and historical presence are portrayed in their artworks on walls in their homes. Most of the Adibasi families I observed during my fieldwork have mud houses, and they display their artwork on the walls. Moreover, most Adibasi communities play musical instruments that they make themselves.[179] The Santal dance and music traditionally revolved around Santal religious celebrations.[180] Their music and dance both retain connections to conventional ceremonies. The names of many Santal tunes and lyrics are derived from traditional rituals and sacred histories. For example, *Sohrai* tunes were those sung at the *Sohrai* festival.[181]

The Santal have some festivals such as *Sohrai Parban* (also known as Bandana), *Baha Parban*, *Dalpuja Parban,* etc. that are entirely different from the celebrations of Bangalees and other ethnic communities in surrounding areas. Cherobin Hembram stated that Santals also have *Nobanno Utsab* what they call *irgondli* (celebrate with new paddies, traditional alcohol, and worship). In celebrating *Sohrai*, *Yog Manjhi* (communication member of a *Manjhi Parishad*) takes responsibility for organizing. *Baha* is observed during the blooming of Sal tree flowers. Santal

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[175] Interview with Chebrobin Hembron, in Dhanjuri Hamlet, Birampur (Apr. 05, 2016).

[176] *Id.*

[177] Sanders, *supra* note 75, at 11.

[178] Interview with S. Baske, in Ratanpur Village, Birampur (Mar. 06, 2016).

[179] Interview with Chebrobin Hembron, in Dhanjuri Hamlet, Birampur (Apr. 05, 2016).

[180] 2 STEVEN L. DANVER, NATIVE PEOPLES OF THE WORLD: AN ENCYCLOPEDIA OF GROUPS, CULTURES AND CONTEMPORARY ISSUES 560 (2013).

[181] Interview with Chebrobin Hembron, in Dhanjuri Hamlet, Birampur (Apr. 05, 2016).

women celebrate the *Baha* with traditional dances and water throwing among family members. *Holi* (Adibasis regard it as the celebration of love) is also commemorated together with the *Baha* festival, and Santals drink their traditional *haria*.[182] Cherobin discussed Santal's traditional way of making *haria.* He said that *haria* is used in *Sanatan* Santals' marriages, other festivals, and rituals sacredly, but Christian Santals do not use *haria* as their sacred anymore.[183]

The local Union Council chairman told me that he had chances to see Adibasi festivals and rituals closely due to his responsibilities. According to him, Adibasis honor their ceremonies and celebrations in their distinct style, which is entirely different from dominant Bangalees. They make *haria* and drink during their festivals. This is their ancient tradition, and local Muslim Bangalees do not complain much and respect Adibasi traditions and customs, although alcohol is prohibited in Islam.[184]

H. Distinct Characteristics such as Language, Race, Sacred Oral Story, Religious Functionality

Kingsbury and the World Bank identify that the surrounding community should also recognize that the communities who claim to be Indigenous maintain distinctiveness and non-dominance in relation to other groups. Most of the Bangalee respondents of my research area call the communities 'Adibasi' and recognize their distinct cultures, their different languages, backwardness, and their long connection with the traditional knowledge of cultivation and hunting methods. Ethnic groups in Bangladesh who identify as Adibasi or Indigenous continue to struggle for their rights and identity, bearing in mind the international law context. Though Adibasis in my research area have been living in miserable economic and social conditions and are subjected to multiple sources of discrimination and exploitation, they retain their traditions such as myths, belief systems, languages, rituals, and other cultural practices which they inherited from their ancestors. The overall situation of Bangladeshi Adibasi communities is acutely disadvantaged compared to the rest of the country.[185]

Religious functionality is inseparably linked to Indigenous peoples' distinct language and dialects, where their unique Indigenous expressions,

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[182] Haria is a homemade alcohol with rice and honey, which is the oldest tradition of Adibasis. This is also called rice beer. *See* Vivek Kumar and RR Rao, *Some interesting indigenous beverages among the tribals of Central India*, in 6 INDIAN J. OF TRADITIONAL KNOWLEDGE 141, 143 (2006).

[183] Interview with Chebrobin Hembron, in Dhanjuri Hamlet, Birampur (Apr. 05, 2016).

[184] Interview with Y.A., in Birampur (Apr. 04, 2016).

[185] *See* Roy, *supra* note 25.

sacred oral history, and myths, can be traced in their ceremonial festivities.[186] One of my Santal respondents stated that they are a distinct ethnic group and have maintained different cultural, religious, and linguistic features from dominant Bangalees and other ethnic communities of Bangladesh. The Santals also follow their diverse societal values and ethics which make them distinct from others.[187]

Adibasis kept their ancestors' customs and traditions. Though Bangalee Hindus and *Sanatan* religious Adibasis have similar kinds of worship, Adibasis have distinct systems of observing.[188] Adibasis also have different customs of observing the rituals of a deceased person, which is entirely different from Hindus and other Bangalees. When an Adibasi dies, the *Mandal* of a hamlet must take responsibility and arrange the funeral rites. The *Sanatan* Santals arrange *Shraddha* (obsequies) after a lapse of eight days following the death. In *Shraddha*, traditional food with *haria* is served. The Christian Santals arrange prayer sessions within one to two years following the death.[189]

Tattoos on body parts are one of Santal's oldest traditions which people continue, though the predisposition of tattoos among converted Christian Santals decreases day by day. There is a sacred oral history behind the art of making tattoos. Santals believe that if they do not draw tattoos on body parts, snakes will attack them after death, and they cannot go to heaven.[190] Munda people continue inscribing three vertical lines on their foreheads to mean their victory over the Mughals.[191]

There are many sacred stories that continue through generations in Santal communities. The story of the *Jado* (the deceiver) exists among Adibasi communities. *Daini* (witch) and *Dakin* (wizard) are seen as wicked souls that transfer to people. The *kabiraj*[192] usually goes to a family, reads *mantras*,[193] uses bustle, and later says that a *Daini* exists in a family and

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[186] *See id.*

[187] Interview with T. Murmu, Dhakundah, Birampur, (Mar. 02, 2016).

[188] Adibasis (especially Santal and Munda people) are primarily animistic nature worshipers. Most of their deities are similar to Hindus, but they do not worship any idols like Hindus. The chief of the Gods of Adibasis is *Sing Bonga* (the God of the sun), next is *Marang Budu* (the God of mountain), and *Abe Bonga* (house-deity). Their belief is that soul is immortal, and supernatural soul determines the goods and bads on earth; *see* ABUL BARKAT ET. AL., LIFE AND LAND OF ADIBASHIS 244 (2009).

[189] Interview with Chebrobin Hembron, in Dhanjuri Hamlet, Birampur (Apr. 05, 2016).

[190] *Id.*

[191] Dristi Sharma, *A Link Through the Ink*, INDIA TODAY, https://www.indiatoday.in/interactive/immersive/contemporary-tattoo-culture-know-history-tattoo-types-and-other-details/.

[192] Kabiraj is an occupational title found in persons of India or Indian origin. In old days the people practicing Ayurveda in India were also called Kabi (Vaidhya).

[193] Mantra is believed to have a special spiritual power. *See* Editors of Encyc. Britannica, *Mantra*, in ENCYC. BRITANNICA 1, (Encyc. Britannica, Inc. 2022).

stays with someone who he identifies can harm all family members. The news spreads to all the family members and hamlets. Later, people start blaming that person for any accident that happens in the hamlet. I observe that Adibasis are much inclined to believe their sacred story and kinship networks, which affect their traditional way of life.

V. POLITICS OF RECOGNITION AND FIGHT FOR SELF-DETERMINATION OF ADIBASIS IN BANGLADESH

A. Are 'Adibasi communities' Indigenous Peoples?

Bangladeshi Indigenous leaders who are vocal for their rights prefer the term 'Indigenous peoples' in English and 'Adibasi' in Bangla,[194] arguing that there is no difference between the two terms. The Sanskrit word 'Adibasi' is comprised of the phrases 'Adi' and 'Basi'; the former means 'original or earliest times,' and the latter means 'residents or inhabitants.'[195] In this sense, Adibasis are the original and earliest residents or inhabitants in a particular region. These groups are descendants of a 'pre-Dravidian race,' who are considered the oldest inhabitants of the Indian subcontinent.[196] In the Indian sub-continent, especially in India and Bangladesh, self-defined Indigenous peoples call themselves and prefer to be called 'Adibasi,' but they are neither recognized by the state constitution nor other legal instruments exclusively. The Indian government classified 'all ethnic communities who are calling themselves Indigenous peoples' into three categories in its constitution: 'scheduled tribes,' 'scheduled castes or forward castes,' and 'other backward classes.'[197] As Pooja Parmar points out in the Indian context, "the claims of Adibasis as original inhabitants were thus effectively written out of the Constitution, foreclosing any possibility of a future recognition in the country's law. Since there are no recognized Adibasis, there is no legal basis for any claim as an original inhabitant."[198] Adibasis are also not recognized in Bangladesh, and no such categorizations exist in India. However, some ethnic groups are generally recognized as 'tribes,' 'minor races,' 'ethnic sects' and 'communities,' 'small ethnic

[194] Bangladeshi Indigenous peoples, both from the CHT and the plains, have started to refer themselves as Indigenous in English and as Adibasi in Bangla when the International Year of the Indigenous Peoples was declared by the United Nations. *See also* Roy, *supra* note 25.

[195] Kamal, *supra* note 156, at xi; *see also* DAVID HARDIMAN, THE COMING OF THE DEVIL: ADIVASI ASSERTION IN WESTERN INDIA # (Delhi: Oxford University Press ed., 1987).

[196] *Id.* at xii.

[197] The complete list of Scheduled Tribes and Scheduled Castes was made through two subsequent Presidential Orders. *See* Ministry of Law, S.R.O. 385 (Notified August 10, 1950); Ministry of Law, S.R.O. S.R.O 510 (Notified September 6, 1950).

[198] Parmar, *supra* note 101, at 516.

groups,' 'upojati,' etc., and some are not recognized at all. For example, the 1991 official census data identified and recognized only 27 'tribal' communities in Bangladesh, as reflected in the Small Ethnic Groups Cultural Institution Act 2010 (SEGCI Act) comprising 1.7% of the total population of Bangladesh. However, Adibasi leaders and researchers came up with almost double that number.[199] Surprisingly, the 2001 and 2011 official censuses did not categorize any Indigenous groups and their numbers, because both the censuses considered the religious base of the population.[200] Although Chattogram[201] Hill Tracts (CHT) (the southern hill districts) have the largest concentration of Adibasis, the northwestern region of North Bengal, the north-central part, the north-eastern region, and coastal regions have a large number of Adibasis. Most of the Bangladeshi Adibasi communities are also concentrated in neighboring countries such as India and Myanmar.

Table 1: Location of [Adibasis] in Bangladesh[202]

Adibasi Groups	**Regions**	**Divisions and Districts**	**Relevant Information**
Chakma, Marma, Tripura, Mru, Khumi, Lusai, Bawm, Pankhua, Tanchangya, Chak, and Khyang	Chattogram Hill Tracts (Southern-East)	Bandarban, Rangamati, Khagrachhari	These 11 Adibasi communities are collectively called as 'Jumma people.' The Chakma is the largest in number. Each community group has distinct features regarding language, culture, and social settings.

[199] GAIN, *supra* note 12, at 1.

[200] *Id.*

[201] It was Chittagong before; the government recently changed the spelling officially into Chattogram to comply with Bengali pronunciation. Chattogram is one of the eight administrative Divisions (bivag) of Bangladesh. In Bangladesh, 64 district administrations are divided into different Divisions. Kazi Anis Ahmed, *Mixed Reactions as Govt Changes English Spelling of 5 District Names*, DHAKA TRIBUNE (Sep. 5, 2023), https://www.dhakatribune.com/bangladesh/142256/mixed-reactions-as-govt-changes-english-spellings.

[202] Directorate of Primary Education Ministry of Primary & Mass Education Government of the People's Republic of Bangladesh, Indigenous Peoples Framework Primary Education Sector Development Program 3 (PEDP III): ADB TA NO. 7169-BAN, ASIAN DEV. BANK 1, 7-8 (prepared 2010), https://www.adb.org/sites/default/files/linked-documents/42122-013-ban-ippfab.pdf.

Santal, Munda, Oraon, Paharia, Koch, Mahili, Mahato, Malo, Kol, Karmakar, Robidas etc.	North-western region or North Bengal	Rajshahi and Rangpur Divisions (Concentrated in all 16 districts)	The Bangladesh Statistics Bureau in their Population Census estimates that Adibasis in this region constitute 1.5% of the total population and represent 26% of the entire Adibasi group of Bangladesh. They are also regarded as Adibasis or Indigenous peoples of the plains. Santal is the largest Adibasi community in Bangladesh, and throughout its history, it has been one of the most marginalized, persecuted, and disadvantaged communities in Bangladesh.
Garo, Hajong, Koch, and Dalu.	North-Central	Dhaka and Mymensingh	Garo is the largest in this region.
Manipuri and Khasia	Northern-East	Sylhet (Sylhet, Sunamgonj, Moulavibazar , Habigonj districts)	A considerable number of Garo live in this region too.

Rakhine	Coastal	Chattogram and Barisal (Cox's Bazar and Pautakhali districts)	Some Marmas are found in the region too. The Rakhine and Marma have similarities regarding their social matters.

As Pooja Parmar has demonstrated, considering the literal meaning, government authorities of the Indian sub-continent have tried to argue that 'Scheduled tribes,' 'Tribal,' or 'Ethnic groups' are not 'Adibasi' or 'Indigenous peoples.'[203] Some regard them as ethno-occupational groups.[204] The Bangladeshi government contends that the entire Bangalee community of Bangladesh had 'coexisted' with other ethnic groups before the geographical divisions by British administrators, and therefore, "all Bangalee people are Indigenous or Adibasi."[205]

At the international level, Bangladesh ratified the ILO Convention No. 107 on July 22, 1972, which is now closed for further ratification. Ratification remains valid for those countries that have ratified it but have not ratified the ILO Convention No. 169. Since Bangladesh has not ratified Convention No. 169, the government has obligations to adopt provisions for Indigenous and Tribal populations under Convention No. 107. Bangladesh became a party to the International Convention on Elimination of All Forms of Discrimination in June 1979. Bangladesh is one of the eleven countries that abstained from voting when UNDRIP was adopted by the General Assembly in 2007, reasoning that there are no 'Indigenous peoples' in Bangladesh, and 'therefore, Bangladesh has no responsibility to implement its international law obligation.'[206] Nevertheless, Bangladesh has promised several times to work together with Indigenous peoples for the implementation of the UNDRIP.[207] As Bangladesh is a member state of the UN, the country is an automatic party of the UDHR and the UN charter. In this regard, Bangladesh is obliged by the UN's mandates. The Bangladesh government ratified ICESCR on October 5, 1998, and ICCPR in 2000, but did not sign the optional protocols of both covenants. The covenants have

[203] POOJA PARMAR, INDIGENEITY AND LEGAL PLURALISM IN INDIA: CLAIMS, HISTORIES, MEANINGS. (New York: Cambridge University Press, 2015).

[204] Gain, *supra* note 12.

[205] *Id.*

[206] Binota Moy Dhamai & Pallab Chakma, *Bangladesh* in THE INDIGENOUS WORLD 2015 314 (Cæcilie Mikkelsen, ed., 2015).

[207] Pallab Chakma, *Fight for Indigenous Rights in Bangladesh Continues*, THE DAILY STAR, (Aug. 9, 2016), https://www.thedailystar.net/opinion/human-rights/fight-indigenous-rights-bangladesh-continues-1445536.

provided declarations and reservations upon ratification, accession, or succession for each of the countries.[208] The ICESCR delivered the obligation for the Bangladesh government to implement it at the country level. Article 1 under 'Declarations' states: "It is the understanding of the Government of the People's Republic of Bangladesh that the words "the right of self-determination of Peoples" appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation, and similar situations." The Declaration also, in Article 7, 8, 10, and 13, state that the government must "implement the said provisions progressively, in keeping with the existing economic conditions and the development plans of the country," and the government has to adopt the Covenant's provision in the constitution and the relevant legislation of Bangladesh. The Bangladesh government has made reservations about specific provisions[209] which Germany and the Netherlands strongly opposed.[210] The ICCPR also provides some directions for Bangladesh to implement its guiding principles.

B. Government's Systematic Denial of Indigenous Existence

As part of international law obligation and to end the debate on Indigenous or Adibasi identity and recognition of Indigenous peoples in Bangladesh, the Ministry of Cultural Affairs formed a committee in 2009 to identify the ethnic groups in Bangladesh.[211] Executive heads of all districts, who were asked to make a list of Indigenous groups, sent a list of 228 community names collected from the whole country to the ministry. After carefully examining the list (excluding 27 Indigenous communities that are listed in the 2010 SEGCI Act) and visiting some places to identify the ethnic groups, the committee by the Ministry of Cultural Affairs finally decided to include a total of 50 Indigenous groups on the list.[212] However, Indigenous organizations and activists are not satisfied with the initiatives taken by the Ministry, which they believe are ill-motivated and attempt to deny Indigenous people real recognition.[213] In 2013, the Bangladesh government pre-empted a legislative proposal entitled "Bangladesh Adibasi Rights Bill" that had been submitted by the Caucus, aimed to ensure the recognition of

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[208] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S 3.

[209] *Id.*

[210] *Id.*

[211] Dhamai & Chakma, *supra* note 206.

[212] Pallab Chakma & Bablu Chakma, *Indigenous World 2019: Bangladesh*, IWGIA, (Apr. 24, 2019), https://www.iwgia.org/en/bangladesh/3446-iw2019-bangladesh.

[213] *Id.* at 1.

Adibasis as 'Indigenous peoples' or 'Adibasi' and protect their rights.[214] However, the bill was never tabled by the government in the Parliament, who argued that if the bill was presented as a private bill, "the recognition of the ethnic minorities as Adibasi" would be a political issue, which the government wants to avoid.[215]

In various diplomatic discussions, government officials have rejected the claim of the existence of Indigenous peoples in Bangladesh, though the United Nations (UN) acknowledges that the recognition of Indigenous peoples should not be dependent on whether national governments recognize them as Indigenous or not.[216] Moreover, various international legal instruments and scholars emphasize 'self-identification' as a significant criterion. However, instead of taking the self-identification principle as the basis of recognizing Indigenous peoples, the Bangladesh government took 'historical continuity' as the primary basis. During a discussion with foreign diplomats and UN agencies representatives in 2011, Bangladeshi former Foreign Minister Dipu Moni insisted, "'tribal people' of the CHT did not exist before the 16th century, and they were not regarded as 'Indigenous peoples' in historical reference books or legal documents; instead, they have been identified as a 'tribal' population."[217]

When the UN Special Rapporteur Lars Anders Baer presented a study titled "Status of Implementation of the CHT Accord of 1997" in 2011, Iqbal Ahmed, the First Secretary of the Bangladesh Mission in New York, said, "Bangladesh does not have any Indigenous population."[218] He also added, "We urged upon the UN forum not wasting time on politically fictitious issues in Bangladesh."[219] The government authority also contends that the CHT has a more dominant Bangalee population than 'tribal people,' but they do not want to recognize the enormous population migration from various parts of Bangladesh that settled in Indigenous lands in the late 1970s, which continues. Bangalee settlers occupied Indigenous territorial lands and legally registered for ownership.[220]

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[214] Binota Moy Dhamai & Sanjeeb Drong, *Bangladesh*, *in* THE INDIGENOUS WORLD 2014 324 (Cæcilie Mikkelsen, ed., 2014).

[215] *Id*. at 324.

[216] FAO, *supra* note 2, at 12.

[217] *Ethnic Minority, Not Indigenous People*, THE DAILY STAR, (Jul. 27, 2011), https://www.thedailystar.net/news-detail-195963.

[218] *No Indigenous People in Blagadesh*, THE DAILY STAR, (May 28, 2011), https://www.thedailystar.net/news-detail-187527.

[219] *Id*. at 2.

[220] In 1947 the Indigenous constituted more than 98% of the population of the CHT, the Bangalees less than 2%. In the period 1951 to 1974, the Indigenous numbers increased by 71.7% while the Bangalees increased by 125.1%. Bangalee population in the Hill Tracts rose to 9% in

C. Adibasi Voices are Strong! Hear them!

N. Mardi, a Santal woman from an Adibasi hamlet of the mining area, claimed that the government is trying to disregard the existence of Adibasi in Bangladesh. Moreover, the government assimilates Adibasi communities into Bangalee cultures so that Adibasis will forget their traditional practices.[221] Again, their culture, language, spiritual beliefs, customs, and festivals are different from dominant Bangalees. I observed in my research area that all characteristics of Indigenous peoples in internationally accepted definitions are also found in Adibasi communities.

Adibasi leader Rob Soren rejected the term 'small ethnic minority' which, according to him, is an assault on all Adibasis of Bangladesh. Adibasis feel dissatisfaction with the imposition of this term on them. He added that he would be happy to be known as a 'Santal' and as an 'Adibasi/Indigenous,' but not as an 'upojati,' a 'tribe,' or as a 'small ethnic minority.' He claimed that if there is a 'small,' there should be a 'large.' Adibasis are proud of their ancient history, and they would not tolerate being identified as other than Adibasi or Indigenous peoples.[222] B. Murmu expressed his anger in the following words: "A huge number of dominant Bangalees think that 'Santal' is the name of an animal. They do not consider Santal and other Adibasi communities as human beings. They do not want to understand Santal is one of the earliest ethnic communities in the region."[223] T. Murmu, a schoolteacher from the Santal community, said:

> We want recognition as Adibasi. There are different ethnic groups living in this area. I am a Santal; nobody can denounce my identity. Now the question is if Santals are Adibasi or not. Identity should emerge from ethnicity, not religion. I have no problem if the government wants to recognize me as a Santal. Besides Santals, I want all other communities to be recognized as such.[224]

Adibasi communities in Bangladesh claim that since they are clearly distinctive regarding linguistic, cultural, and socio-political means and they identify themselves as 'Indigenous,' they demand a separate status in the

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1951, 12% in 1961, and 40% in 1981. *See* Syed Aziz-al Ahsan & Bhumitra Chakma, *Problems of National Integration in Bangladesh: The Chittagong Hill Tracts*, 29 ASIAN SURVEY 959, 965-66 (Oct. 10, 1989); Between 1980 and early 1984, 4,00,000 Bangalees were settled in the CHT which accounted for almost 50% of the total population of the CHT. Since the government could not provide lands for Bangalee settlers it promised, settlers started to grab Indigenous lands with the help of military which is still continuing. *See* Bhumitra Chakma, *Structural Roots of Violence in the Chittagong Hill Tracts*, 45 ECON. POL. WKLY. 19, 21 (Mar. 20-26, 2010).

[221] Interview with N. Mardi, in Lakshipur, Phulbari, (Mar. 7, 2016).

[222] Interview with Rob Soren, in Dhaka, (Apr. 11, 2016).

[223] Interview with B. Murmu, in Dhakundah, Birampur, (Mar. 1, 2016).

[224] Interview with T. Murmu, in Dhakunda, Birampur, (Mar. 2, 2016).

constitution as 'Adibasi.'[225] Adibasis who are aware of their rights and recognition are concerned about the role of the Adibasi leaders to push the government for their recognition. Cherobin Hembram blamed Adibasi leaders and organizations who were supposed to help Adibasi; instead, they are harming the rights of Adibasi communities since they have no courage to go against the government's decision but agree with them in exchange for their benefits. He claimed that there were four Adibasi members in the Parliament, but they never protested when the bill (he meant amendment of the Constitution) was tabled and passed. Moreover, Adibasi leaders are blamed for the recent language debate.[226] All courses in the elementary schools to a higher level in the Adibasi area are taught only in *Bangla* and English languages, although the government is trying to introduce six more Adibasi languages such as Chakma, Marma, Tripura, Garo, Santali, and Sadri languages. If the plan is implemented, children from six Adibasi communities can have chances to practice their words in school. Jovan was contending that their distinct culture, heritage, and identity would be lost if their words are lost. Adibasi NGO worker, K. Kisku, said that his NGO tried to introduce Adibasi languages at the community level so that Adibasi people can learn. He added that his NGO established a few schools in different Santal hamlets where the Santali language in Roman scripts is taught. He also added that the NGO and local Adibasi leaders are negotiating with the government policymakers to improve the situation.[227] It is documented and evident that throughout Bangladesh, self-identified Indigenous peoples are marginalized, and their voices are rarely heard. The respondents of my research articulated that they have been facing discriminatory treatment, not only from the government, but also from powerful Bangalee neighbors. In recent times, the Bangladesh government obstructed the respondents' fight for recognition as Adibasis or Indigenous peoples. Some of my Adibasi respondents pointed out that their fights for their rights to be incorporated into the state policy and in the constitution will be continued.

D. Only Bangalees are "People" in Bangladesh?

Despite strong demands from Indigenous peoples to be recognized as 'Adibasi' in the 15th Amendment of the constitution, this issue was also not considered in the 16th amendment.[228] Instead, "all 'people' shall be regarded

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[225] Sanchay Chakma, *The Legal Rights Situation of the Indigenous Peoples in Bangladesh, in* 80 VINES THAT WON'T BIND 151, 151 (IWGIA, 1996).

[226] Interview with Cherobin Hembrom, in Dhanjuri, Hamlet, Birampur, (Apr. 5, 2016).

[227] Interview with K. Kisku, in Phulbari, (Mar. 7, 2016).

[228] Dhamai & Chakma, *supra* note 206.

as Bangalee as a nation" provision[229] is inserted in the constitution. By incorporating this Article in the constitution, the government intended to include them as dominant Bangalees, which is a threat to further self-determination of Adibasi. The insertion of the above clauses in the constitution ensured the political and cultural dominance of Bangalees within the state.[230] The imposition of Bangalee nationality on all the residents of Bangladesh underestimates the ethnic groups. This classification is a disavowal of the cultural distinctiveness of the other groups.[231] However, the Supreme Court of Bangladesh in a recent (September 2017) judgment stated that the 16th Amendment is invalid, as such, the provisions it inserted in the constitution would be invalid as well.[232]

Most of the respondents of my research identified themselves as 'Adibasi,' not 'Bangalees.' When I asked a Santal (one of the Adibasi communities in Bangladesh) people during my fieldwork in the Phulbari coal mine project area, "Do you feel comfortable being known as a Bangalee," he replied:

I am not a Bangalee. We two have dissimilarities in many senses (pointing at me). I am proud to be a Bangladeshi, but I am not a Bangalee. Bengali is not my mother tongue. I have my own language. Again, according to the constitution, I am not a 'people.' Then who I am? I have no existence in the country! The constitution is the highest place for everyone where I am not regarded as a 'people.' All Adibasis rejected to be 'Bangalees,' they would not be treated as 'people.' As I said before, I am a Santal, an Adibasi, not a Bangalee. The Santals and Bangalees have distinct cultures, distinct languages, distinct families, and social settings.[233]

However, the state constitution extends guarantees for Bangalee, the dominant group of the country. In the name of majoritarian rule or democracy, Adibasi communities in Bangladesh have been marginalized politically, economically, and culturally.

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[229] Article 6(2) of the current constitution reads as follows: "the peoples of Bangladesh shall be known as Bangalees as a nation, and the citizens of Bangladesh shall be known as Bangladeshies." *See* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 6(2).

[230] AMENA MOHSIN, THE POLITICS OF NATIONALISM: THE CASE OF THE CHITTAGONG HILL TRACTS BANGLADESH 92 (University Press Ltd., 1997).

[231] Saleem Samad, Commentary, *State of Minorities in Bangladesh: From Secular to Islamic Hegemony*, REG'L CONSULTATION ON MINORITY RTS. (1998).

[232] Ashif Islam Shaon, *16th Amendment scrapped, parliament loses power to impeach SC judges,* DHAKA TRIBUNE (July 3, 2017), https://www.dhakatribune.com/bangladesh/court/23695/16th-amendment-scrapped-parliament-loses-power-to.

[233] Interview with Rob Soren, in Dhaka, (Apr. 11, 2016).

E. Cease to be Indigenous?

According to the World Bank's Operational Policy 4.10, Indigenous peoples cease to hold Indigenous status or identity by leaving their communities and land.[234] In this regard, Jeff Corntassel argues that the realities of Indigenous refugees caused by war or state policies of resettlement would harm their identity as 'Indigenous' through the policy established by the World Bank.[235] Considering the example of the CHT, the author asks whether Adibasi communities who were displaced by the state-induced Bangalee settlement in the region would be regarded as Indigenous or not under the World Bank definition despite their illegal removal from the area.[236] Corntassel also argues that if a group even pursues statehood, as Adibasi communities in the CHT in Bangladesh, or Mohawk Nations in Canada and the US have shown their intention various times in their history, they would cease to be Indigenous in this conceptualization.[237] So, if any Indigenous community or all groups in a geographical location pursue statehood and form a state, they would lose their indigeneity.

In India, it can be effortlessly argued that some Scheduled tribes ceased to be Indigenous and have become castes or something else. This has happened extensively elsewhere as well.[238] Although self-identified Indigenous peoples of India are recognized in the Constitution as 'Scheduled Tribes,' 'Scheduled Castes,' and 'Other Backward Castes,' their claims have never been established as 'Indigenous peoples' or 'Adibasis.' A similar situation can be seen in Bangladesh, where self-identified Indigenous peoples are called and named 'small ethnic groups' or 'tribes.' In Russia, under new law 'Indigenous peoples' are treated as only those ethnic groups living in the territories of their ancestors who enjoy a traditional lifestyle, and whose populations remain under 50,000, known as 'small,' 'numerically small peoples,' or 'small-numbered peoples.'[239]

Most of the Adibasi communities in my research, especially the Santal people, are leaving their ancestral religions and converting to Christianity.[240] Not all but most of them left their ancestral *Sanatan Dharma* and began practicing new religions by assimilating with their old religious deities and

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[234] *See* The World Bank Group [WBG], Operational Policy 4.10, https://thedocs.worldbank.org/en/doc/947dcf0fc95418e924aa3258b010679b-0290012023/original/OP-4-10-Annex-B-Indigenous-Peoples-Plan.pdf.

[235] Corntassel, *supra* note 69, at 87.

[236] *Id.* at 87-88.

[237] *Id.* at 80.

[238] Beteille, *supra* note 16, at 190.

[239] Popova-Gosart, *supra* note 3, at 100.

[240] Cherobin Hembrom confirmed that Santals are being converted into Christianity, some of them also converted into Islam too. The Dhanjuri Church was established in 1906. *See* Interview with Cherobin Hembrom, in Dhanjuri, Hamlet, Birampur, (Apr. 5, 2016).

rituals.[241] Christian Adibasis in the area do not stop practicing their traditional festivals, but they practice them under the supervision of the 'Father' (priest) of the Church during Easter, Christmas, and the English New Year.[242] Due to the conversion of religion, the Church is involved in Adibasi festivals. K. Kisku said that the government helps poor Adibasis celebrate Christmas, although *Sanatan* Adibasis do not receive any financial help from the government.[243]

Moreover, they follow their distinct customary laws and traditions regarding '*panchayet shalish*' (hamlet court) system, inheritance, marriages, birth and naming, and oral history. Though most Adibasis still make and drink traditional *haria* on every occasion and try to be distinct from Bangalee communities,[244] I observe that many Adibasis are leaning towards accommodating the Bangalee way of life and their new religious cultures into Adibasi cultures. The former Chairman of the Phulbari sub-district, who was one of the central leaders of the Phulbari resistance movement, told me with frustration:

> Adibasis themselves do not want to be 'Adibasi' because they are so marginalized that they cannot protest publicly. Moreover, they are losing their distinctiveness by the influence of the Church and NGOs. Their main identity was their culture, their livelihood, dress, languages, festivals, rituals, etc., but due to converting into Christianity, they now have to follow the Church's rule and the Father's order. Churches and NGOs are polluting their distinctiveness by engaging them into different religious functionalities and detaching them from Santal's customs and traditions. [245]

He observed that one of his friends who has a close relationship with Christian missions, started introducing himself as a Christian, not an Adibasi. They must struggle to keep their identity safe from the polluting influence of the dominant culture in society.[246] There was a case found in the Birampur Land Revenue Office where a man named Kanai Nunua claimed himself as a Santal man and tried to buy and register a piece of land from another Santal man. When the land officer informed a *Mandal* to confirm whether the man was a Santal or not, the *Mandal* reported to the officer that 'Nunua' was neither a member of a Santal clan (title) nor any of the Adibasi

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[241] Interview with S. Baske, in Ratanpur Village, Birampur, (Mar. 6, 2016).

[242] Interview with Cherobin Hembrom, Dhanjuri Hamlet, Birampur, (Apr. 5, 2016).

[243] Interview with S. Baske, in Ratanpur Village, Birampur, (Mar. 6, 2016).

[244] Cherobin told me that converted Christians are not using and drinking haria as their sacred deity anymore. *See* Interview with Cherobin Hembrom, in Dhanjuri, Hamlet, Birampur, (Apr. 5, 2016).

[245] Interview with A.I.B., in Phulbari Bazaar, (Mar. 14, 2016).

[246] *Id.*

clans in Bangladesh. Therefore, Kanai Nunua cannot be an Adibasi. Later it was proven that he was a Bangalee man who tried to forge the land deed.[247]

Furthermore, considering the current debate on the existence of Adibasi in pre-colonial settings in Bangladesh, I argue that the Indigeneity of people would not be suspended if any community was forced to leave their ancestral place and resettle involuntarily in another location of the same geographical area. However, the question arises whether those communities are still considered as Indigenous to a region or country if they are migrated from another area that was not colonized or occupied by colonial rulers. Given the above instance, are they going to lose their 'Indigenous' or 'Adibasi' identity? What about not speaking their distinct languages or becoming economically stable and educated? Alternatively, can we say, once an Indigenous is always an Indigenous, no matter what happens after? What about the self-expressed identity of people who are native speakers of an Indigenous language, live in a community with rituals and social institutions different from that of the cosmopolitan culture, and continue to adopt markers of ethnicity such as hairstyles and clothing and who, nevertheless, do not identify as Indigenous?[248]

CONCLUSION

The disregarded communities of Bangladesh have emphasized the need for official recognition as 'Adibasi' or 'Indigenous peoples.' They have also accentuated the importance of recognition of their right to land and control over natural resources. The Adibasi representatives, leaders, and activists have expressed their concern about development issues related to using land despite the signing of an agreement with the government.[249] However, the marginalized communities of Bangladesh meet the requirements of the international legal concept of 'Indigenous peoples.' The claim of the distinct ethnic communities in Bangladesh to the status of Indigenous peoples cannot be defeated on the ground of a lacking or unclear definition or for the common excuse that the entire Bangalee population of Bangladesh are Indigenous.[250] Moreover, one major challenge persists, as Bangladeshi Adibasi or Indigenous peoples are not recognized legally, and non-governmental development agencies are unlikely to gain government

[247] Interview with P. Murmu, in Boro Bukshi, Birampur, Dinajpur, (Mar. 3, 2016).

[248] Andrew Canessa, *Who is indigenous? Self-identification, indigeneity, and claims to justice in contemporary Bolivia*, URB. ANTHROPOLOGY & STUD. OF CULTURAL SYS. & WORLD ECON. DEV. 195, 209 (2007).

[249] Ahmed, *supra* note 46, at 51.

[250] *Id.*

approval for their projects and development initiatives if they use the term Adibasi or Indigenous peoples in their description of activities.[251]

In the above discussion, I reviewed various definitions of Indigenous peoples in international law. According to the definitions, Indigenous peoples are those people who have distinct identities and form non-dominance in society with long-standing persecution and marginalization history. In the case of the Indigenous situation in Bangladesh, after reviewing oral histories, participant observation, and interviews from Adibasi communities (especially Santals and Mundas) of the Phulbari mining area, Adibasi communities are the 'peoples' who can be identified as Indigenous peoples under international law. In my analysis, I have shown that Adibasis in the mining region retains most of the characteristics which have been identified by scholars and international institutions.. Most of the respondents recognized and identified themselves as 'Adibasi,' which means to understand the universally accepted term 'Indigenous peoples.' Moreover, local Bangalees also identified them as Adibasi, and they are habituated to calling them 'Adibasi.' Many respondents claimed that their ancestors had settled in the area long before Bangalees had settled in the area. Moreover, the historical documents I have reviewed also supported that the communities existed in time immemorial. Some even said that Adibasis migrated and settled in the mining area and other parts of Bangladesh from Jharkhand and Nagpur of current India (Bangladesh was also a part of India before 1947). However, in all instances, it is proved that Adibasi existed in the area before British colonial rule.

Adibasis are victims of colonial and post-colonial oppression and persecution. Their rights are violated, and their territorial lands are being alienated and grabbed by the dominant Bangalee people with the help of the government. Adibasis have traditions and customs of maintaining kinship networks, and they have strong ties with natural resources and their traditional knowledge. Interviewees also claimed that they maintain a sacred oral history of what they believe, maintain their religious and cultural functionality by following their tradition and customs, and have distinct languages that they practice among their communities. Through all of this, Adibasis find themselves as completely distinct communities from the dominant and majority Bangalees. The festivals and rituals Bangladeshi Adibasi communities observe are also unique. Furthermore, Adibasis are struggling to retain their distinct identity, and sometimes they fight for self-determination. As their properties are being illegally grabbed, alienated, and dispossessed by dominant Bangalees, they demand to establish a separate

[251] Dhamai & Chakma, *supra* note 206.

land commission to deal with this matter and return their lands. They also demand to recognize their language, culture, and traditions.

RESPECT, THE RIGHT TO SELF-IDENTIFICATION, AND THE SURVIVAL OF CULTURE

Alexandra D'Italia*

"I call them Adibasi because they love to be called Adibasi and I respect their self-recognition and identification."[1]

In or around 2002, I was in an art gallery. I don't remember where. But it was the first time the country of Bangladesh came into full focus. I was viewing Edward Burtynsky's photograph series, *Shipbreaking*.[2] The photographs, taken in a shipbreaking yard in Chittagong, Bangladesh, were post-apocalyptic. Shallow waters. Gigantic ships moored in the sand. Oil slicks. Workers with no shoes, let alone protective gear, feet deep in oil. Young workers' eyes upon me.

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[1] Mohammad Hasan, *Politics of Recognition and Indigenous Peoples in Bangladesh*, 30 SW. J. INT'L L. 126, 151 (2024).

[2] Edward Burtynsky, *Shipbreaking*, EDWARD BURTYNSKY, https://www.edwardburtynsky.com/projects/photographs/shipbreaking (last visited Nov. 21, 2023).

Edward Burtynsky, *Shipbreaking #13*, Chittagong, Bangladesh, 2000[3]

Edward Burtynsky, *Shipbreaking #10*, Chittagong, Bangladesh, 2000[4]

[3] Edward Burtynsky, *Shipbreaking #13*, EDWARD BURTYNSKY, https://www.edwardburtynsky.com/projects/photographs/shipbreaking (last visited Nov. 21, 2023).

[4] Edward Burtynsky, *Shipbreaking #10*, EDWARD BURTYNSKY, https://www.edwardburtynsky.com/projects/photographs/shipbreaking (last visited Nov. 21, 2023).

The Chittagong shipbreaking yards, despite court cases and public outcry, are still one of the most dangerous workplaces in the world.[5] According to Human Rights Watch, an "entire industry exists to enable shipowners to circumvent international regulations so that shipping companies can continue to cheaply discard ships in Bangladesh's dangerous yards."[6] That same report noted that Bangladeshi shipbreaking yards often take shortcuts on safety measures, dump toxic waste into the surrounding environment, and deny workers living wages. Bangladesh's labor laws go unenforced. In fact, a 2019 survey of shipbreaking workers estimated that thirteen percent of the workforce are children.[7]

These workers often come from the Northwest area of Bangladesh,[8] an area where Adibasi peoples live.[9] And yet, as Bangladesh's shipbreaking industry depends on marginalized communities for its workforce, the country does not respect how those communities want to be recognized.

When reading Dr. Mohammad Hasan's call to action for Bangladesh to recognize Adibasi[10] as Indigenous Peoples, these were my first thoughts. The art had burrowed into my soul, dormant until Dr. Hasan's article summoned it up to add color and texture to his argument. His article is timely and only underscores the importance of self-identification to not just the individual but a culture. The world is just beginning to appreciate the individual's lived experiences and how systems created by others fail those lived experiences. And consequently, fail an entire people. Dr. Hasan's argument for Bangladesh to recognize the Adibasis as Indigenous Peoples is not just

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[5] *See* Human Rights Watch, *Trading Lives for Profit: How the Shipping Industry Circumvents Regulations to Scrap Toxic Ships on Bangladesh's Beaches*, HUMAN RIGHTS WATCH (Sept. 28, 2023), https://www.hrw.org/report/2023/09/28/trading-lives-profit/how-shipping-industry-circumvents-regulations-scrap-toxic; *see also* John Vidal, *'Mollah's life was typical': the deadly ship graveyards of Bangladesh*, THE GUARDIAN (Jan. 31, 2020), https://www.theguardian.com/global-development/2020/jan/31/khalid-mollah-life-was-typical-the-deadly-ship-graveyards-of-bangladesh.

[6] Human Rights Watch, *supra* note 5, at 11.

[7] Human Rights Watch, *Bangladesh: Shipping Firms Profit from Labor Abuse, EU Should Revise Law to Promote Safe, Sustainable Ship Recycling*, HUMAN RIGHTS WATCH (Sept. 23, 2023), https://www.hrw.org/news/2023/09/27/bangladesh-shipping-firms-profit-labor-abuse (citing Dr. Muhammod Shaheen Chowdhury, *Study Report on Child Labour in the Shipbreaking Sector in Bangladesh*, NGO SHIPBREAKING PLATFORM (June 19, 2019), https://shipbreakingplatform.org/wp-content/uploads/2022/01/Child20Labor20Final_compressed.pdf).

[8] NGO Shipbreaking Platform, *Bangladesh*, NGO SHIPBREAKING PLATFORM, https://shipbreakingplatform.org/our-work/the-problem/bangladesh/ (last visited Nov. 21, 2023).

[9] Father R.W. Timm, *The Adivasis of Bangladesh*, MINORITY RIGHTS GROUP INT'L 15 (Dec. 1991), https://minorityrights.org/wp-content/uploads/2022/09/The-Adivasis-of-Bangladesh.pdf. *See also* Hasan, *supra* note 1, at 150.

[10] Note the spelling difference between the Adibasi Peoples in Bangladesh and the Adivasi Peoples in India. *See* Hasan, *supra* note 1, at 130.

poignant and compelling, it's urgent: Adibasi culture itself depends on Bangladesh's and the world's recognition of the peoples as Indigenous.

Honoring how a person, community, or people want to be recognized is currently part of our public discourse. Recently, I spoke at a conference about the changing nature of language.[11] There, I advocated for more than person-first language;[12] I argued that we do not define people by their disability, ethnicity, or race—unless, of course, they *want* to be identified as such.[13] For instance, many people in the Deaf community choose to be identified as Deaf and not as a person with hearing loss. The key point was to respect self-identification.

For many of us, that means we need to de-automate our processes and ask each individual about any descriptor or label we might use.[14] This paradigm shift is already in the rearview mirror for some of us and might now seem obvious: *Of course, of course, I should ask before I stick a label on another person.* And yet problems abound. Even well-meaning descriptors are given to groups who they themselves do not identify in that particular way. Consider, for example, the controversies surrounding the terms BIPOC and Latinx. These were labels created by a dominant culture to avoid othering, bias, and outright pejorative language. Yet these terms were not created by the groups themselves, did not take into account the groups' cultures, or even consider the diversity within the particular groups being labeled.

So too argues Dr. Hasan—and on a much larger scale. Dr. Hasan's work analyzes the term "indigenous peoples," but also discusses who even has the right to identify and define people as such. As he noted, scholars, policymakers, and legal instruments draw these distinctions, which necessarily include certain people and exclude others. While Dr. Hasan argues that other terminology has pushed large swaths of peoples to assimilate toward the descriptors or culture of the term, so too would the term indigenous peoples unless the people being discussed have a say in their own self-determination.[15]

Under-inclusion runs the risk of incentivizing people to move away from their own unique culture and move toward assimilating into the dominant culture to gain governmental protections. In essence, an entire people will shift away from their own unique culture merely to be seen. How very parallel to our own multicultural struggle in the United States. The only

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[11] Alexandra D'Italia, *Storytelling in the Fast-Changing Landscape of Inclusive Language*, Ninth Applied Legal Storytelling Conf. (July 28, 2023).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Hasan, *supra* note 1, at 149.

hope to prevent the eradication of non-dominant cultures is to embrace self-identification—a necessary precursor to self-determination.

"[A] Santal woman from an Adibasi hamlet of the mining area, claimed that the government is trying to disregard the existence of Adibasi in Bangladesh. . . . [T]he government is assimilating Adibasi communities into Bangalee cultures so that Adibasis forget their traditional practices.[16]

In looking for Adibasi literature and poetry—for me, a window into culture, I found that the Adibasis have oral traditions that rely on the power of variability of collective memory.[17] And so interestingly, the written form is both a step onto the global stage and a step towards assimilation.[18] In her 2022 article, Ms. Ruby Hembrom, the founder and director of an archiving and publishing outfit of and by Adivasi noted, "When one questions why we write or claim that we reject writing, it is a perverse, subtle way of denying us agency—refusing us elbow room in creative and literary fields and space as cultural peoples."[19] If there is any quotation in Ms. Hembrom's article that furthers the thesis of Dr. Hasan's argument, it is this: "If there's room for Adivasis, there's room for their writing, their thinking, their expressions, and their deviance from expected norms and standards of being."[20]

To protect the Adibasi culture while it emerges onto the world stage, I can only hope Dr. Hasan's argument bends Bangladesh and International Law toward justice. Because as Percy Bysshe Shelley wrote in his essay *A Defence of Poetry*, "Poets are the unacknowledged legislators of the world."[21] Poetry, that form of art stemming from oral tradition, can capture the rhythm and essence of a culture; it can hold a mirror up to a world; it can be revolutionary; and it can, very much indeed, echo a professor's call to action.

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[16] Hasan, *supra* note 1, at 165.

[17] *See* Ruby Hembrom, *Cohabiting a Textualized World: Elbow room and Adivasi Resurgence*, 56 MODERN ASIAN STUD. (SPECIAL ISSUE 5: MULTIPLE WORLDS OF THE ADIVASI) 1464-88 (Sept. 2022), https://eprints.lse.ac.uk/117294/1/Cohabiting_a_textualized_world.pdf. Note that Ms. Hembrom's description of the Adivasi culture in India is similar to the oral traditions Dr. Hasan discusses in his work.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] PERCY BYSSHE SHELLEY, *A Defence of Poetry* (1821)*, reprinted in* A DEFENCE OF POETRY AND OTHER ESSAYS (2004) (The Project Gutenberg ebook), https://www.gutenberg.org/files/5428/5428-h/5428-h.htm#link2H_4_0010.

Whose name is this?[22]

I was born on Somwar, Monday,
so, I was called Somra.
I was born on Mangalwar, Tuesday,
so, I am Mangal, Mangar, or Mangara.
I was born on Bruhaspatiwar, Thursday,
that is why I was called Birsa.
I stood on the chest of time
like the days of the week,
but they came and they changed my name.
They destroyed those days and dates
that marked my being.
Now I am either Ramesh, Naresh, or Mahesh
or Albert, Gilbert, Alfred.
I have names from every one of those lands
whose soil hasn't made me,
whose history is not my history.
I keep searching for my history
inside theirs and I realise
that each corner of this world,
in each place, I am the one being slaughtered
and each killing has a beautiful name.

[22] JACINTA KERKETTA, *Whose Name is This?, in ANGOR* (2016), *reprinted in* Jacinta Kerketta, *A Name and the Conspiracy of Naming*, JANATA WKLY. (Pratishtha Pandya, trans., Nov. 27, 2022), https://janataweekly.org/a-name-and-the-conspiracy-of-naming/.

THE UNENUMERATED RIGHTS PROVISIONS IN THE U.S. AND ARGENTINE CONSTITUTIONS: DIFFERENT PATHS FROM A PURPORTEDLY SINGLE SOURCE

Lucía Belén Araque*

INTRODUCTION

In his popular book *Democracy and Distrust*, John Hart Ely described two competing views on constitutional adjudication: one holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution"; the other urges that "courts should go beyond that set of references and enforce norms that

cannot be discovered within the four corners of the document."[1] An extra layer to this debate is added when constitutional provisions that refer to "unenumerated rights" come into play.

Some constitutions are guided by the approach that the absence of expressly stated rights must not be construed to deny other rights not explicitly delineated therein, thus granting unenumerated rights equal recognition and protection. At least formally, the U.S. Constitution takes this position. The Ninth Amendment led the way and has been the inspiration for similar provisions in Latin-American constitutions.[2]

The Constitution of Argentina contains an unenumerated rights provision—Article 33—borrowed from the Ninth Amendment to the U.S. Constitution. However, judicial treatment of these clauses varies significantly. While courts in the United States have seldomly drawn upon the Ninth Amendment, Argentine courts have consistently recognized substantive and procedural rights under Article 33.

References to the Ninth Amendment in decisions before the U.S. Supreme Court's ruling in *Griswold*[3] are scarce and trivial. Not even after this case—considered the most important one addressing the Ninth Amendment—did the provision become a sufficient basis for recognizing a right. Nor did the provision gain popularity among judges as a support of decisions reached on other grounds. Conversely, the use of Article 33 has been central to finding unenumerated substantive and procedural rights under the Argentine Constitution, such as those recognized by the Supreme

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[1] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (10th ed. 1980).

[2] Héctor Gros Espiell, *Los derechos humanos no enunciados o no enumerados en el constitucionalismo americano y en el artículo 29.c) de la Convención Americana sobre Derechos Humanos*, 4 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 145, 148 (2000).

[3] Griswold v. Connecticut, 381 U.S. 479 (1965).

Court of Argentina (*Corte Suprema de Justicia de la Nación*; hereinafter "CSJN") in cases like *Kot* (writ of *amparo*)[4] or *Sejean* (right to remarry).[5]

A few reasons could explain the dissimilar attitudes American and Argentine judges have toward their respective unenumerated rights provisions. First, the natural law[6] roots of the common law tradition—responsible for adopting the Ninth Amendment—lost ground to a more positivist[7] approach during the late nineteenth century, and U.S. judges became reluctant to utilize open-ended sources like the unenumerated rights provision. Second, a strong cultural component in American constitutional law discourages interpretive practices perceived as "undemocratic" while encouraging rather conservative ones, which prevents Ninth Amendment arguments from gaining traction. Third, legal practice in Argentina, though centered on codified rules, is perceived as a scientific discipline, and relies heavily on legal scholarship and general principles, which makes Argentine judges more willing to invoke open-ended sources such as Article 33. Fourth, unlike the United States, Argentina has a long-standing tradition of borrowing from other legal systems, so Article 33's open-endedness not only comes naturally to Argentine judges but also operates perfectly as a vehicle to "import" rights. Finally, although Article 33 shares much of the language of the Ninth Amendment, its wording suggests a different reading that facilitates (and even encourages) recognizing rights.

This article sheds light on why these two analogous constitutional provisions, one being the direct inspiration of the other, have not been given the same weight in their respective countries' case law. Part II deals with the origins of the unenumerated rights provision in the U.S. and Argentine constitutions. Parts III and IV explore through judicial decisions the different

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[4] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.); In the Argentine legal system, the writ of amparo is a procedural remedy that provides effective protection for rights other than physical liberty (which is exclusively protected through the writ of habeas corpus). It has been described as "a . . . suit of a summary nature roughly comparable to the Anglo-American writs of injunction and mandamus." Thomas E. Roberts, The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina, 31 OHIO ST. L. J. 831, 831 (1970).

[5] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/11/1958, "Sejean, Juan Bautista c/ Zaks de Sejean, Ana María s/ inconstitucionalidad del art. 64 de la ley 2393," Fallos (1986-308-2268) (Arg.).

[6] The concept of natural law has been the subject of numerous disputes. In its simpler form, "'natural law' is the understanding that there is a *universal morality naturally accessible to all rational people*." ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS 103 (2019). The term is frequently used to describe approaches that view law as intrinsically linked to moral principles. *See id.*

[7] As opposed to natural law, "[l]egal positivism is [. . .] often defined, minimally, as the contention that law has no necessary connection with morality." *Id.*

approaches to the unenumerated rights provision adopted in each country while outlining some features of the American and Argentine legal systems that could account for it. Part V offers a recap of the article and some closing thoughts.

I. THE HISTORY OF THE UNENUMERATED RIGHTS PROVISIONS

A. The Ninth Amendment to the U.S. Constitution

In 1787, delegates from the thirteen newly independent states were entrusted with proposing changes to the Articles of Confederation; instead, they proposed a Constitution that designed a new government.[8] Given their lack of authority for that enterprise, the Constitution had to be ratified, not by the Confederation Congress, but by the people themselves.[9] Special ratifying conventions were held throughout the states; debates in favor and against the Constitution raged for over a year in newspapers, taverns, and state legislatures.[10]

Those who opposed ratification came to be known as the "Antifederalists." Some of them rejected the Constitution altogether, while others tried to condition ratification on the prior enactment of a federal bill of rights.[11] They feared that the federal government would encroach on the people's natural rights, and declarations of rights had proven to be useful resources to limit abuses of power.[12]

The Federalists were reluctant to adopt a bill of rights for two main reasons. First, they deemed it unnecessary: the Constitution did not grant unlimited powers to the federal government.[13] People's rights were not at risk because Congress would not be able to, for example, censor the press, since that power was nowhere to be found in Article I.[14] Second—and

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[8] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 ix (2010).

[9] At least nine ratifications were needed to put the Constitution into effect.

[10] MAIER, *supra* note 8, at ix.

[11] Some pamphleteers, like the ones called "Federal Farmer" and "Brutus", wrote flyers in favor of this document at the federal level because bills of rights were already commonly found in state constitutions. KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 13 (2009).

[12] *See, e.g.*, Brutus II (Nov. 1, 1787), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST EDITED, WITH COMMENTARY AND NOTES, BY HERBERT J. STORING 117-22 (Herbert J. Storing ed., 1981).

[13] Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE 6, 7 (Randy E. Barnett ed., 1993).

[14] For James Iredell, for example, a bill of rights made sense in countries with unwritten Constitutions, that is, they were simply an English institution. But they would not be necessary in the United States; the people expressly declared in the Constitution the amount and extent of the power they gave to the federal government. People simply retained all the power not expressly handed away to a central authority. MAIER, *supra* note 8, at 418.

perhaps most importantly—a bill of rights would be dangerous: any enumeration might be construed as a closed list of rights that denied the existence of *other* rights.[15]

The Antifederalists had the upper hand, and the debate leaned towards rejecting ratification. Even James Madison, who had never fought for amendments as essential protections of the rights of the American People,[16] hoped that such a "nauseous project" would "kill the opposition."[17] He started arguing in favor of a series of amendments after ratification, which led to the Constitution being ratified by all but two states—North Carolina and Rhode Island—and coming into effect in 1789.

The Federalists won forty-eight of the fifty-nine seats in Congress in the first federal election,[18] and this overwhelming majority helped Madison submit to the House of Representatives a list of nine amendments to the Constitution. He had argued against them, but now that the Constitution was ratified, he thought they would "serve the double purpose of satisfying the minds of well-meaning opponents and of providing additional guards in favor of liberty."[19] The House submitted Madison's proposal—and amendments proposed by states—to a committee composed of a representative from each state. Madison was one of its members. Since he had previously opposed a declaration of rights, he had to consider carefully the arguments against it. He claimed first that a bill of rights was needed because, even though the federal government's powers were enumerated, it also had discretionary powers that could be abused.[20] Second, as to the dangers of misconstruing a bill of rights as encompassing an exhaustive list of rights, he proposed the following amendment:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[21]

The House of Representatives agreed to a list of seventeen amendments, and the Senate passed twelve of them.[22] Only amendments numbered three

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[15] James Wilson deemed the idea of a declaration "absurd": "If we attempt an enumeration [of rights], everything that is not enumerated is presumed to be given [to the authorities]." *Id.* at 108.

[16] Madison had written extensively to counter these arguments, emphasizing that such dangers were not realistic because Congress' powers were very limited. *Id*. at 455.

[17] *Id.* at 455-56.

[18] *Id.* at 433.

[19] *Id.* at 441.

[20] *Id.* at 451.

[21] Barnett, *supra* note 13, at 8.

[22] MAIER, *supra* note 8, at 454-55.

through twelve ended up being ratified, and the debate over the necessity and dangers of a bill of rights was finally settled with the last two amendments. The Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In contrast, the Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

B. Article 33 of the Argentine Constitution

Argentina's constitutional history is tainted with violence, chaos, and dictators. For more than thirty years after independence from Spain in 1816, the country tried—unsuccessfully—to unite the provinces of the former Viceroyalty of the Río de la Plata into a single federal government. Two somewhat liberal constitutions (1819 and 1826) were rejected due to their "unitarian" tendency (they created a centralized government located in Buenos Aires).[23] "Unitarians" thought the country should be ruled by members of Buenos Aires' elite, whereas "federalists" who were rural *caudillos* (warlords), wished to maintain their autonomy.[24] For over a decade, wars between unitarians and federalists made constitutional agreements impossible. In 1829, the debate was violently settled when Juan Manuel de Rosas, a federalist, established a dictatorship in the Province of Buenos Aires that lasted until 1852.[25]

For over twenty years, Rosas' political opponents were either executed or forced into exile, and soon, a liberal generation of intellectuals started planning, from abroad, a more federal national government that could gain support from the provinces.[26] When Rosas was defeated in February 1852 by another *caudillo*, Justo José de Urquiza, from the Province of Entre Ríos, the time finally came for a constitutional convention.[27]

Unlike the American colonies, the Río de la Plata region never had liberal governmental institutions. Spanish rule left no room for self-government, and three hundred years of colonial authority deeply rooted in

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[23] *See* MANUEL JOSÉ GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL: LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO 70-72 (2006).

[24] DAVID ROCK, ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSÍN 79-80 (rev. exp. ed. 1987).

[25] *Id.* at 103-04.

[26] *Id.* at 114.

[27] *Id.* at 120.

the legal culture were not easy to dismiss.[28] The drafters of the Argentine Constitution sought to create a liberal government for the first time while eliminating colonial approaches. A group of liberal thinkers led by Juan Bautista Alberdi and Domingo Faustino Sarmiento thoroughly studied the U.S. Constitution, and their writings shaped the work of the National Convention.[29]

One of the drafters, José Benjamín Gorostiaga, indicated that the document was "cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world."[30] The Madisonian influence in the Convention was profound. Its members suggested incorporating key aspects of American constitutionalism: federalism, separation of powers (with checks and balances), a government of limited and enumerated powers, and a bill of rights.[31] All four ended up in the Constitution of the Argentine Confederation, which was enacted in 1853.[32]

However, Buenos Aires had refrained from sending delegates to the Convention and thus remained a separate sovereign entity until 1860. When it finally agreed to join the Confederation, Sarmiento, on behalf of the province, strongly argued in favor of a series of reforms to the text of the 1853 Constitution to make it even more similar to that of the U.S.

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[28] *See* Jonathan Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483, 1499-1500 (1997).

[29] *Las bases y puntos de partida para la organización política de la República Argentina*, written by Alberdi in 1852, is considered the fundamental text of Argentine constitutionalism. *See* GARCÍA-MANSILLA & RAMÍREZ CALVO, *supra* note 23, at 31-55 (discussing the importance of Alberdi's writings and the influence of American constitutionalism on the Alberdian vision). See *infra* note 33 for a comment on Sarmiento's most influential work.

[30] Miller, *supra* note 28, at 1515 (statement of José Benjamín Gorostiaga at the Congreso General Constituyente de la Confederación Argentina, Session of Apr. 20, 1853) (quoting 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 468).

[31] GARCÍA-MANSILLA & RAMÍREZ CALVO, *supra* note 23, at 16.

[32] This document, unlike the U.S. Constitution, did not require ratification from the provincial legislatures to come into effect. In 1852, representatives from thirteen of the fourteen provinces that constituted the Argentine Confederation signed and ratified the San Nicolás Agreement, which laid the foundations of the national organization of Argentina and served as a precedent for the 1853 Constitution. Article 12 of the agreement stated that after the Constitutional Convention had approved the text of the Constitution, the person in charge of the Confederation's foreign affairs would immediately promulgate and enforce it as the Law of the Nation. Acuerdo celebrado entre los gobernadores de las Provincias Argentinas en San Nicolás de los Arroyos, el 31 de mayo de 1852, *in* LAS CONSTITUCIONES DE LA REPÚBLICA ARGENTINA 399-407 (Faustino J. Legón & Samuel W. Medrano eds., 1953). The Province of Buenos Aires was a signatory to the San Nicolás Agreement but never ratified it due to a series of confrontations that ended up with its secession from the Confederation, which lasted until 1861. *See* ROCK, *supra* note 24, at 121.

Constitution.[33] An Examining Committee to propose said amendments was appointed by the province. Sarmiento was one of its members, so, unsurprisingly, the body accorded great deference to the U.S. constitutional experience.[34] The Committee treated the U.S. Constitution as natural law and disregarded Argentine practices in public law.[35] Dalmacio Vélez Sarsfield, another Committee member, criticized the 1853 Constitution because its drafters "did not respect [the U.S. Constitution's] sacred text, and an ignorant hand made deletions or alterations of great importance, pretending to improve it."[36] One of those "deletions of great importance" was the Ninth Amendment. According to Vélez Sarsfield, the lack of this clause demonstrated only that "those who deleted it knew less than those who made that great Constitution."[37]

In 1860, the Constitution was revised, and, among other modifications, an unenumerated rights provision, Article 33, was incorporated.[38] Its text reads: "The declarations, rights, and guarantees which the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated, but which issue from the principle of sovereignty of the people and from the republican form of government."[39]

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[33] The same year the 1853 Constitution came into effect, Sarmiento published *Comentarios de la Constitución de la Confederación Argentina*. There, he strongly suggested that, given the American influence on the specific wording used in the Argentine Constitution, its method of interpretation had to be precisely that of U.S. constitutional law; the work of American commentators and U.S. Supreme Court precedents had to be binding if the Argentine Constitution were to be interpreted correctly. Domingo Faustino Sarmiento, *Comentarios de la Constitución de la Confederación Arjentina* [sic]*, con numerosos documentos ilustrativos del texto* 8 (1st ed. 1853). He further argued that "it would be monstrous, if not to say ridiculous, to pretend that the same ideas, expressed with the same words, for the same ends, might produce different results in our Constitution or have a different meaning." *Id.* at 9-10.

[34] *See* Convención del Estado de Buenos Aires, Informe de la Comisión Examinadora de la Constitución Federal, Session of Apr. 26, 1860, *in* 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 769, *quoted in* Miller, *supra* note 28, at 1524 ("[T]he criteria of the provincial convention in formulating its reforms has been the science and the experience of the analogous or similar Constitution which is recognized as most perfect,—that of the United States—because it is the most applicable and is the standard of the Constitution of the Confederation.").

[35] Miller, *supra* note 28, at 1524-25.

[36] Convención del Estado de Buenos Aires, Informe de la Comisión Examinadora de la Constitución Federal, Session of Apr. 26, 1860, *in* 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 791 (statement of Dalmacio Vélez Sarsfield), *quoted in* Miller, *supra* note 28, at 1525.

[37] *Id.*

[38] Miller, *supra* note 28, at 1530.

[39] Art. 33, Constitución Nacional [Const. Nac.] (Arg.).

II. THE NINTH AMENDMENT: A DIRECT SOURCE OF NATURAL LAW RIGHTS

The question as to what type of rights are those that cannot be found within the four corners of the U.S. Constitution has received completely different answers. Some scholars have argued that the Ninth Amendment simply refers to a "collective right" of the People to alter or abolish government through means other than the amendment mechanism in Article V, that is, by holding a constitutional convention.[40] Others have suggested that its purpose was not to protect rights found outside the constitutional text, but "residual" rights in it, meaning those that could be discerned by virtue of the limited powers scheme put into place.[41] But the most persuasive reading of the Ninth Amendment is that the Founders firmly believed in natural law, and were thus pointing to rights the People already had regardless of what any positive law could possibly enumerate or declare. Simply put:

> [T]he unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, should be treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights.[42]

This last interpretation can be read through some of the cases in early American history. In *Calder v. Bull* (1798), for example, Justice Chase considered the appropriate role of natural law in constitutional interpretation.[43] He argued that "the purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it."[44] He added that "[an] act of the legislature (for I

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[40] AKHIL REED AMAR, THE BILL OF RIGHTS. CREATION AND RECONSTRUCTION 120 (1998). In fact, Amar suggests that to see the amendment as a "palladium of countermajoritarian individual rights—like privacy—is to engage in anachronism." *Id.*

[41] Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE 271, 272-73 (Randy E. Barnett ed., 1993).

[42] Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).

[43] Calder et Wife v. Bull et Wife, 3 U.S. 386 (1798). This Supreme Court case concerned a Connecticut law that ordered a new trial in a will contest, setting aside a judicial decree that had denied inheritance. Justices Chase and Iredell, while agreeing that the statute did not amount to an ex post facto law, disagreed over the appropriate weight natural law had in constitutional interpretation.

[44] *Id.* at 388.

cannot call it a law), contrary to the great first principles in the social compact, cannot be considered a rightful exercise of legislative authority."[45]

Years later, in *Fletcher v. Peck* (1810), the Supreme Court held that a Georgia law that had rescinded a grant of land conveyed to innocent owners was unconstitutional and did so relying partly on natural law principles.[46] Chief Justice John Marshall indicated that legislative power is limited not only by "the words of the constitution," but also by "the general principles of our political institutions."[47]

This idea that rights were ultimately grounded in natural law was also present in how common-law rights were adjudicated at the time. An early example of this can be found in an 1823 Pennsylvania Circuit Court case, *Corfield v. Coryell,* in which a vessel was seized, condemned, and sold for violating a New Jersey law that prohibited taking oysters from a river.[48] In finding that the law had infringed the Privileges and Immunities Clause of Article IV of the Constitution, the court defined these privileges and immunities as those which are "in their nature, fundamental; which belong, of right, to the citizens of all free government; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[49] The court cited as examples, among others, the right to acquire, possess, and dispose of property; to pursue and obtain happiness and safety; to pass through or to reside in any other state; and to institute and maintain actions of any kind in the courts of the state.[50] Certainly, attributes of property and the pursuit of happiness and safety would have been basic common law concepts.[51] Why, then, has the Ninth Amendment been rarely invoked in constitutional jurisprudence? One answer lies in the drastic transformation of legal practice that took place in the U.S. during the late nineteenth century when the natural law roots of the common law were abandoned in favor of

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[45] *Id.* As examples of legislative acts contrary to those "great first principles" and thus not enforceable, he mentioned "a law that punishe[s] a citizen for an innocent action . . . ; a law that destroys, or impairs, the lawful private contract of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from [one] and gives it to [another]". *Id.*

[46] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW. PRINCIPLES AND POLICIES 907 (5th ed. 1995).

[47] Fletcher v. Peck, 10 U.S. 87, 139 (1810).

[48] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

[49] *Id.*

[50] *Id.* at 551-52.

[51] Blackstone considered that natural law—which he defined as those laws "that existed in the nature of things antecedent of any positive precept"—and "the happiness of each individual" were "inseparably interwoven". William Blackstone, Commentaries *40. He viewed the rule "that [a] man should pursue his own true and substantial happiness" as the "foundation" of natural law. *Id.* at *41. Blackstone also identified "the right of personal security, the right of personal liberty; and the right of private property," *id.* at *129, as "absolute rights" i.e. those rights "vested in [individuals] by the immutable laws of nature," *id.* at *124.

a more positivist approach.[52] Another answer has to do with the ramifications of American "constitutionalism [being] a matter of political identity."[53]

A. Legal Positivism Takes the Lead

Legal positivism was formulated in the eighteenth and nineteenth centuries by Jeremy Bentham and John Austin as a reaction to William Blackstone's theory of the common law, particularly his belief that its authority derived from natural law.[54] Both thinkers "insisted on the need to distinguish . . . law as it is from law as it ought to be."[55] Their philosophy rested on the principle of separation between law and morals.[56]

Bentham and Austin's ideas made their way to the United States after the Civil War, where they gained popularity.[57] Americans developed their implications along two lines: one line, called "analytical" jurisprudence, "emphasized the importance of clarifying legal concepts and categories, and sought to organize doctrine into ordered sets of internally consistent principles."[58] The other line, known as "pragmatic" jurisprudence, rejected the abstractness of the analytical approach and "argued that law was an evolving human phenomenon that could be understood only contextually and empirically."[59] Christopher Columbus Langdell was the leading proponent of the former, while Oliver Wendell Holmes Jr. was the main exponent of the latter.

Langdell, who was appointed Dean of Harvard Law School in 1870, forever changed American legal education by introducing the case method of study that replaced traditional textbook lectures on broad topics of the

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[52] *See* FORSYTH, *supra* note 6, at 103 ("As American common law was worked out in the . . . nineteenth century, natural law was subsumed into its details; except in rare circumstances – notably in the arena of international law – common law less frequently appealed to natural law, for judges and jurists could now turn to the developing body of principles and precedents constitutive of American common law.").

[53] Paul Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 198, 206 (Michael Ignatieff ed., 2005).

[54] Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2062-63 (1995).

[55] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958).

[56] Austin formulated this thesis in the following terms: "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not found positive conformable to an assumed standard, is a different enquiry." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (1995).

[57] *See* Edward A. Purcell Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1466 (2015).

[58] *Id.* at 1472.

[59] *Id.*

law. The case method was "a representation of, and the means to create and support" Langdell's concept of law.[60] He thought of law as a science akin to geometry, consisting of principles or doctrines.[61] Like geometric principles, "[t]he law was to be discovered and extracted from its [sole] source [(rulings)] . . . by *induction*."[62] Law students had to infer legal principles from the study of courts' decisions found in reported cases, "thereby developing their own analytical powers,"[63] but it was the identification of those principles that mattered, not their explanation or justification.[64] So, where early nineteenth-century jurists would have resorted to natural law considerations, Langdellian-trained practitioners appealed to precedents; only the "historical determinations of judges provided the material of the law, and not human nature or philosophical reflection thereon."[65]

The Langdellian model of legal education fostered a different understanding of the grounding of the U.S. legal system. By focusing entirely on what was "contained in printed books"[66] and thus discouraging wide-ranging investigations of questions beyond the law,[67] "Langdell's science of the law – known and perpetuated in the case method – helped to displace natural-law forms of thinking about the law."[68] In legal discourse, common law rights were no longer grounded in natural law, but rather in a body of doctrine that emerged from prior judicial decisions, systematically studied, and from which legal principles could be coherently deduced.[69]

Langdell's approach contributed to "natural law los[ing] its hold on the common assumptions of most lawyers,"[70] but it was the Holmesian vision that profoundly shaped American law and marked its definitive break with natural law. Skeptical about the supposedly scientific basis of Langdell's ideas, Holmes believed that law was just what the courts did and that the task of lawyers was, therefore, to predict judicial decisions, not to determine right answers.[71] While the case method may have left no place for natural law in legal reasoning, Holmes denied its existence altogether. He criticized natural

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[60] FORSYTH, *supra* note 6, at 110.

[61] *Id.*

[62] *Id.* at 111.

[63] Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI. -KENT L. REV. 429, 449 (1981).

[64] FORSYTH, *supra* note 6, at 122.

[65] *Id.*

[66] BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION. C. C. LANGDELL, 1826-1906 350 (2009).

[67] Stein, *supra* note 63, at 454.

[68] FORSYTH, *supra* note 6, at 121.

[69] *See* PAUL W. KAHN, LEGITIMACY AND HISTORY. SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 110 (1993).

[70] Richard. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 UNIV. PA. J. CONS. L. 401, 402 (2007).

[71] FORSYTH, *supra* note 6, at 126-27.

law jurists for "reading their personal values" into the law[72] and turning them into universal standards.[73] Instead, he claimed, law "should correspond with the actual feelings and demands of the community, whether right or wrong."[74] Holmes' approach was pragmatic: the law could not be axiomatically induced from precedents; its substance had much to do with what society understood to be convenient at a particular time.[75] In his own words: "the life of the law has not been logic: it has been experience."[76]

Holmes preached his moral skepticism not only as a legal scholar, but also from the bench. He argued that once natural law is taken out of the picture (because there is no such thing, actually), and "scientific" legal reasoning attacked as a farce, all that is left for judges to do is apply whatever society had set forth as the law. Holmes became wary of the counter-majoritarian tension that grew each time judges invalidated statutes for an alleged normative conflict with higher principles of law grounded in whichever source. This caution, as exercised in his famous dissent in *Lochner v. New York*,[77] led him to argue in favor of a rather radical democratic deference.[78]

It is no surprise that Holmes' jurisprudence ended up being the perfect vehicle for early twentieth-century progressives to insist on social and economic reform and governmental regulation.[79] Their faith in legislatures resonated with Holmes' deference to the will of the majority and his attack on natural law and "scientific" legal reasoning (on which conservative judges of the time relied to strike down progressive legislation).[80] In fact, "the use of positivist ideas . . . [against] the judiciary became habitual and reflected a fundamental change in American law and governance since the Civil War."[81]

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[72] Purcell, *supra* note 57, at 1498.

[73] *See* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) ("The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.").

[74] OLIVER WENDELL HOLMES JR., THE COMMON LAW 41 (Little Brown and Company, 1951) (1881).

[75] *Id.* at 1-2.

[76] *Id.* at 1.

[77] *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (J. Holmes, dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

[78] *See* I HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953) ("If my fellow citizens want to go to Hell I will help them. It's my job.").

[79] *See* Purcell, *supra* note 57, at 1475-77.

[80] *See id.* at 1498.

[81] *Id.* at 1500-01.

Both Langdell's approach and Holmes' theory "exclude[d] the broader normative principles that common law courts had traditionally invoked . . . ."[82] With natural law forever displaced from the American legal system, the possibilities of developing Ninth Amendment jurisprudence vanished. In a framework where courts are to decide cases based on rules established by precedents and "without appeal[ing] to special claims of justice" or "higher-order" justifications,[83] there is no room for an open-ended provision that brings natural rights to the table.

Positivism has made the practice of law in the United States extremely "legalistic": litigants and judges resort to "pre-existing rules and doctrines—purified by Langdell or reduced by Holmes—to make the legal system predictable, consistent, and knowable."[84] Neither dare to make a Ninth Amendment case. Of course, they may still believe that natural law exists, or even that it demands a certain outcome as a matter of universal justice, but courtrooms are no longer an appropriate place for discussing these issues.[85] As of the late nineteenth century, litigation tools are limited to "human-made sources of law," irrespective of personal religious or philosophical convictions.[86]

Contrary to Argentina's civil law tradition—as I will argue in Part IV(a)—the American positivist common law approach forces practitioners to deal with novel cases by exclusively relying on (and drawing from) precedents. Invoking abstract, vague, immutable principles of justice is neither necessary nor encouraged. Even when dealing with a constitutional issue, lawyers and judges only use Supreme Court precedents to derive constitutional principles to be applied in cases not covered by the text of the Constitution. As David Strauss put it, "there are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings."[87] The Constitution is interpreted not only by reading its text but by "[relying] on the elaborate body of law that has developed, mostly through judicial decisions, over the years."[88] Cases not

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[82] Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 RATIO JURIS 26, 29 (2002).

[83] *Id.* at 48.

[84] *Id.* at 49.

[85] STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 5 (2021).

[86] *See id.* at 1 ("In 1850, when a lawyer spoke in court, it would have been entirely normal for the lawyer to discuss the law of nature alongside statutes and court decisions as acknowledged sources of law. Today, if a lawyer tries to discuss natural law in court, the judge will look puzzled, and opposing counsel will start planning the victory party. Natural law is no longer a part of a lawyer's toolkit.").

[87] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

[88] *Id.*

within the four corners of the Constitution are argued and adjudicated from principles that prior rulings have elaborated from its textual provisions. For example, instead of arguing that there is a natural right to burn the American flag, once the Supreme Court has reached a principled decision in which some conduct is recognized as an expression of thought or ideas,[89] litigants and courts claim that flag burning—which the Constitution does not explicitly protect—falls within the scope of the First Amendment.[90] There is no need to rely on the Ninth Amendment (and conjure natural law); an enumerated right (free speech) shaped by precedents provides a solid grounding.

Once we understand the Ninth Amendment as a direct and natural law-inspired source from which rights can be drawn, then the reluctance of lawyers and judges to employ it as an argument in cases not covered by other constitutional provisions seems easier to comprehend. A rare exception to this approach can be found in *Griswold*. Justice Goldberg's concurring opinion is a bold attempt to give teeth to the Ninth Amendment. By recognizing the right to marital privacy (in relation to the use of contraceptives) under the unenumerated rights provision, he invited the Court to rethink the Ninth Amendment as a tool for finding fundamental rights without having to ground them in specific amendments.[91]

B. The Fixation with "We the People"

With the positivist reshaping of the American legal system that occurred in the late nineteenth century, it is possible to argue that conservative theories of interpretation have pushed the Ninth Amendment even further away from Justice Goldberg's proposed reading. Consider Robert Bork's defense of originalism during his testimony before the Senate in 1987. When asked about why the Ninth Amendment had little to no useful application, he answered the following:

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[89] *See* Stromberg v. People of State of Cal., 283 U.S. 359, 369-70 (1931). The Supreme Court struck down as a First Amendment violation a California law that prohibited the display of a red flag as a symbol of opposition to government. The conduct at issue was considered a form of expression constitutionally protected.

[90] *See* Texas v. Johnson, 491 U.S. 397, 404-06 (1989). Johnson was convicted of desecration for burning the American flag. The Supreme Court found that such an action intended to convey a particularized message (disagreement with Ronald Reagan's renomination as President) which was "overwhelmingly apparent," and thus considered it "expressive conduct" protected by the First Amendment. *Stromberg v. People of State of Cal*. was enough to justify the existence of the right to burn the American flag as part of the constitutional framework.

[91] Griswold v. Connecticut, 381 U.S. 479, 486-95 (1965) (Goldberg, J., concurring).

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot.[92]

Originalism has tried—rather successfully—to put the final nail in this amendment's coffin. Its animosity towards the mere idea of unenumerated rights comes from a more general theory of the role of the judiciary and the nature of the Constitution. It identifies the Constitution with what it was understood to mean by those who ratified it; to abandon the original understanding is to abandon the Constitution itself and to engage in political judging.[93] Judges, originalists claim, ought not to engage in value judgments but merely apply the self-interpreting constitutional text.[94] Such an open-ended provision like the Ninth Amendment would simply be too dangerous; judges might read into it whichever right they think would better serve the law, the country, or society. For Bork—as for many originalists—"adherence to the original understanding is justified because the abandonment of that understanding will lead judges to make 'moral choices' they have not been authorized to make."[95]

Conservative theories of constitutional interpretation stress a belief that already permeates constitutional discourse in the United States: law is the product of a deliberate choice made by the popular sovereign ("We the People"). This does not necessarily require that the meaning of the Constitution is fixed forever at the time each provision was enacted, as originalism suggests,[96] but only that it locates the ultimate source of authority in a democratic foundational act.[97] There is maybe room for legal development as societies evolve, but the law's application to new circumstances is never seen as an act of judge-made law, but rather as demanded by the law itself in the first place. This makes it very difficult for arguments about unenumerated rights to prosper in court. The American way of doing constitutional law is more consistent with a claim that an already enumerated right—thought of by the Framers and enacted by "We the People"—has a bigger scope than it was originally thought to have, than with a claim for a novel right lacking textual support.

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[92] *Robert H. Bork, of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States, vice Lewis F. Powell, Jr., retired: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (testimony of Robert H. Bork).

[93] Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 206 (1991).

[94] *Id.* at 215.

[95] *Id.* at 213.

[96] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B. U. L. REV. 1953, 1958 (2021).

[97] *See generally* Paul W. Kahn*, Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

Believing that law results from collective self-authorship that has also prevented the success of other types of arguments: those that explicitly rely on foreign or international law. What courts from abroad have done in the past or the consensus that has been reached by the international community, although of great importance to comparative law scholars, has limited relevance in American judicial decision-making.[98] Self-sufficiency is a distinctive feature of the U.S. legal system; "American judges are resistant to using foreign . . . [or international] precedents to guide them in their domestic opinions."[99] U.S. courts base their legitimacy on the claim that their opinions express the will of the popular sovereign, not universal reason as reflected by comparative and international practice.[100] American constitutional discourse turns heavily toward "the Framers, original intent, and the historical artifact of the text" while "[rejecting] . . . natural law, legal science, and claims of universal rights."[101]

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[98] This does not mean that there are no decisions by U.S. courts invoking comparative or international practice. Even the Supreme Court has used it as persuasive authority in the central constitutional areas of cruel and unusual punishment, and due process. For example, in *Roper*, the Court held the juvenile death penalty unconstitutional under the Eighth Amendment. In determining the content of "evolving standards of decency" that guide what constitutes "cruel and unusual punishment," the Court relied on the contemporary national consensus confirmed by global affirmations. *See* Roper v. Simmons, 543 U.S. 551, 575-578 (2005). In *Lawrence*, the Court held unconstitutional the criminalization of same-sex relations between consenting adults under the Due Process Clause of the Fourteenth Amendment. The Court turned to English law and the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom* to overrule a constitutional precedent. *See* Lawrence v. Texas, 539 U.S. 558, 572-73 (2003). However, these two areas are "exceptional areas, and neither are developed primarily with reference to international human rights." Jonathan Miller, *The Influence of Human Rights and Basic Rights in Private Law in the United States*, 62 AM. J. COMP. L. 133, 147 (2014). The truth is that the U.S. Supreme Court and lower courts have been much less inclined to look into these sources to aid them in their own deliberative process than courts of other countries.

[99] Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 8 (Michael Ignatieff ed., 2005).

[100] Justice Scalia embodies—to an extreme degree—this approach. During a famous televised conversation with Justice Breyer on the constitutional relevance of foreign court decisions, Justice Scalia was asked the following question: "if our courts look at another country's courts and they're able to find opinions that are persuasive on the merits, why couldn't that be a way of informing our judges in a positive way?" His response is illustrative of U.S. courts' historical tendency to ignore foreign or international law: " . . . your question assumes that it is up to the judge to find THE correct answer. And I deny that. I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says. . . . [T]he Constitution should keep up to date, but it should keep up to date with the views of the American people. And on these constitutional questions, you're not going to come up with a right or wrong answer; most of them involve moral sentiments." Federal News Service, Inc., *Constitutional relevance of foreign court decisions*, C-SPAN (Jan. 13, 2005), https://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions.

[101] Kahn, *supra* note 97, at 2696.

The lack of Ninth Amendment jurisprudence is, therefore, hardly surprising. While foreign courts might willfully engage in transnational dialogues, drawing from collective experience to recognize unenumerated rights or expand the scope of enumerated rights under their respective legal orders,[102] sources that are completely detached from the democratic foundational act of the enactment of the U.S. Constitution are not seen as emerging from the will of "We the People," and are thus out of line in American constitutional law practice.[103] Attempts to interpret domestic constitutional law in light of comparative or international sources are usually criticized as undemocratic moves.[104] The reluctance to look into foreign and international law prevents U.S. courts from drawing from those transnational dialogues to give substance to the Ninth Amendment and turn it into a useful litigation and adjudication tool.

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[102] For example, in *Hopkinson v. Police*, the New Zealand court of appeals had to decide whether setting fire to the country's flag was a way of dishonoring a national symbol under the Flags, Emblems, and Names Protection Act of 1981 or whether it was protected by the free speech provisions of the New Zealand Bill of Rights Act of 1990. Justice France cited *Texas v. Johnson* to argue that the state's aims of preserving the flag as a symbol of national unity and the prevention of breaches of the peace were legitimate ones. However, to find if a ban on flag burning was a rational and proportionate means of advancing those legitimate aims, she turned to a case from Hong Kong in which a similar restriction was upheld on the grounds of special exigencies of public order due to the Hong Kong's delicate position in relation to China. In the end, she relied on a New Jersey case from 1941 to narrowly interpret the word "dishonor" (in the flag protection statute) to mean "defile" or "vilify." Given that Hopkinson's conduct was nothing of the sort, the conviction was reversed. For a brief account of the case, see JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 109-10 (2012).

[103] *See* Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L. J. 1283, 1327 (2004) ("Th[e] 'everyone's doing it' approach to constitutional interpretation requires explanation and justification. Yet, to date, neither the [Supreme] Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law.").

[104] Consider, for example, Justice Scalia's dissent in *Roper*: "I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment. […] Foreign sources are cited today, *not* to underscore our 'fidelity' to the Constitution, our 'pride in its origins,' and 'our own [American] heritage.' To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources 'affirm,' rather than repudiate, is the Justice's own notion of how the world ought to be, and their diktat that it shall be so henceforth in America." Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

III. ARTICLE 33: A PRINCIPLE OF INTERPRETATION

During the first three decades after the sanction of the 1860 Constitution, Argentina's institutions tried to model those of the United States. The CSJN engaged in constitutional discourse by citing and debating U.S. court decisions, treatises, and legislative practices.[105] Senator and former President Bartolomé Mitre argued openly that "our written law is the Constitution, and our subsidiary law, where we must search to discover the true doctrine, is the case law of the [American] Constitution which we took for a model."[106]

Despite an early mention of Article 33 in a case that had little to do with unenumerated rights,[107] this provision remained unused during this period. Up until the 1920s, the CSJN seemed to follow in the footsteps of its American counterpart. Surprisingly, the CSJN cited Article 33 regularly throughout the rest of the twentieth century and continues to do so today. The attitude of Argentine judges towards Article 33—which so sharply contrasts with U.S. courts' sentiments regarding the Ninth Amendment—can be explained by three main factors. The first relates to civil law's scientific methodology in Argentina; the second is linked to the openness of the Argentine legal system to foreign and international law influences; and the third one concerns the wording of Article 33.

A. The Civil Law Tradition

Argentine legal culture quickly fell victim to nineteenth-century European rationalism,[108] of which codification was its most advanced and

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[105] *See* Miller, *supra* note 28, at 1544.

[106] Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1869, Sess. of Sept. 11, 1869, at 691 (statement of Senator Mitre), *quoted in* Miller, *supra* note 28, at 1545.

[107] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/05/1865, "Don Domingo Mendoza y hermano c. Provincia de San Luis s/ derechos de exportación," Fallos (1865-3-131) (Arg.). The issue was whether the Province of San Luis could tax goods that were manufactured in its territory to be later transported out of the province. The Court referred to Article 33 and then Article 104 (now Article 121, which states that "[t]he provinces reserve to themselves all the powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation") but relied on the constitutional provisions prohibiting provinces from imposing imposts or duties on imports and exports to hold San Luis' legislation unconstitutional. *Id.* at 136-37.

[108] VÍCTOR TAU ANZOÁTEGUI, LAS IDEAS JURÍDICAS EN LA ARGENTINA (SIGLOS XIX-XX) 17-18 (Editorial Emilio Perrot, 1977).

popular technique.[109] Drafting a legal code entails an extraordinary effort to foresee and legislate all possible human interactions[110] in a methodical fashion. The emphasis on systematizing that such a project places encourages a perception of legal practice as a scientific endeavor.[111] Indeed, Argentine legal scholar and politician José María Moreno claimed that "[Argentine] private law, especially . . . civil law, is essentially scientific, a true product of science, and founded in doctrine . . . ."[112] Mitre, who appointed Argentine legal scholar Vélez Sarsfield to single-handedly draft a Civil Code for Argentina, argued that since the code was a work of science, the Argentine Congress had no choice but to accept it as a whole without any deliberation.[113]

Codification makes profound changes in the legal culture of a country. Law becomes a matter of applying the right rules, not crafting creative arguments, so lawyers see themselves as technicians, as "operator[s] of a machine designed and built by others."[114] Legal scholarship becomes "pure and abstract, relatively unconcerned with the solution of concrete social problems or with the operation of legal institutions" since its main goal is to "build a theory or science of law."[115] But how do courts cope with unforeseen circumstances of fact? Given the very little weight precedents have in the civil law tradition, they rely on legal scholarly work and general principles.[116]

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[109] Rationalism is the philosophical belief that human reason is the sole source of knowledge. *Id.* at 23. "Natural law as it was understood by the philosophers and lawyers of the Enlightenment [that is, as the law of human reason] gave impetus to the codification . . . of legal systems, particularly as they affected private relations." Horst Klaus Lücke, *The European Natural Law Codes: The Age Of Reason And The Powers Of Government*, 31 U. OF QUEENSLAND L. J. 7, 7 (2012).

[110] For example, a civil code covers private law relating to contracts, torts, family relationships, and property. *Id.* at 11 n.28.

[111] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 452 (2000).

[112] José María Moreno, *Introduction* to LUIS V. VARELA, I CONCORDANCIAS Y FUNDAMENTOS DEL CÓDIGO CIVIL ARGENTINO I, IV (1873).

[113] Congreso Nacional, *Diario de sesiones de la Cámara de Senadores*, Session of Sept. 25, 1869, at 825 (statement of Senator Mitre), *quoted in* Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 106 (1997) ("Congress has entrusted the drafting of the civil code to men of science because it is a scientific operation.").

[114] John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 866 (1975).

[115] *Id.* at 867.

[116] According to Merryman and Pérez-Perdomo, this is how legal science is done in civil law: "[t]he scholar takes the raw materials of the law and, by an inductive process sometimes called logical expansion, reasons to higher levels and broader principles. These principles . . . reveal on further study the even broader principles of which they are only specific representations, and so

Civil law methodology ended up permeating public law. Constitutional law issues are also settled by reference to the work of commentators on the Constitution or general principles. As Argentine legal scholar Rafael Bielsa said:

The study of constitutional law much like any law, public or private, requires a method that is determined by the type of discipline[.] . . . This method must be *juridical,* that is, an *inductive* and *deductive* method; the inductive one is undoubtedly essential, since it is through it that *principles* are established."[117] The Constitution is thought to contain both rules and principles, the latter being "fundamental propositions that dominate over other provisions, not only from the Constitution but from the entire legislative system (private and public laws).[118]

If law (private or public) is a scientific activity, then lawyers and courts do not have to deal with the democratic objections that arise in the United States when a party or a group argues in favor of a right not explicitly mentioned in the text of the Constitution. Argentina had indeed its foundational act of adopting a Constitution in 1853/60, but the content of the document is not determined by what the Drafters intended or the public meaning of the provisions they enacted. The gaps and penumbras in the Argentine constitutional text are sorted out via scholarly work or scientific principled reasoning.[119]

This encourages Argentine courts to use open-ended sources like Article 33. If what lawyers and judges are doing is "legal science,"[120] using

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on up the scale. The principles derived by logical expansion are, at one level, the 'provisions that regulate similar cases or analogous matters' and, at a higher level, the 'general principles of the legal order of the state' that judges should employ in dealing with the problem of lacunae in the interpretation of statutes." *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 66 (4th ed. 2018). Argentine practitioners then consult legal scholars' work for these interpretations or even carry out the abstraction exercise themselves.

[117] RAFAEL BIELSA, DERECHO CONSTITUCIONAL 43 (2d ed. 1954).

[118] *Id.* at 44.

[119] *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/11/1929, "Comité Radical Acción c/ Resolución del Jefe de Policía de la Capital Federal s/ derecho de reunión," Fallos (1929-156-81) (Arg.), at 91. The Court not only recognized a right to peacefully assemble using general principles, but reinforced the reasoning by citing public law scholars: "in fact, the right to assemble is not a specific right: it is no other thing, says Dicey, than a consequence of the way in which individual liberty and freedom of speech are conceived . . . Smein, p. 578." For a more detailed comment on the case, see *infra* p. 40.

[120] A key difference between the scientific approach of the civil law tradition in Argentina and Langdellian legal science needs to be stressed at this point. As I argued in Part III.a., Langdell's case method sought to train students in scientific legal thinking, that is, in extracting rules of law from precedents in an axiomatic fashion. In the U.S. legal system, precedents are

the unenumerated rights provision does not raise counter-majoritarian concerns (because legal practice overall is detached from democratic considerations). Article 33 can be coupled with legal scholars' work and/or general principles to make the case that an alleged right had existed all along, even if the Constitution did not explicitly protect it.

B. The Openness to Foreign and International Law

The scientific nature of legal practice in Argentina makes the Argentine legal system more porous to external sources than the American one; it opens the door to any sound argument made elsewhere. In fact, Argentine judges have traditionally looked to foreign and international practice for inspiration when applying domestic law.

During the first thirty years after the Constitution's enactment, a good domestic constitutional position was one that could be backed by U.S. practice.[121] Although this approach lost momentum during the late 1890s, Argentine courts continued to rely on American precedents (but no longer considered them binding).[122] Between the end of the nineteenth century and most of the twentieth century, the CSJN also cited—though not very often—customary international law.[123] By the mid-1980s, the use by Argentine

lawyers' only tool to make a case. This analytical methodology makes it impossible for Ninth Amendment jurisprudence to emerge, as the provision requires drawing rights directly from natural law. The Argentine way of doing legal science is quite different. Prior judicial decisions do not play a crucial role in the Argentine legal system because there is no principle of *stare decisis* (at least in the strict sense of the term). Practitioners claim to be "faithfully" applying the Civil Code or the Constitution (or whatever law controls the matter); instead of drawing from a controlling precedent grounded in a principle that can be expanded to cover the novel case, they consult the work of legal scholars who have "discovered" or "clarified" existing yet "hidden" law, and classified it into an orderly scheme of legal concepts and principles. Legal practice resembles not geometry, but the natural sciences (like biology or physics). *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 116, at 64-65 (explaining how legal scientists in civil law countries tried to emulate natural scientists).

[121] *See* Miller, *supra* note 28, at 1546.

[122] *Id.*

[123] The Court relied on international custom to rule in cases concerning immunities of foreign state officials, the President's war powers, foreigners' right to exit the country during a time of war and foreign prisoners' right to be granted asylum. *See* Mónica Pinto & Nahuel Maisley, *From Affirmative Avoidance to Soaring Alignment: The Engagement of Argentina's Supreme Court with International Law* 3 (Int'l L. Ass'n., Study Grp. on Principles on the Engagement of Domestic Cts. with Int'l L.), https://www.academia.edu/20225843/From_Affirmative_Avoidance_to_Soaring_Alignment_The_Engagement_of_Argentina_s_Supreme_Court_with_International_Law.

courts of foreign authorities (other than U.S. practice) and international materials had become more frequent.[124]

In the early 1990s, international law began to play a more influential role in judicial decision-making.[125] But the practice of extensively citing international sources peaked after the 1994 constitutional reform when nine treaties and two declarations on human rights were incorporated into the Constitution and given the same status as its provisions (Article 75 Subsection 22).[126] International law was vindicated as "the supreme law of the land" and soon, arguments of constitutional law and international human rights law became indistinguishable from each other. During this era of "soaring alignment" with international law, the CSJN held that international treaties could override domestic law, provided constitutional foundations to the previously held position regarding customary international law, and "[gave] unprecedented consideration to the decisions of international courts and tribunals, and even to those of other international organs."[127]

Scientific legal discourse provides Argentine judges with tools to easily dismiss potential contradictions between the text of the Constitution and

[124] *See* Martín Böhmer, *The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority,* 77 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 411, 430 (2008) ("During crucial moments of its history, Argentina looked to foreign Law in order to force the dialogue that its institutions could not produce on their own. After the massive violation of rights in the 1970s and the permanent impossibility of building democracy for more than a hundred years, Argentina looked once more into other legislations and judicial decisions . . . .").

[125] *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 07/07/1992, "Recurso de hecho deducido por Miguel Angel Ekmekdjián en la causa Miguel Angel Ekmekdjián c/ Sofovich, Gerardo y otros," Fallos (1992-315-1492) (Arg.). Ekmekdjian, deeply offended by comments made about Jesus Christ and the Virgin Mary in a television show, filed a suit to enforce his right of reply contained in Article 14 of the American Convention on Human Rights, a treaty ratified by Argentina in 1984. The Court first stated that, pursuant to Article 31 of the Argentine Constitution (Supremacy Clause), treaties were the supreme law of the land. *Id.* at 1511. Then, in dicta, held that international law (treaties) prevailed over domestic law (citing Article 27 of the Vienna Convention on the Law of Treaties). *Id.* at 1512. Relying on the Inter-American Court of Human Rights' Advisory Opinion No. OC-7-86, the Court concluded that Article 14 of the American Convention was a self-executing provision and granted Ekmekdjian's request. *Id.* at 1513-15.

[126] Article 75 also left the door open to the incorporation (with constitutional status) of other international human rights treaties in the future. After the 1994 constitutional reform, three (up to September 2023) other treaties were added to the list. Art. 75, Sec 22, Constitución Nacional [Const. Nac.] (Arg.) *translated in* constituteproject.org by Jonathan M. Miller and Fang-Lian Liao https://www.constituteproject.org/constitution/Argentina_1994#s187.

[127] Pinto & Maisley, *supra* note 123, at 5.

what incorporated international human rights law instruments demand.[128] If an interpretative doubt arises regarding the meaning or scope of a provision included in any of those legal instruments, their respective interpretative bodies are considered the authority on the matter, and their documents are deemed authoritative sources of law.[129] In fact, when—as in Argentina—practitioners believe they are engaging in a scientific activity, they look for universally valid positions, so they cannot rule out arguments because of their pedigree. Even foreign constitutional courts of other countries can be cited to make one's case.[130] Giving substance to the unenumerated rights provision becomes a quite simple task for judges: they can see if a certain right or guarantee was recognized in another legal system and use the open-ended source as a vehicle to import that interpretation into their own. Argentine courts' proneness to external sources accounts for the use of an

[128] *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/1996, "Monges, Analía M. c/ U.B.A. –resol. 2314/95–," Fallos (1996-319-3148) (Arg.). The case concerned an alleged incompatibility between an article of the Argentine Constitution and a provision of the International Covenant on Economic, Social and Cultural Rights, which has constitutional status. The Court argued that " . . . the members of the Constitutional Convention . . . had compared the treaties [incorporated in 1994] and the constitutional provisions and verified that there is no derogation whatsoever, a judgment that the constituted powers cannot ignore or contradict." *Id.* at 3158. Of course, there was no evidence that such judgment had ever been made, but an interpretation that could harmonize both texts was simply required by reason. The opposite (that treaties given constitutional status could derogate part of the Constitution) "would be a contradiction in terms that could not be attributed to the members of the Constitutional Convention, whose lack of foresight cannot be presumed." *Id.* at 3159.

[129] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 07/04/1995, "Recurso de hecho deducido por Osvaldo Iuspa (defensor oficial) en la causa Giroldi, Horacio David y otro s/ recurso de casación –causa N° 32/93–," Fallos (1995-318-514) (Arg.), at 530.

[130] *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/11/2011, "Pellicori, Liliana Silvia c/ Colegio Público de Abogados de la Capital Federal s/ amparo," Fallos (2011-334-1387) (Arg.). The case concerned a worker who sued her former employer on the grounds that her firing had been discriminatory. The Court of Appeals had dismissed the plaintiff's claim because it considered she was not able to prove the employer's discriminatory intent, but the CSJN reversed the decision. Like its U.S. counterpart had similarly done almost forty years before in McDonnell Douglas Corp. v. Green, 411 US 792 (1973), the CSJN decided to shift the burden of proof and make the plaintiff carry the initial burden of establishing a prima facie case of discrimination, and then shift the burden back to the employer to articulate a legitimate and nondiscriminatory reason for firing the plaintiff. *Id.* at 1394. To argue that the decision was not a violation of the employer's right to equal protection and due process of law, the CSJN cited similar decisions reached by many other international and foreign courts and bodies: the Committee on the Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Discrimination against Women; the International Work Organization; the Council of Europe; the Constitutional Tribunal of Spain; the Constitutional Court of Belgium; the English House of Lords; the European Committee on Social Rights; and the European Court of Human Rights. *Id.* at 1395-1404.

open-ended provision like Article 33 that serves as a conduit for arguments made abroad to recognize unenumerated rights and guarantees.

C. Wording Changes

Another reason why Argentine judges have used the unenumerated rights provision more than U.S. judges relates to the wording of Article 33. As the comparative law literature has noted, a legal transplant[131] can often be modified in the process of transfer from the country of origin to the country of destination.[132] Although we can trace a reference to the Ninth Amendment in the Argentine constitutional debates, the text of Article 33 differs slightly from that of its American counterpart. First, it covers not only unenumerated rights, but also "guarantees" (procedural remedies); second, and more importantly, it reveals the source from which those unenumerated rights and guarantees should be drawn: they both "[arise] from the principle of sovereignty of the people and from the republican form of government."[133]

If "[e]ven mere translation can increase the differences between the original [rule] and its new incarnation, [and] can cause considerable interpretative . . . difficulties in practice,"[134] it may well be that the additions made by the drafters of the Argentine Constitution have contributed to the markedly different trajectory of Article 33. Judges are likely to feel more comfortable recognizing unenumerated guarantees when the text of the provision directly invites them to do so. Besides, finding unenumerated rights becomes easier when the search field is reduced from the nebulous

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[131] Legal transplantation can be defined as "the moving of a rule or a system of law from one country to another, or from one people to another." ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (2d ed. 1993). "'Borrowing' is the analogous metaphor used to capture the phenomena of constitutional transplants." Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations* 6 (B.C. L. Sch. Faculty Papers, Paper No. 360, 2012), http://lawdigitalcommons.bc.edu/lsfp/360.

[132] *See* Jörg Fedtke, *Legal Transplants*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 434, 435 (Jan M. Smits ed., 2006); *see also* Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. INT'L L. 163, 177 (2003).

[133] The reason behind these two particular changes is not clear. The second one might have been an attempt to protect the unenumerated rights and guarantees of "the people" as a "collective entity" (as opposed to individual rights). *See* Laura Clérico, *Los derechos no enumerados*, *in* CONSTITUCIÓN DE LA NACIÓN ARGENTINA Y NORMAS COMPLEMENTARIAS. ANÁLISIS DOCTRINAL Y JURISPRUDENCIAL 1222, 1228 (Daniel Alberto Sabsay & Pablo Luis Manili eds., 2009) (explaining that while there was consensus among the drafters about the existence of unenumerated rights and guarantees, there was a dispute over who was the subject of said rights and guarantees).

[134] Jörg Fedtke, *Constitutional Transplants: Returning to the Garden*, *in* 61 CURRENT LEGAL PROBLEMS 49, 51 (Jane Holder & Colm O'Cinneide, eds., 2008).

concept of natural law to the more defined notions of popular sovereignty and republican government. Political theory provides a structured framework with evolving models; it offers a more tangible grounding and allows judges to recognize rights (and guarantees) not within the text of the Constitution or to expand enumerated ones in order to fit current understandings of what a republican form of government requires.[135]

D. Article 33 Cases

The CSJN has cited Article 33 in many different contexts and in cases of a very different nature. In some instances, it was used to extend the scope of an enumerated right. In others, it was cited as a justification to create guarantees without which, it argued, enumerated rights could not be exercised properly. The Court has also adjudicated rights without any textual basis because they were "implicitly necessary" to exercise other rights that were indeed enumerated. Some illustrative cases are presented below.

The right to assemble. In 1929, the CSJN decided *Comité Radical Acción*. A group of people had asked the Chief of Police for a permit to assemble in public, but the petition was denied because the location chosen was too central, so it would disrupt the traffic. The Court reaffirmed the denial on the merits but given the lack of textual basis, gave careful consideration to the plaintiffs' argument concerning their "right to assemble". Invoking Article 33 principles and expanding the scope of Article 14 ("right to petition to authorities") of Argentina's Constitution, the Court argued:

> [E]ven though the Constitution does not contain a provision or text directly affirming a right of the citizens or inhabitants to assemble peacefully, the existence of such a right flows not only from . . . unenumerated rights and guarantees . . . rooted in the principle of popular sovereignty and the republican form of government (Article 33), but also from the right to petition to authorities (Article 14), which incorporates the traits of the right to assemble peacefully when the petition is done collectively . . . .[136]

In *Arjones* (1941), faced with a similar situation, the Court ordered the Chief of Police to issue the permit, and construed a right to assemble from all other civil rights enumerated in Article 14:

> [A]lthough the right to assemble is not enumerated in Article 14 of the National Constitution, its existence arises from the sovereignty of the people and the republican form of government, and is thus implicit under Article 33. The right to assemble has its origin in individual liberty, in

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[135] *See* Laura Clérico, *supra* note 133, at 1229-30, 1261.

[136] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/11/1929, "Comité Radical Acción c/ Resolución del Jefe de Policía de la Capital Federal s/ derecho de reunión," Fallos (1929-156-81) (Arg.), at 91.

> freedom of speech, in freedom of association. It is inconceivable how these rights could be exercised . . . , without the freedom to assemble . . . , to teach or learn, to disseminate one's ideas, to petition to authorities, to orient public opinion and to pursue other lawful ends.[137]

Through the decades, the Court held to this expansive interpretation of Article 14 by way of Article 33 to recognize freedom of assembly as a constitutional right.[138]

Procedural remedies. One of the most famous CSJN cases is *Kot* (1958), which gave birth to the writ of *amparo*.[139] A clothing factory owner was prevented from accessing his property due to a labor strike and organized sit-in. Since there was no procedural remedy at that time[140] that could put an end to this problem quickly enough, his lawsuit was filed as a writ of *habeas corpus*, even though he obviously did not claim an illegal detention, but a violation of his right to engage in productive activity and his property rights.[141] The Court had decided a similar case the year before concerning the shutdown of a newspaper by the local police.[142] In that instance, it argued for the first time that, when constitutional rights are being infringed, the lack of a proper procedural remedy is no excuse not to grant expedient relief: "Individual guarantees exist by the sole reason of being enshrined in the Constitution and regardless of regulatory laws."[143] In *Kot*,

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[137] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/12/1941, "Arjones, Armando y otros," Fallos (1941-191-197) (Arg.), at 203.

[138] *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/05/1943, "Asoc. Constitución y Libertad Argentina," Fallos (1943-195-439) (Arg.); CSJN, 07/04/1947, "Recurso de hecho deducido en los autos Campaña Popular en Defensa de ley 1420, apela resolución Jefe de la Policía Federal," Fallos (1947-207-251) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/04/1987, "Recurso de hecho deducido por Antonio Jesús Ríos en la causa Ríos, Antonio Jesús s/ oficialización candidatura Diputado Nacional - Distrito Corrientes," Fallos (1987-310-819) (Arg.).

[139] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.).

[140] The 1853/60 Argentine Constitution did not include the writ of *amparo*. Although some provincial constitutions had recognized this procedural remedy during the first half of the twentieth century, it was not until 1966 that it was incorporated under federal law. Law no. 16,986 established its admissibility against acts or omissions by public authorities. In 1968, the Civil and Commercial Procedural Code of the Nation approved its use to protect violations of rights by private individuals. The writ of *amparo* was finally recognized under Article 43 (1st and 2d paragraphs) of the Argentine Constitution after the 1994 constitutional reform. *See* GERMÁN J. BIDART CAMPOS, II MANUAL DE LA CONSTITUCIÓN REFORMADA 372-74 (2d reprt. 1997).

[141] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.), at 298.

[142] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri, Ángel s/ interpone recurso de hábeas corpus," Fallos (1957-239-459) (Arg.).

[143] *Id.* at 463.

the Court reiterated this argument and added Article 33 as a justification to grant the writ of *amparo* against an act of a private party:

Having established that there is a tacit or implicit guarantee that protects different aspects of personal liberty (Art. 33 of the National Constitution), no reservation can be made to exclude in an absolute and *a priori* manner restrictions by private parties.

> It is plausible to think that, in the spirit of the 1853 drafters, constitutional guarantees had as their immediate aim the protection of essential rights of the individual against the excesses of public authority . . . But the drafters had the sagacity and prudence not to fix exclusively in the text their concrete and historical fears.[144]

The CSJN has also cited Article 33 to expand the scope of guarantees in criminal proceedings, all of which, at their core, are controlled by Article 18 of the Argentine Constitution. It recognized an implicit guarantee to be tried by an impartial judge,[145] a right to counsel,[146] and a right to recuse a criminal judge.[147] It justified granting standing as well: the Court stated that acting as a "citizen" is enough to prove a direct interest in a case when there is a violation of a constitutional provision that amounts to the essence of the republican form of government.[148]

Liberty. Article 19 of the Argentine Constitution has been regarded as the embodiment of the core tenet of classical political liberalism:

> The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.[149]

This article enshrines an autonomy principle from which the CSJN, with the help of Article 33, has pivoted to recognize other unenumerated rights

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[144] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.), at 299.

[145] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, "Recurso de hecho deducido por el fiscal general de la Cámara Nacional de Casación Penal en la causa Quiroga, Edgardo Oscar s/ causa N° 4302," Fallos (2004-327-5863) (Arg.)

[146] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/09/1987), "López, Osvaldo Antonio (ex Cabo Primero) s/ asociación ilícita, revelación de secretos concernientes a la seguridad nacional y deserción simple," Fallos (1987-310-1797) (Arg.).

[147] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/05/2005, "Recurso de hecho deducido por el defensor oficial de Horacio Luis Llerena en la causa Llerena, Horacio Luis s/ abuso de armas y lesiones - arts. 104 y 89 del Código Penal – causa N° 3221–," Fallos (2005-328-1491) (Arg.).

[148] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/04/2015, "Recurso de hecho deducido por la demandada en la causa Colegio de Abogados de Tucumán c/ Honorable Convención Constituyente de Tucumán y otro," Fallos (2015-338-249) (Arg.).

[149] Art. 19, Constitución Nacional [Const. Nac.] (Arg.).

linked with personal liberty. For example, in *Ponzetti de Balbín* (1984),[150] Justice Petracchi, in a concurring opinion, borrowed from Justice Cardozo the idea that the Constitution contains an "ordered scheme of liberties"[151] to conclude that it must necessarily include a right to privacy.[152] Article 33 and Article 19, he argued, are two cornerstones of this scheme.[153]

Two years later, the Court extended this reasoning to declare a right to remarry in *Sejean* (1986).[154] Quoting Article 33, it stated that the Constitution "does not mention all the rights it safeguards" and included human dignity among those rights protected by the unenumerated rights provision.[155] The Court then explained that human dignity encompasses the satisfaction of human needs "in such a way that they may lead to personal fulfillment."[156] Because "marriage, as a legal institution, recognizes basic human needs, like that of satisfying [our] sexuality through a lasting relationship, with a view to constituting a family,"[157] the Court concluded that denying divorcees the possibility of remarrying affected their right to privacy under Article 19.[158]

The right to access public information. Having no textual support from any constitutional provision, the right of the people to access information produced, obtained, transformed, controlled, or kept by the government can

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[150] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1984, "Ponzetti de Balbín, Indalia c/ Editorial Atlántida S.A. s/ daños y perjuicios," Fallos (1984-306-1892) (Arg.). The case concerned the publication in a magazine of a photograph of a renowned political figure (Ricardo Balbín) while lying in agony in an intensive care unit. The Court rejected the magazine's freedom of the press arguments and held that the publication lacked public interest and constituted a violation of Balbín's right to privacy. *Id.* at 1908.

[151] Justice Cardozo, writing for the U.S. Supreme Court in a case concerning the application to the states of the Double Jeopardy Clause of the Fifth Amendment, held that some rights are "of the very essence of a scheme of ordered liberty" or "implicit" in this concept, and thus valid against the states through the Fourteenth Amendment. *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). The Court did not find the right to protection from double jeopardy as one of these. *Id.* at 328. This decision was later overruled in Benton v. Maryland 395 U.S. 784 (1969).

[152] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1984, "Ponzetti de Balbín, Indalia c/ Editorial Atlántida S.A. s/ daños y perjuicios," Fallos (1984-306-1892) (Arg.), at 1938-40 (Petracchi, J., concurring).

[153] *Id.*

[154] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/11/1986, "Sejean, Juan Bautista c/ Zaks de Sejean, Ana María s/ inconstitucionalidad del art. 64 de la ley 2393," Fallos (1986-308-2268) (Arg.).

[155] *Id.* at 2289.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 2290-91. The Court also held that the right to remarry should be recognized because the family (any type of family) enjoys constitutional protection under Article 14, and because the new couples and their children would otherwise be forced to "bear the mark of that which the law does not recognize" in violation of the right to equal protection (Article 16). *Id.*

only be grounded in the principle of the republican form of government.[159] Madison, ahead of his time, saw this very clearly:

> A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.[160]

In *ADC c/ EN - PAMI* (2012),[161] the CSJN derived the right to access public information from Article 33 in conjunction with Articles 1 (adoption of the federal, republican, representative form of government), 14 (right to free speech), and 16 (right to equal protection),[162] as well as international human rights instruments—incorporated into the Constitution through Article 75 Subsection 22—that protect freedom of expression.[163] The Court held that the disclosure of public information "makes for transparency and the publicity of governmental acts, which are the bases of a democratic society."[164]

In a couple of other cases, the Court explored the intersection between these concepts and data protection (understood as a fundamental aspect of the right to privacy). In *Urteaga* (1998),[165] the Court ruled on whether a person could file a writ of *habeas data*[166] to access federal records relating to the circumstances of the death of his brother during Argentina's last military dictatorship.[167] The majority admitted the existence of a right to

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[159] Estela B. Sacristán, *Acceso a la información en poder de una persona pública no estatal*, *in* DERECHO CONSTITUCIONAL 275, 283 (Alberto Dalla Vía ed., 2d ed. 2015).

[160] Letter from Madison to W.T. Berry, (Aug. 4, 1822), *in* I THE FOUNDERS' CONSTITUTION 690-91 (Phillip B. Kurkland & Ralph Lerner eds., 1987).

[161] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 04/12/2012, "Asociación Derechos Civiles c/ EN-PAMI - (dto. 1172/03) s/ amparo ley 16.986," Fallos (2012-335-2393) (Arg.). The case concerned the National Institute of Social Services for Retirees and Pensioners (PAMI)'s refusal to provide an NGO with disaggregated data on the budget spent by the agency on advertising.

[162] *Id.* at 2404.

[163] *Id.* The Court mentioned the American Convention on Human Rights (Article 13) and the International Covenant on Civil and Political Rights (Article 19). It also cited Article IV of the American Declaration of the Rights and Duties of Man. *Id.* at 2406.

[164] *Id.* at 2406.

[165] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, "Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986," Fallos (1998-321-2767) (Arg.), at 2781.

[166] In the Argentine legal system, the writ of *habeas data* can be described as a special type of writ of *amparo* that protects information pertaining to the individual and gives the owner of such data the power to decide how and where it can be used. It was incorporated into the Constitution (Article 43, 3d paragraph) after the 1994 constitutional reform.

[167] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, "Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986," Fallos (1998-321-2767) (Arg.).

know the whereabouts of a relative *desaparecido*;[168] Justice Bossert, in a concurring opinion, grounded this right in Article 33:

> Among those rights protected by . . . art. 33 . . . there is the right to know the truth about disappeared people with whom family ties exist . . . , since this right arises substantially from the republican principle and the principle of the publicity of governmental acts . . . .[169]

In 1999, the CSJN decided *Ganora*, another case concerning the writ of *habeas data*.[170] Citing *Urteaga*, the majority recognized a right to obtain one's personal information gathered by law enforcement agencies.[171] Justice Vázquez, in a concurring opinion, went a step further by arguing that Article 43 "establish[es] a mechanism by which all inhabitants can access any information about themselves . . . or their property . . . ."[172] He also stated that "the republican form of government that the Argentine Nation adopted through the constitutional text requires the publicity of its acts . . . ."[173] Although he did not cite Article 33, the influence of the unenumerated rights provision in his reasoning is unquestionable.

CONCLUSION

This article explored the roots of the unenumerated rights provision contained in the U.S. and Argentine constitutions and dug deep into its different treatments by the courts of each country. The explanation revolved around American common law and its relationship with natural law; the commitment of the U.S. to the belief that law is the product of collective self-authorship; Argentine civil law and the use of legal scholarship and general principles; Argentina's interaction with foreign and international law; and the particularities of Argentina's unenumerated rights provision.

At first look, the texts of the Ninth Amendment to the U.S. Constitution and Article 33 of the Constitution of Argentina seem very similar. A superficial reading leaves us thinking about why the approach adopted in judicial decisions has not been the same. Yet a more detailed analysis shows that the Ninth Amendment is understood as a direct source of rights

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[168] *Id.* at 2781.

[169] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, "Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986," Fallos (1998-321-2767) (Arg.), at 2813 (Bossert, J., concurring).

[170] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/09/1999, "Ganora, Mario Fernando s/ hábeas corpus," Fallos (1999-322-2139) (Arg.).

[171] *Id.* at 2149, 2151.

[172] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/09/1999, "Ganora, Mario Fernando s/ hábeas corpus," Fallos (1999-322-2139) (Arg.), at 2172 (Vázquez, J., concurring).

[173] *Id.* at 2173.

grounded in natural law that was brushed off by positivism and rather conservative interpretive practices. In contrast, Article 33 is considered a principle of interpretation that allows bringing "new" rights and guarantees to the table or expanding the scope of enumerated ones.

The Ninth Amendment requires judges to think in natural law terms, which is hard to do when the legal system they are a part of is committed to a positivist approach to law that resists any claim about the enforceability of universal rights. Legal discourse's fixation with "We the People" does not help the unenumerated rights provision gain traction either.

Article 33 of the Argentine Constitution relies on the notion of republican government, that is, models offered by political theory, which are theoretical frameworks that evolve over time. As concepts of republicanism change, rights and guarantees that are considered inherent to this idea change too, and judges are to reflect these changes when reading the Constitution.

Considering the characteristics of the American legal system as presented in this article, a focus on political theory like that of Argentina's Article 33 might offer the U.S. a way of returning some content to the Ninth Amendment.

THE INTER-AMERICAN SYSTEM ON HUMAN RIGHTS SHOULD APPLY THE UN GUIDANCE ON LESS LETHAL WEAPONS IN LAW ENFORCEMENT

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INTRODUCTION

Current use of Less Lethal Weapons (LLW) in law enforcement provokes gross violations of human rights. Empirical evidence sustains that these weapons can effectively kill and cause serious injuries. A group of human rights experts from the International Network of Civil Liberties Organizations (INCLO), Physicians for Human Rights, and the Omega Research Foundation reviewed medical literature from the 2016-2021 period and analyzed reports of 2,190 injured by rubber bullets[1] and 100,000 injured by chemical irritants, such as tear gas and pepper spray.[2] The outcomes of this research are shocking. Reports indicate that of those who received impacts from rubber bullets, twelve had died, 1,575 suffered ocular injuries (including blindness), and 945 were permanently disabled.[3] From those exposed to chemical irritants, the records show that at least fourteen of them died, all of them because of trauma inflicted by the canister.[4] Researchers found a wide range of short and long-term associated risks as well, including eye irritation, dermal pain, respiratory distress, disorientation, agitation, and permanent disability.[5] Besides, the study alerts that Electronic Conduction Devices (ECDs), like tasers, "have been identified as contributing factors in over 100 in custody deaths in the United States as well as thousands of injuries globally" and are responsible for cardiac arrhythmias, muscle damage, and electric burns, both on the skin and internally.[6]

Moreover, the use of LLW undermines fundamental rights to free speech and public assembly, because they are frequently deployed against peaceful, unarmed people, in the context of the arbitrary use of police force to repress social protest. Examples of this phenomenon can be found worldwide, like in the repression of the 2018 "Yellow Vests" protests in France, the 2019 demonstrations in Chile, the 2021 Colombian "National Strike," or in the repression of the wave of protests that aroused after George Floyd's 2020 murder by a policeman in the United States.[7] All in all, a proper regulatory framework for the use of LLW in law enforcement seems pivotal to ensure the most basic human rights.

The United Nations has begun to address the dangers posed by LLW

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[1] INT'L NETWORK OF CIV. LIBERTIES ORGS. ET AL., LETHAL IN DISGUISE 2: HOW CROWD-CONTROL WEAPONS IMPACT HEALTH AND HUMAN RIGHTS 39-40 (n.d.), https://lethalindisguise.org/wp-content/uploads/2022/12/LID2-Main-Report-Pages-Final-1.pdf.

[2] *Id.* at 11.

[3] *Id.* at 10.

[4] *Id.* at 11-12.

[5] *Id.*

[6] *Id.* at 14.

[7] *Id.* at 8.

through the release of the UN Guidance on Less Lethal Weapons in Law Enforcement (2020),[8] however, none of the relevant UN human rights bodies have authority comparable to that enjoyed by regional human rights mechanisms like the Inter-American Human Rights System or the European Court of Human Rights.[9] Many countries in the Americas face serious problems involving LLW yet place far less weight on measures adopted by UN human rights bodies than decisions from the Inter-American Commission on Human Rights, which hears individual petitions from individuals in most of the countries of Latin America, and the Inter-American Court of Human Rights, which issues domestically enforceable judgments in cases sent to it by the Commission, and which also offers advisory opinions.[10] Thus, there is a mismatch between the human rights body that has been doing the important work of developing guidelines and the international organs that can make a difference in Latin America.

The United Nations has long established a framework on the use of force by law enforcement officials with a focus on lethal weapons, and more recently has turned its attention to LLW. This new interest in regulating the use of LLW led to the process that resulted in the UN Guidance on Less Lethal Weapons in Law Enforcement.

Historically, the two main UN instruments addressing the use of force by Law Enforcement Officials have been the Code of Conduct for Law Enforcement Officials (1979)[11] and the Basic Principles on the Use of Force and Firearms by Law Enforcement officials (1990).[12] These instruments established certain principles applicable to every use of force, including LLW: a) strict necessity and minimum extent (necessity and exceptionality);[13] b) legitimate purpose in the performance of duty and in

[8] Human Rights Council Res. HR/PUB/20/1, (June, 2020).

[9] The Inter-American Human Rights System (IHRS) was formally created in 1948, with the adoption of the Organization of the American States (OAS) Charter and the American Declaration on the Rights of Man and Citizen by the Ninth International Conference of American States. The two main organs of the IHRS are the Inter-American Commission on Human Rights, created in 1959 and headquartered in Washington D.C., and the Inter-American Court of Human Rights, established by the American Convention on Human Rights (1969), installed in 1979, and based in Costa Rica. The IAHRS is one of the world's three major regional human rights systems. The other two are the European Council System (based on the Convention for the Protection of Human Rights and Fundamental Freedoms) and the African system (based on the African Charter on Human and Peoples Rights). *See generally* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 497-99 (2011) (for a brief introduction to the IAHRS).

[10] *Id.* at 499.

[11] G.A. Res. 34/169, (Dec. 17, 1979).

[12] G.A. Res. 45/166 (Dec. 14, 1990).

[13] United Nations General Assembly, *supra* note 11, art. 3.

accordance with the law (legality);[14] c) proportional with its objective (proportionality);[15] and d) planned to minimize the risk of death or injury (precaution).[16] Otherwise, the use of force is considered excessive and prohibited by international law, because these principles are binding on all states as general principles of law.[17]

However, while the UN introduced the notion of "non-lethal" weapons in the Basic Principles as an alternative to the use of firearms, it did not provide any specificity on the use of these weapons. The Principle 2 generically states that governments and law enforcement agencies should develop "non-lethal incapacitating weapons for use in appropriate situations, with the aim of increasingly restraining the application of means capable of causing death or injury to persons."[18] Principle 3 adds that:

> "The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled."[19]

The so-called non-lethal weapons, or more appropriately "less lethal weapons" (LLW),[20] are widespread for law enforcement purposes, particularly rubber bullets, tear gas, and tasers. However, misuse of LLW can cause death and injury, while constituting cruel, degrading, or inhuman treatment,[21] or violating other human rights such as the freedom of peaceful assembly and freedom of speech.[22]

The Guidance on LLW in Law Enforcement issued in 2020 by the UN

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[14] *Id.*

[15] *Id.*

[16] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, § 5(b).

[17] Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council, in* GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS 1, 6 (Plain Sense ed., 2016).

[18] *Id.* at 10, 14-15 (stating Principle 2 also provides that for the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind).

[19] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, art. 3.

[20] *See generally* Human Rights Council Res. HR/PUB/20/1, at 1, 3 (June, 2020) (explaining many human rights actors, including the UN, have eventually adopted the term "less-lethal weapon" (LLW) or Crowd Control Weapons (CCW) when it refers to the repression of social protest because these weapons can effectively kill).

[21] Organization of American States, *Inter-American Convention to Prevent and Punish Torture*, Dec. 9, 1985, O.A.S.T.S. No. 67; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 16, 1984, 1465 U.N.T.S 85.

[22] Organization of American States, *American Convention on Human Rights "Pact of San José, Costa Rica,"* art. 13, 15, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S, 123; Optional Protocol to the International Covenant on Civil and Political Rights, art. 19, 21, Dec. 16, 1966, 999 U.N.T.S 171.

Office of the High Commissioner on Human Rights (OHCHR) represents an important advance in regulating LLW, as it brings specificity and bright-line rules regarding their compliance with international human rights standards on the use of force. Nevertheless, it does not provide victims with any practical enforcement mechanism. In this sense, the Inter-American Commission and the Inter-American Court of Human Rights could play a vital role in the fight against the arbitrary use of LLW at the Inter-American level by taking account of this Guidance to apply it in their future decisions. The Inter-American system can provide the enforcement mechanism that the Guidance lacks, owing to its historical activism in protecting human rights and to the ample remedy powers of the Inter-American Court, which has developed a tradition of ordering "extensive and detailed equitable remedies alongside compensations."[23] Essentially, the Inter-American System on Human Rights provides a unique framework and should start applying this Guidance because:

a) Latin America represents a region in which the use of LLW poses a major threat to human rights, particularly concerning the repression of social protest;
b) the Inter-American Commission has stated its support for most of the principles established in the Guidance; and
c) the Inter-American system has played an active role in the application of the Code of Conduct and the Basic Principles in the region, which the UN Guidance on LLW seek to supplement and complement,[24] and has ample powers to set obligations to the state parties.

I. BACKGROUND

The UN has finally constructed principles to govern less-lethal weapons, but enforcement power is lacking. Nevertheless, the development of the Guidance itself is a fundamental achievement of the human rights

[23] The Inter-American Court's jurisprudence on reparations. The Inter-American Court has been celebrated for developing a uniquely "activist" remedial regime--in all its recent rulings, it orders extensive and detailed equitable remedies alongside compensation. While the [European Court of Human Rights] ECHR is generally content to find a violation of the Convention and allow the state to fashion a remedy emphasizing monetary compensation, the Inter-American Court regularly issues long lists of detailed actions the state must take to repair the violation. Huneeus, *supra* note 9, at 501.

[24] "The Guidance supplements and complements the standards laid down in the Code of Conduct for Law Enforcement Officials (Code of Conduct) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles)," Office of the United Nations High Commissioner for Human Rights, *supra* note 8, § 1.4 at 2.

movement, and its standards are appropriate to confront the ongoing emergency on Latin America in terms of repression of social protest.

The Guidance establishes essential standards but has limited operativity. On the one hand, the UN Guidance on LLW claims that its purpose is to provide States, law enforcement agencies, manufacturers, and human rights bodies and mechanisms,[25] with direction "on the lawful and responsible design, production, transfer, procurement, testing, training, deployment and use of LLW and related equipment."[26] But on the other hand, these ample words lose their force when the Guidance also specifies that it "is not intended to serve as a set of standing operating procedures for individual officers but may assist States and their law enforcement agencies in fulfilling their duty to put such procedures in place."[27] Notwithstanding this, an argument can be made on the fact that the Inter-American System on Human Rights is one of this "human right bodies and mechanisms"[28] that the guidance is addressing, and that this system is ready to apply it, as I will discuss in the next sections.

A. The Development of the Guidance on LLW

The Guidance establishes an international consensus on essential principles. It is the result of persistent efforts by Human Rights NGOs, such as Amnesty International and INCLO. These organizations have reported human rights violations arising from the use of LLW for years, as well as researched the health consequences and other human rights aspects of LLW. The Guidance incorporates the experience of these NGOs by quoting some of their foremost research and findings[29] to support, for example, standards on the accuracy of kinetic impact projectiles.[30]

These organizations insistently pointed out the need for clearer rules on LLW because the broad terms used by the Basic Principles referring to LLW "are not easily translatable into concrete, practical guidelines that can be

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[25] *Id.* at 1, § 1.3 (This Guidance is also addressed to "private security companies, police oversight bodies and human rights defenders, and to individuals seeking to assert their right to a remedy for human rights violations").

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] INT'L NETWORK OF CIV. LIBERTIES ORG. & PHYSICIANS FOR HUMAN RIGHTS, LETHAL IN DISGUISE: THE HEALTH CONSEQUENCES OF CROWD-CONTROL WEAPONS (American Civil Liberties Union, 2016), https://www.aclu.org/report/lethal-disguise-health-consequences-crowd-control- weapons; AMNESTY INT'L & OMEGA RSCH. FOUND., THE HUMAN RIGHTS IMPACT OF LESS LETHAL WEAPONS AND OTHER LAW ENFORCEMENT EQUIPMENT (Amnesty International, Apr. 13, 2015), https://www.amnestyusa.org/files/human_rights_impact_less_lethal_weapons_doha_paper.pdf.

[30] Office of the United Nations High Commissioner for Human Rights, *supra* note 8, § 7.5.7, at 36.

readily applied at the domestic level."[31] Further, they noted that the Basic Principles seem outdated because of the rapid technological developments in the market of LLW. For instance, "neuromuscular incapacitating projectile electric-shock weapons," such as the tasers, did not yet exist in 1990 when the UN established the Basic Principles, and by 2015 they were used by more than 17,000 law enforcement and military agencies.[32]

Christof Heyns, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary executions between 2010 and 2016, also played a key role in the development of the Guidance. It was Heyns who recommended in 2014 that the Human Rights Council should appoint an expert body to develop standards and guidelines on LLW "that would allow for a differentiated use of force consistent with international rules and standards."[33] Heyns stressed that there was a need for independent guidelines on LLW "over and above standards that may be set by individual police forces;"[34] and that "the growing, largely self-regulated market of 'less-lethal weapons' cannot solely determine policing weapons technology, especially when it could involve unacceptable human cost."[35]

Heyns conceded that, under certain circumstances, LLW could restrain the use of firearms and allow a graduated use of force but insisted that under the umbrella of the category of LLW, there is a wide range of weapons with their own characteristics, mechanism of injury and associated risk. He concluded that "in some cases ´less-lethal weapons´ are indeed lethal and can lead to serious injuries. The risks will be dependent on the type of weapon, the context of its use, and the vulnerabilities of the victim or victims" and "innocent bystanders may also be affected where weapons cannot be directed at one individual."[36]

B. The Release of the Guidance and its Basic Framework

The Office of the UN High Commissioner for Human Rights (OHCHR) released in 2020, the UN Human Rights Guidance on LLW in Law Enforcement, after a two-year- project with a group of experts from the

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[31] INT'L NETWORK OF CIV. LIBERTIES ORG. & PHYSICIANS FOR HUMAN RIGHTS, *supra* note 29, at 18.

[32] AMNESTY INT'L & OMEGA RSCH. FOUND., *supra* note 29, at 4.

[33] GAOR, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/26/36 para. 119 (2014).

[34] *Id.* para. 106.

[35] *Id.* para. 105.

[36] *Id.* para. 104.

University of Pretoria[37] and the Geneva Academy. According to the OHCHR, it fills "a significant gap in the interpretation of fundamental human rights" and provides "guidance on when and how to use less-lethal weapons in accordance with international law."[38] The result is a comprehensive instrument that addresses the utility, design, risks, and potentially lawful and unlawful uses of specific LLWs: police batons, hand-held chemical irritants (like pepper spray), chemical irritants launched at a distance (tear gas), conducted electrical weapons ("tasers"), kinetic impact projectiles, dazzling weapons, water cannons, and acoustic weapons and equipment. In addition, it assesses the use of these LLW in specific situations (like during arrest, in custodial settings, and during assemblies).

The Guidance bases its standards on "international law, in particular human rights law and law enforcement rules, and good law enforcement practice."[39] It invokes, inter alia, jurisprudence, reports, and publications of the Inter-American Commission, the Inter-American Court of Human Rights, the European Court of Human Rights, and the United States. Likewise, it also includes references to different UN instruments, reports of Human Rights NGOs, and specialized clinical research on LLW.

Remarkably, the UN Guidance on LLW adopts many of the standards already expressed by the Inter-American Commission on Human Rights regarding LLW, such as the applicability of the same principles on the use of force that apply to lethal weapons, or the standards on the use of rubber bullets and tear gas. Furthermore, the Guidance expressly provides that it "supplements and complements the standards laid down in the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," both UN instruments that the Inter-American System has consistently used to interpret and give content to the international obligations of the American states on the use of force.[40]

As its basic framework, the Guidance offers a broad definition of less lethal weapons and calls to reduce its negative impacts, especially among the most vulnerable. It defines LLW as "weapons designed or intended for use on individuals or groups of individuals and which, in the course of

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[37] *Forward* to Office of the United Nations High Commissioner for Human Rights, *supra* note 8, at iv (noting former Special Rapporteur Christof Heyns, who was Professor of Human Rights at the University of Pretoria led the work).

[38] *Background* to Office of the United Nations High Commissioner for Human Rights, *supra* note 8, at v.

[39] *Id.* §1.4.

[40] *Id.*; Not only the Inter-American Commission and the Inter-American Court, but also the European Court of Human Rights have been citing the Code of Conduct and the Basic Principles "as authoritative statements of international rules governing use of force in law enforcement." Casey-Maslen, *supra* note 17 at 5-6; Cruz Sánchez et al v Peru, Preliminary Objections Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292 para. 264 (Apr. 17, 2015).

expected or reasonably foreseen use, have a lower risk of causing death or serious injury than firearms."[41] It includes "conventional firearms when they are used to discharge less-lethal ammunition."[42] Moreover, it sets the same principles on the use of force that apply to lethal weapons (legality, necessity, proportionality, and precaution) and the principle of non-discrimination, which, like the principle of precaution, requires that "a heightened level of care and precaution shall be exercised with respect to individuals who are known or are likely to be especially vulnerable to the effects of a particular weapon."[43]

Importantly, the Guidance assesses that children, pregnant women, the elderly, persons with disabilities, persons with mental health problems, and persons under the influence of drugs or alcohol are especially vulnerable to LLW.[44]

The UN Guidance brings specificity and some bright-line rules regarding the foremost current concern of the Inter-American system in terms of LLW, which is their use in the repression of social protest. It specifically provides a general framework for their use against assemblies and for the deployment of the weapons more frequently used against demonstrations. The Guidance expresses that law enforcement officials should respect and protect the right of peaceful assembly, and that "the fundamental human rights of participants shall be respected and protected, even if an assembly is considered unlawful by the authorities."[45] It provides that "in an assembly in which certain individuals are behaving violently, law enforcement officials have a duty to distinguish between those individuals and other assembly participants, whose individual right to peaceful assembly should be unaffected."[46] It also states that before approving dispersal, law enforcement agencies should seek to identify any violent individuals and isolate them from the other participants, to enable the assembly to continue.[47] Furthermore, it establishes that which using firearms to disperse an assembly is always unlawful, and that in a situation where the use of force is necessary, only LLW can be used.[48] Moreover, when LLW are needed, the weapons that can be individually aimed (like rubber bullets, pepper spray, or police batons) should only be targeted against the persons involved in acts of

[41] Human Rights Council Res. HR/PUB/20/1, at 45 (June, 2020).
[42] *Id.*
[43] *Id.* § 2.11, at 7.
[44] *Id.* at 6.
[45] *Id.* § 6.3.2, at 23.
[46] *Id.* § 6.3.3, at 23.
[47] *Id.*
[48] *Id.* § 6.3.4, at 24.

violence. In contrast, tear gas should be targeted only "at groups of violent individuals unless it is lawful to disperse the entire assembly."[49] In addition, it notes that heavy displays of LLW may escalate tensions during assemblies and that when they are used in a crowd, it is fundamental to pay attention to the risk of a stampede.[50]

The Guidance provides directions concerning kinetic impact projectiles (also known as rubber bullets, plastic bullets, impact rounds, baton rounds, or bean bags), which are the most used LLW against assemblies. It expressly says that kinetic impact projectiles should not be fired at close range,[51] targeted at the head, face, or neck (because they can provoke skull fracture, brain injury, damage to the eyes, including permanent blindness, or even death), be fired in automatic mode, nor use rubber-coated metal bullets and metal pellets.[52] Moreover, all the kinetic impact projectiles should be tested to ensure they are sufficiently accurate.[53] According to these rules, these projectiles should be used only to address an imminent threat of injury to a law enforcement officer or a member of the public and "only in direct fire with the aim of striking the lower abdomen or legs of a violent individual."[54]

Regarding chemical irritants, it is interesting that the Chemical Weapon Convention (CWC) prohibits their use in warfare, but they remain legal for law enforcement purposes. The Guidance distinguishes between the hand-held chemical irritants, like pepper spray, and the chemical irritants launched at a distance, popularly known as tear gas. The former are designed to be sprayed in the face of a person when there is reason to believe there is an imminent threat of injury, and it is needed to dissuade a violent aggressor or perform a lawful arrest of someone who is resisting violently.[55] Their use is only lawful if the delivery against the target is accurate. The latter are typically launched from projectiles or grenades to disperse members of a violent group or to stop them from violence. If there is a lawful necessity to use them, these irritant projectiles should be fired at a high angle and not at an individual because of the risk of death or serious injury from impact trauma.[56] In any case, law enforcement officers should not use chemical irritants in confined spaces, like in prison cells, and should bear in mind the

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[49] *Id.*

[50] *Id.*

[51] INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANIZATION (INCLO) AND PHYSICIANS FOR HUMAN RIGHTS (PHR), *supra* note 2, at 10 (stating that because there is risk of penetration of the body and that INCLO and Physicians for Human Rights have found that from close range, some types of kinetic impact projectiles "have a similar ability to penetrate the skin as conventional live ammunition and can be just as lethal").

[52] Human Rights Council Res. HR/PUB/20/1 §§ 7.5.3, .5, .8, at 36 (June, 2020).

[53] *Id.* § 7.5.7, at 36.

[54] *Id.* § 7.5.2, at 35.

[55] *Id.* § 7.2.3, at 27.

[56] *Id.* §§ 7.3.2, .6, at 29, 30.

possibility of a stampede when targeted at a crowd.[57] Further, the Guidance stresses that chemical irritants require sufficient toxicological information to dispel the possibility of any unwarranted health problem. And as the rest of the LLW, they can never be used against purely passive resistance.

The Guidance also sets standards for police batons and water cannons. The former are deemed useful if they are aimed against individuals inflicting or threatening to inflict injury on a law enforcement officer or a member of the public. They should be targeted to the arms or legs of the offender and not to other areas.[58] The latter can only be used "in situations of serious public disorder where there is a significant likelihood of loss of life, serious injury, or the widespread destruction of property."[59] They should be rigorously controlled and not be targeted in a way that can cause a secondary injury, such as targeting someone in an elevated position or at a short range.

Finally, the Guidance on LLW addresses the use of "conducted electrical weapons" (popularly known as "tasers") in ways that the Inter-American system has not even started to touch on. According to the Guidance, tasers may lawfully be used only "to incapacitate individuals at a distance posing an imminent threat of injury (to others or themselves)" and, in some cases, as an alternative to other LLW that may be more dangerous.[60] There is also greater risk when used against the elderly or people with heart disease or against those under the influence of certain drugs and alcohol. Several reports from the United Nations Committee Against Torture describe the negative impact it can have on the health and physical integrity of these individuals.[61] Nevertheless, the Inter-American Commission has not referred to tasers in its latest interventions on using LLW in Latin America. This is likely because this LLW is not as widespread in the region as it is in the United States, where they are one of the most used, and because the Commission´s current focus on LLW is the repression of social protest. Some researchers considered them more like a weapon to detain an individual rather than an instrument to control crowds and demonstrations,[62] and, in fact, none of the recent repressions in Latin America involved the use of tasers.

In conclusion, the UN Guidance offers a basic framework to govern

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[57] *Id.* §§ 7.3.3, .7, at 29-31.

[58] *Id.* §§ 7.1.1-.2, at 25.

[59] *Id.* at 38.

[60] *Id.* § 7.4.3, at 32.

[61] *See* U.N Committee against Torture, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/USA/CO/3-5 para. 27, at 14 (Dec. 19, 2014).

[62] INT'L NETWORK OF CIV. LIBERTIES ORG. (INCLO) AND PHYSICIANS FOR HUM. RTS., *supra* note 29, at 8.

LLW, even though enforcement power seems lacking. The Inter-American System on Human Rights should take note of the Guidance, since, as discussed in the next section, Latin America needs more tools to deal with ongoing human rights violations related to the use of LLW.

II. LLWS ARE A MAJOR THREAT TO HUMAN RIGHTS IN LATIN AMERICA. THE REGION NEEDS STRICTER REGULATIONS ON LLW, AND THE UN GUIDANCE CAN PROVIDE THEM.

The use of LLW has gone beyond any limit in Latin America. Thus, the Inter-American Commission on Human Rights has been trying to develop standards to struggle with human rights violations committed with these weapons by the state parties. The UN Guidance on LLW can provide the Inter-American System on Human Rights with the principles and standards it is looking for.

The Commission has been expressing its concern about LLWs across Latin America in the field of repression of social protest. The Colombian and Chilean cases constitute probably the paramount of the most recent human rights violations by LLW in the region, which showed law enforcement officers illegally aiming rubber bullets at the upper part of the body of the demonstrators, blinding dozens of protesters, as well as launching gas grenades against individuals, causing unnecessary injuries.

A. Colombia

The Inter-American Commission on Human Rights visited Colombia in June 2021 to monitor the situation on Human Rights in the country after reports of brutal repression of the peaceful assemblies that initiated on April 28. On that day, a "National Strike" started in Colombia as a series of demonstrations against a controversial tax reform proposed by President Ivan Duque. The strike soon turned to encompass other structural and historical demands of Colombian society, such as solutions to extreme poverty, and the right to education, work, and healthcare.[63] Nevertheless, the national government answered by deploying the military and the anti-riot squad (ESMAD, by its Spanish acronym) to repress the protests during the several weeks that they endured. Basically, the ESMAD confronted the protesters with a very modern and aggressive arsenal of LLW, including not only rubber bullets but also the 'Venom' high-capacity launching grenades,

[63] Inter-Am. Comm´n H.R, *Observations and recommendations of the working visit of the IACHR to Colombia on June 8-10, 2021* para. 2, at 1 (2021), https://www.oas.org/en/iachr/reports/pdfs/ObservacionesVisita_CIDH_Colombia_ENG.pdf.

which caused great injury and deaths among the protesters because the officers aimed knowingly against their bodies.[64] NGOs, like Amnesty International, responded with a call to "immediately cease the direct or indirect supply" of LLW and related equipment to Colombia.[65]

The Inter-American Commission documented 21 deaths during the protests in Colombia.[66] It also gathered information regarding 1,113 civilians injured and between 18 and 84 cases of eye injuries among the protesters.[67] Above all, the Commission strongly condemned the Colombian government's use of LLW and its lack of respect for international standards on the use of force. It confirmed that "the use of nonlethal devices has caused serious injuries, mutilations, and the death of at least one person," and that it has received reports on the excessive use of force with less lethal weapons and the indiscriminate use of expired irritant gases, and on "the use of Venom grenade launchers, which was prohibited by an administrative judge."[68]

The Commission noted that under certain circumstances, the lethality of a weapon depends on its use and control and reminded Colombia of its duty to guarantee the practical and effective application of use-of-force protocols.[69] It also stressed that "the Inter-American system has reiterated that the use of force by the State must follow the principles of exceptionality, legality, necessity, and proportionality"[70] and that this restriction on the use of force does not apply solely to lethal weapons. "Measures considered 'nonlethal' or 'less lethal' must also be among the measures whose use is controlled."[71]

The Commission issued a recommendation to "ensure that the use of nonlethal means of controlling public order is subjected to strict protocols

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[64] Chloé Lauvergnier, *Protests in Colombia: Videos show 'dangerous' use of grenade launchers by police,* FRANCE 24 (May, 24, 2021), https://observers.france24.com/en/americas/20210526-colombia-police-protests-venom- grenade-launchers.

[65] *The United States must stop providing weapons used to repress Colombia's protests,* AMNESTY INTERNATIONAL (May 20, 2021), https://www.amnesty.org/en/latest/news/2021/05/estados-unidos-armas-usadas-para- reprimir-protestas-colombia/.

[66] Inter-Am. Comm´n H.R, *supra* note 63 para. 31.

[67] *See* Inter-Am. Comm´n H.R, *supra* note 63, at para. 31, 37 (explaining the disparity in the eye injured protesters relies on the sources consulted and that while the Office of the Ombudsperson documented 18 cases, the civil organization "Campaña Defender la Libertad" documented 84, as well as 1,790 persons injured in general).

[68] Inter-Am. Comm´n H.R, *Observations and recommendations of the working visit of the IACHR to Colombia on June 8-10, 2021* para. 47, (2021), https://www.oas.org/en/iachr/reports/pdfs/ObservacionesVisita_CIDH_Colombia_ENG.pdf.

[69] *Id*. para. 58, at 13.

[70] *Id*. para. 59, at 13.

[71] *Id*. para. 56, at 12-13.

that prevent and punish their use in ways that gravely affect the health and safety of demonstrators."[72] On this aspect, the Commission took note that the State of Colombia promised to submit a bill to establish a legal framework for the use and sale of less lethal weapons and to issue a decree regulating guns that shoot rubber bullets.[73] The Commission also stated that security forces may only repress a demonstration under exceptional circumstances "based on imminent and serious risk peoples' fundamental rights, lives, or physical safety and when no other measures are available for protecting these rights that would be less damaging."[74]

B. Chile

Before the events in Colombia, the Inter-American Commission had already documented in Chile cases of extraordinary deployment and abuse of LLW to suppress social protest. In January 2020, a delegation of the Inter-American Commission visited Chile to monitor the human rights situation after the repression of the demonstrations that began on October 18, 2019. The protests, which had stemmed from complaints among students over the rise of the price of the metro ticket in Santiago, the capital city, rapidly spread throughout the lower and middle classes under the expression, "it is not 30 pesos, it is 30 years," showing frustration with the economic and social inequality in the country that persists after the democratic transition in 1990. According to the Inter-American Commission, Chile´s response to protests focused on repression, with a disproportionate use of force against demonstrators and a large number of victims of serious human rights violations.[75] After its visit, the Commission reported that 29 people were killed in the protests and that evidence supported the conclusion that pellets and gas cylinders had been purposely shot at demonstrators' bodies, necks, and faces.[76] Quoting the findings of the National Institute for Human Rights (INDH, by its Spanish acronym), the Inter-American Commission informed that by January 15, 2020, 3,649 people had been injured in demonstration contexts, and 1,624 of them had suffered pellet wounds.[77]

Moreover, 405 people presented eye injuries, including 33 with globe

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[72] *Id.* para. 10, at 40.

[73] *Id.* at 14 n.49.

[74] *Id.* para. 57, at 13.

[75] Press release, Inter-Am. Comm´n H.R**,** IACHR Condemns the Excessive Use of Force during Social Protests in Chile, Expresses Its Grave Concern at the High Number of Reported Human Rights Violations, and Rejects All Forms of Violence (Dec. 6, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/317.asp.

[76] Press release, Inter-Am. Comm´n H.R**,** IACHR Issues Preliminary Observations and Recommendations Following On-Site Visit to Chile (January 31, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/018.asp.

[77] *Id.*

rupture[78] and, in some cases, total loss of vision in both eyes.[79] The Commission also expressed concern about the differentiated consequences of the repression on children, adolescents, LGBTI people, and indigenous people, who suffered torture, sexual abuse, and judicial harassment due to the criminalization of social protest. Finally, the Inter-American Commission called for Chile to immediately end the disproportionate use of force by the Carabineros and to comply with international standards on the use of force.[80]

C. Other Cases of Human Rights Violations in Latin America Concerning the Use of LLW: The Situation in Brazil, Venezuela, and Argentina.

The Inter-American human rights system has lately been focused on the danger posed by LLW in Colombia and Chile. However, LLW remains a serious threat to human rights in the rest of Latin America as well, as demonstrated by the cases of Brazil, Venezuela, and Argentina.

The Inter-American Commission on Human Rights examined Brazil in its 2021 country report[81] and demanded improvements in terms of compliance with human rights standards on the use of force and, specifically, the use of LLW. The Commission recalled the country´s past experiences of misuse of rubber bullets in the context of demonstrations, resulting in death and injury. It also noted that it had received complaints of excessive force and cruelty against people in custody, which included indiscriminate use of rubber bullets, pepper gas, and tear gas.[82] Therefore, the Commission recommended Brazil amend its protocols and guidelines for law enforcement agencies to ensure that they meet international standards with regard to "tactics for reducing tension and the use of less lethal weapons"[83]

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[78] *Id*.

[79] See also "Chile: conmoción por el suicidio de Patricio Pardo…", available in Spanish at *https://www.pagina12.com.ar/388788-chile-conmocion-por-el-suicidio-de-patricio-pardo-un-joven-d*; for a discussion of how Patricio Pardo, one of the victims of eye injury in Chile, had committed suicide in December 2021, after going through a depression caused by the mutilation he suffered., he had lost his vision on November 2019, when a tear gas grenade impacted his right eye; and how his death was mourned by, among others, Gabriel Boric, the current president of Chile, who was one of the foremost opponents to the repression of social protests during these events.

[80] *Carabineros,* MERRIAM-WEBSTER (2023), https://www.merriam-webster.com/dictionary/carabinero.

[81] Inter-Am. Comm´n H.R, *Situation of Human Rights in Brazil* (2021), at 192, https://www.oas.org/en/iachr/reports/pdfs/Brasil2021-en.pdf.

[82] *Id*. para. 189, at 73.

[83] *Id.* para. 7(c), at 192.

and also urged the country to train its police on the use of lethal force in accordance with the UN Basic Principles on the Use of Force.[84]

Meanwhile, in its 2018 country report on Venezuela, the Inter-American Commission criticized the use of LLW against political dissidents during demonstrations arising from the decision to ban Henrique Capriles from running for the presidency. Among other considerations, the Commission stated that:

> [L]aunching tear gas at demonstrators from close range and from helicopters, as well as using it directly in health care facilities, homes, and residential buildings, are not only not absolutely necessary (given the existence of other less harmful means) but would have a disproportionate impact on the public owing to their possible indiscriminate effects.[85]

The Commission also received reports of the use of expired gas canisters that was lethal to at least one victim. Finally, it urged Venezuela to "adopt and rigorously implement specific protocols on the gradual and proportional use of less lethal weapons and punish their indiscriminate use."[86]

The use of rubber bullets and tear gas remains widely spread in Argentina as well. However, the country has made efforts at the federal level to ensure institutional reforms to prevent repression of social protest. In 2013, the Police of the City of Buenos Aires deployed rubber bullets, pepper spray, and police batons in the Borda Psychiatric Hospital against patients and doctors who were demonstrating against the demolition of part of the hospital´s premises. Several people were injured, and the media showed the police firing rubber bullets from a dangerously short distance and aiming at the upper part of the body of the demonstrators.[87] Likewise, in 2014, National Gendarmerie shot rubber bullets against dismissed workers of LEAR, a bankrupted company, while they were pacifically demonstrating, and similar events occurred in 2015 and 2016.

The use of these kinetic projectiles was also common to disperse crowds during football matches in Argentina until the police of the Province of Buenos Aires killed a spectator in 2013 by shooting a rubber bullet to his chest. This led the province´s government to ban the use of rubber bullets at sports events, and the national government to ban the away supporters at

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[84] *Id.* para. 282, at 104.

[85] Inter-Am. Comm´n H.R., *Situation of Human Rights in Venezuela*, para. 225, at 124, OEA/Ser.l/V/II. Doc. 209
(Dec. 31, 2017), https://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf.

[86] *Id.* para. 230, at 126.

[87] INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANIZATION (INCLO) AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 29, at 19-27.

matches, a prohibition that remains.[88]

Furthermore, on June 2020 and December 13, 2021, the Federal Chamber of Cassation of Argentina upheld the conviction of the former National Secretary of Security, Enrique Mathov, and the former Chief of the Federal Police, Ruben Santos, for the wrongful death of three individuals during the massive demonstrations that occurred in December of 2001 in the city of Buenos Aires, during the final days of the presidency of Fernando De la Rua.[89] This repression involved an astonishing use of LLW, such as water cannons, rubber bullets, police batons, and tear gas, as well as the deployment of the mounted police and their whips, which were used against members of the Madres of Plaza de Mayo. Basically, the trial focused on the use of lethal weapons, and not on the many injured by LLW. Nevertheless, it is important to note that three of the dead victims were shot with metal pellets fired from shotguns that can alternatively be loaded with lead, rubber, or flash-bang ammunition cartridges, a type of weapon that is discouraged by the current standards of the Inter-American Commission on Human Rights because they are "particularly elusive to current control mechanisms during operations and for the administrative or judicial reconstruction on their use."[90] The case of the 2001 deaths is a leading case on standards on the use of force by law enforcement officials because, for the first time in Argentinean history, a political officer and a chief of police were convicted for their negligence in ordering and coordinating the repression of social protest under democracy.[91] The three-judge panel tribunal that convicted

[88] Claudio Gómez, *Argentine football marks 10 years without away supporters at matches*, BUENOS AIRES TIMES (June 11, 2023), https://www.batimes.com.ar/news/sports/argentine-football-marks-10-years-without-away-fans-at-matches.phtml.

[89] Cámara Federal de Casacion Penal [Federal Chamber of Criminal Cassation I], decisions held on June 1, 2020 and December 13, 2021, in re "Mathov, Enrique José" (Arg.). Mathov was convicted to 4 years and 3 months of effective imprisonment and Santos to 3 years and 6 months, although defenses will try an extraordinary appeal to get the review of the National Supreme Court, but only on regard of the length of the conviction. Other lower-ranking police officers were convicted as well.

[90] Edison Lanza (Special Rapporteur of the Freedom of Expression) of the Inter-Am. Comm´n H.R., *Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State* para. 123, at 47, OEA/Ser.L/V/II CIDH/RELE/INF.22/19 (Sept. 2019), https://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf.

[91] "For the first time, the Judiciary considered that political officials are criminally responsible for the consequences of an order to repress a social protest. The conviction of one of the political leaders and three in charge of the leadership of the PFA expresses that the court considered that the security forces are not autonomous: they have a political leadership that must respond for the effects of their actions and for the use of the force that is carried out in the operations. At the same

Mathov and Santos in 2016[92] quoted the Code of Conduct and the Basic Principles as part of the internationally recognized standards on the use of force and established that the defendants ignored the many alarms they received during the police operations concerning the misconduct of the police officers and the possibility that they could end in a deadly result, as they did. This lack of consideration of the possible harmful consequences of police operations is directly related to the principle of precaution on the use of force, which mandates that security forces must plan their operations to minimize the risk of death and injury. The judges also noted that the government failed to provide part of their police officers with defensive equipment and rubber bullets that would have prevented them from using lethal force.

The above experiences of Colombia, Chile, Brazil, Venezuela, and Argentina bolster the idea that LLW is a major threat to human rights in Latin America and that there is a need to enforce stricter regulations on them, such as the ones that the UN Guidance provides.

III. THE INTER-AMERICAN COMMISSION HAS STATED ITS SUPPORT FOR THE PRINCIPLES ESTABLISHED IN THE GUIDANCE, AND IF THE INTER-AMERICAN SYSTEM BEGINS TO ENFORCE THEM, IT CAN PROVIDE THEM WITH NECESSARY EFFECTIVENESS.

The Inter-American System should start applying the UN Guidance on LLW in their future interventions, as the Inter-American Commission has already endorsed the establishment of the Guidance on LLW and shares most of their standards. Furthermore, the Inter-American Court can use the Guidance to set a line of jurisprudence on the use of LLW, as well as to order the state parties to adapt their domestic legislation on LLW to these standards, as it has already done with the Code of Conduct and the Basic Principles on the field of lethal weapons.

The Inter-American Commission of Human Rights endorsed rapporteur Heyns in his call to form a group of experts to develop the UN Guidance on LLW. The Commission did so in its 2015 annual report on the use of force,[93]

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time, the verdict confirms that the declaration of a state of siege cannot be considered a blank check for repression . . . ." (*19 y 20 de diciembre de 2001: condenas a la represión de la protesta social*, CENTER FOR LEGAL AND SOCIAL STUDIES (May 23, 2016), https://www.cels.org.ar/web/2016/05/19-y-20-de-diciembre-de-2001-condenas-a-la-represion-de-la-protesta-social/.

[92] Tribunal Oral en lo Criminal Federal Nro. 6 de la Ciudad de Buenos Aires [Federal District Court No. 6 for the City of Buenos Aires], decision held on August 4, 2016, in re "MATHOV, Enrique José y otros s/abuso de autoridad y violación de deberes de funcionario público" (Arg.).

[93] INTER-AM. COMM´N H.R., *CHAPTER IV.A, THE USE OF FORCE*, ANNUAL REPORT (2015), http://www.oas.org/en/iachr/docs/annual/2015/doc-en/informeanual2015-cap4a-fuerza-en.pdf.

when, quoting Heyn´s 2014 report to the UN Human Rights Council,[94] the Commission expressed that "it was essential to have clear and appropriate international rules" on LLW to avoid death and injury, given the expansion of its industry and its use.[95] The Commission also emphasized "the need to develop normative provisions, protocols, and manuals that consider absolute prohibitions of their use in contexts or with persons that may imply greater risk."[96]

The Inter-American Commission not only shares with the UN the concern on the human rights impact of LLW, but it also shares the foremost standards set by the UN Guidance on LLW in Law Enforcement. To support the necessity of stricter regulation on LLW, in its 2015 annual report on the use of force the Inter-American Commission gave some examples of misuse of LLW, all of which were finally adopted by the UN Guidance. For instance, the Inter-American Commission mentioned the case of rubber munitions shot from a short distance at the upper part of the body, tear gas fired at persons' bodies, irritating gases used against children and the elderly, and pistols that fire an electric charge used against persons with heart conditions. It also mentioned in its report that tear gas should not be used in closed spaces,[97] and that before using it crowds should be given a prior opportunity to evacuate the zone to prevent situations of panic or stampedes.[98]

Besides, the Inter-American Court's ample remedy powers represent a unique framework to start applying the UN Guidance on LLW. The Inter-American Court could order state parties to adapt their domestic legislation on using force to comply with the standards set by the UN Guidance on LLW. The Court could do it in the same fashion it has ordered before state parties to adapt their domestic legislation to comply with the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement officials,[99] both UN instruments that the Inter-American Commission and the Court have been invoking in the case law to interpret and to give content to the international obligations

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[94] Christof Heyns (Special Rapporteur on extrajudicial summary or arbitrary executions), *supra* note 37 para. 119, at 19.

[95] Inter-Am. Comm´n H.R., *supra* note 93 para. 18, at 509-10.

[96] *Id.* para. 16, at 509.

[97] *Id.* para. 16-18, at 509-10.

[98] *Id.* para. 16, at 509 (foregoing the considerations that the Inter-American Commission had in its interventions in Colombia, Chile, Brazil and Venezuela, regarding the use of LLW in the context of assemblies, as already explained in section III, all of which are in line with the standards currently set by the UN Guidance on LLW in Law Enforcement).

[99] *Id.* para 7, at 506.

of state parties on the use of force.[100]

Essentially, the Inter-American System on Human Rights has proven to be very activist in setting state party´s obligations and fostering remedies to protect human rights. Since its earliest case, the Inter-American Court has established, for instance, that state parties have a legal duty to take reasonable steps to prevent human rights violations and to carry out serious investigations of those violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation.[101] It has also established that states may not invoke any domestic legal provision against the effective application of their international legal obligations on human rights. For example, in the Bulacio case, the Court ordered Argentina to set aside provisions on statutes of limitations to continue investigating a death under the custody of a juvenile.[102]

In setting obligations to the state parties, the Inter-American Court has interpreted that Article 2 of the American Convention on Human Rights[103] allows the Court to issue decisions ordering the states to adapt their domestic legal framework to the Inter-American standards. This power is also deemed as part of the concept of "conventionality control" or "conventionality review" coined by the Inter-American Court.[104] Basically, according to the jurisprudence of the Inter-American Court, the obligation of the states to comply with the Inter-American instruments and standards requires both suppressing any rules or practices that violate them and developing standards and practices leading to the effective observance of the Inter-American standards.[105] This conventionality review can be performed by the state on its initiative, or by the Inter-American system while monitoring the state or issuing a decision.

The Inter-American Court has required states on at least two occasions

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[100] U.N. Human Rights Office of the High Commission, *supra* note 8, para. 1.4, at 2 ("The Guidance supplements and complements the standards laid down in the Code of Conduct for Law Enforcement Officials (Code of Conduct) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles.").

[101] Velasquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174, at 31 (Jul. 29, 1988).

[102] Bulacio v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 100, ¶ 116-118, at 48-49 (Sep.18, 2003).

[103] Inter-Am. Comm´n H.R., *Obligation of States to Adapt Their Domestic Legislation to the Inter-American Standards of Human Rights* para. 25, at 18, OEA/SER.L/V/II. Doc. 11 (Jan. 25, 2021), https://www.oas.org/en/iachr/reports/pdfs/CompedioobligacionesEstados-en.pdf ("Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms").

[104] *Id.* para. 19, at 16.

[105] *Id.* para. 28, at 19.

to adapt their domestic law to comply with the standards set by the Code of Conduct and the Basic Principles, and nothing stops the Court from doing the same with the UN Guidance on LLW. The Court has required the Dominican Republic and Venezuela to adapt their domestic law to the Code of Conduct and the Basic Principles in the *Nadege Dorzema* and the *Montero-Aranguren* cases.[106] The Dorzema case involved the excessive use of force by Dominican soldiers, that resulted in the killing of seven Haitians, while the Montero-Aranguren case related to the alleged extrajudicial execution of 37 detainees in Venezuela.[107]

These cases show how far the Inter-American system is willing to go to hold state parties accountable to their international obligations on the use of force, and the importance that the system gives to these UN instruments.

As the use of LLW poses a major threat to human rights in Latin America, especially regarding the repression of social protest, the UN Guidance on LLW in Law Enforcement should be used by the Inter-American System to interpret the extent of the international obligations of the state parties regarding the use of force when it comes to LLW. The Inter-American Court should order the states to adopt protocols on the use of LLW following the principles settled in the Guidance.

As human rights violations by LLW continue, it is expected that petitions related to the arbitrary use of LLW will arrive soon in the Inter-American system (maybe petitions concerning the Chilean and Colombian repressions of 2019 and 2021) and the principles set in the Guidance would be fundamental to adjudicate the cases and to handle the problems arising from LLW.

While the Inter-American Commission has been actively involved in the discussion on LLW, the Inter-American Court case law on the use of force is still focused on the use of lethal weapons. By applying the Guidance´s principle on LLW to new case law, the Inter-American Court on Human Rights would have a unique opportunity to establish a line of jurisprudence on the use of LLW. The Guidance could be also applied through an advisory opinion of the Inter-American Court, in the case that any state party requests an opinion regarding the compatibility of its domestic law with international legal standards on the use of force or

[106] Nadege Dorzema v Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 251 (Oct. 24, 2012); Montero Aranguren v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 150 (Jul. 5, 2006).

[107] *Id.*

requests the interpretation of the American convention or a treaty.[108] The Guidance could also be applied within the framework of the Inter-American Commission in any of its interventions, including in the negotiation of friendly settlements between petitioners and state parties.

CONCLUSION

The Inter-American Commission and the Inter-American Court on Human Rights should apply in their future decisions and interventions the principles settled in the UN Guidance on LLW in Law Enforcement. This instrument brings bright line rules and a clear framework for using LLW.

Improper use of LLW is provoking gross violations of human rights in Latin America, especially in the field of repression of social protest. The Inter-American System of Human Rights is ready to enforce the Guidance, as it shares its core standards and has a long tradition of applying the Basic Principles and the Code of Conduct on the use of force, which the Guidance complements. Moreover, the Inter-American system has ample powers to set obligations to the state parties through the decisions of the Inter-American Court, which provides a unique opportunity for the enforcement of the Guidance.

[108] Organization of American States, American Convention on Human Rights, art. 64, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

THE DEATH OF ARTICLE 17: HOW THE CJEU IN *POLAND V. PARLIAMENT* CREATED A FRAMEWORK WHICH PREVENTS HOLDING YOUTUBE LIABLE FOR COPYRIGHT INFRINGEMENT UNDER DIRECTIVE (EU) 2019/790

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INTRODUCTION

On March 23, 2020, nearly 170,000 people[1] across Europe took to the streets to protest an existential threat[2] the world has never seen before. It was not a mass protest against an unprovoked invasion, societal injustices, or the results of an election. Rather, the uproar caused by a revolutionary copyright directive was denounced by over five million online users,[3] and aimed to modernize European copyright law for the digital era.

In 2014, the European Commission found a need to develop a more modern, more European copyright framework by creating a digital single market.[4] Five years later, the European Union Parliament passed Directive (EU) 2019/790[5] (the "Directive"). Under Article 17, Section 4 of the Directive, online content-sharing service providers ("OCSSP(s)") shall be liable for unauthorized acts of communication to the public unless they demonstrate they have: (a) made best efforts to obtain authorization, (b) made diligent best efforts to ensure the unavailability of specific works, and (c) acted expeditiously when notified to remove infringing content and prevent future uploads.[6] Although the Directive did not single out any individual OCSSP, "anyone versed in the political economy of digital

[1] Philipp Grüll, *One year of EU copyright reform: Is the Internet still working?*, EURACTIV (Apr. 20, 2020) https://www.euractiv.com/section/digital/news/one-year-of-eu-copyright-reform-is-the-internet-still-working/ (last visited Oct. 4, 2022).

[2] Lauren Feiner, *YouTube and its users face an existential threat from the EU's new copyright directive*, CNBC (May 12, 2019, 6:00 A.M.). https://www.cnbc.com/2019/05/10/youtube-faces-existential-threat-from-the-eus-new-copyright-directive.html (last visited Oct. 4, 2022).

[3] Save The Internet, *Stop the censorship-machinery! Save the Internet!*, CHANGE.ORG (June 2018) https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet (last visited Oct. 4, 2022).

[4] *A Digital Single Market Strategy for Europe*, at 6, COM (2015) 192 final (June 5, 2015).

[5] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter *Directive*].

[6] *Id.* art. 17, at 4.

copyright knows that Article 17 was designed specifically to make YouTube pay."[7]

One week after the Directive passed, the Republic of Poland brought an action of annulment against the European Union Parliament.[8] Poland argued Article 17, Section 4, Points B and C should be severed from the Directive, or, in the alternative, Article 17 should be annulled entirely.[9] The Court of Justice of the European Union (the "CJEU") rejected the notion Article 17 violated fundamental rights protected by the Charter of Fundamental Rights of the European Union.[10] Accordingly, the CJEU upheld Article 17 in its entirety.[11]

The CJEU's judgment laid out a thorough interpretation of Article 17, which arguably gutted the stringent standards intended by the European Union to open OCSSPs to liability for copyright infringement. The CJEU's discussion of Article 17 included three significant findings. First, OCSSPs can determine and choose the measures that qualify as their "best efforts."[12] Second, liability only arises after the rightsholder provides the OCSSP with relevant and necessary information about their copyrighted content.[13] Third, OCSSPs are not required to prevent unlawful, infringing content on their platform, when it requires an independent assessment to determine if the content violates copyright law.[14]

Therefore, the CJEU's judgment in *Poland v. Parliament* effectively prevents YouTube from being held liable for copyright infringement under Article 17(4), because the Charter of Fundamental Rights of the European Union enables YouTube to create their own "best efforts" of content moderation. YouTube's current copyright policies qualify as "best efforts" to remove infringing content once the platform is notified and prevents future uploads, and any external determination of copyright infringement thereafter, precludes liability for YouTube.

This paper will analyze the CJEU's judgment in *Poland v. Parliament* within the context of OCSSP copyright infringement litigation and its

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[7] Annemarie Bridy, *The Price of Closing the "Value Gap": How Music Hacked EU Copyright Reform*, VAND. J. ENT. & TECH L. 323, 325 (2020) [hereinafter *The Price of Closing the Value Gap*].

[8] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶¶ 1-2 (Apr. 26, 2022).

[9] *Id.*

[10] *Id.* ¶ 98.

[11] *Id.* ¶ 100.

[12] *Id.* ¶ 73.

[13] *Id.* ¶ 89.

[14] *Id.* ¶ 90.

potential effect as a robust liability shield for YouTube. Part II will overview EU copyright law and discuss YouTube's current copyright policies. Part III will dissect the CJEU's judgment in *Poland v. Parliament* and explain how YouTube's determination of "best efforts" under Article 17(4) is protected by the Charter of Fundamental Rights of the European Union. Part IV will detail how YouTube's copyright policies comply with Article 17(4), thereby greatly limiting YouTube's potential for liability. Part V will discuss the role independent legal assessments and exceptions to copyright infringement play in precluding liability for YouTube. Finally, Part VI will briefly conclude this article's major arguments and forecast future developments in OCSSP copyright infringement litigation.

I. YOUTUBE'S COPYRIGHT MANAGEMENT TOOLS, EU COPYRIGHT LAW, AND THE BATTLE TO HOLD OCSSPS LIABLE FOR COPYRIGHT INFRINGEMENT.

YouTube is the second largest online content-sharing service provider (OCSSP) in the world, with over 2.56 billion active monthly users.[15] The main purpose of an OCSSP "is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organizes and promotes for profit-making purposes."[16] In the United States alone, YouTube's creator economy contributed over twenty-five billion dollars to the nation's gross domestic product ("GDP") and over 425,000 full-time equivalent jobs in 2021.[17] From August 2018 to August 2021, YouTube paid thirty billion dollars in advertising revenue from its videos to media companies, creators, and artists.[18]

A. YouTube's Copyright Management Tools

YouTube utilizes three tools, the Webform, Copyright Match Tool, and Content ID, to manage copyright infringing content uploaded, published,

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[15] Stacy Jo Dixon, *Most popular social networks worldwide as of January 2023*, *ranked by number of monthly active users*, STATISTA, (Aug. 29, 2023), https://0-www-statista-com.library.swlaw.edu/statistics/272014/global-social-networks-ranked-by-number-of-users/.

[16] *Directive*, *supra* note 5, art. 2(6), at 29, 30.

[17] HAMILTON GALLOWAY, OXFORD ECONOMICS, THE STATE OF THE CREATOR ECONOMY—ASSESSING THE ECONOMIC, SOCIETAL, AND CULTURAL IMPACT OF YOUTUBE IN THE US IN 2021 6, (2022).

[18] Marco Pancini, *YouTube's approach to copyright*, GOOGLE BLOG (Aug. 31, 2021), https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/ (last visited Nov. 13, 2022).

improperly monetized, or a combination thereof on YouTube.[19] The Webform allows any YouTube creator to submit a copyright removal request to remove the rightsholder's copyright-protected work uploaded without their authorization.[20] The removal request consists of six elements: the copyright owner's contact information, a description of the copyrighted work, specific URL(s) of the infringing video(s), an agreement that the rightsholder has a good faith belief the material was used without authorization, an assertion under the penalty of perjury that they are the copyright owner, and a signature.[21] After three "copyright strikes," a channel may be terminated from YouTube.[22]

The Copyright Match Tool is available to over two million channels who fall into three categories: users in the YouTube Partner Program, those granted access through the Copyright Management Tool application, and users who have previously removed a video due to a valid copyright takedown request.[23] The Copyright Match Tool scans YouTube for reuploads of all the user's public, unlisted, and private videos uploaded after the user's initial video to identify potential matches of that specific video.[24] Unlike Content ID, the tool only looks for complete or nearly complete matches to the user's videos, so the tool will not identify videos that include short clips of copyrighted material.[25] The user reviews any matched videos to determine whether they want to archive the video, request removal, or contact the channel.[26] The removal request can be effective immediately or seven days after the request is filed, and the user can prevent future copies from being uploaded to YouTube.[27]

Content ID is available to over nine thousand channels, primarily "movie studios, record labels, and collecting societies."[28] The channels provide YouTube with reference files so that YouTube can create "digital

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[19] YOUTUBE, YOUTUBE COPYRIGHT TRANSPARENCY REPORT H1 2021 1 (2021).

[20] *Submit a copyright removal request*, *YouTube Help*, https://support.google.com/youtube/answer/2807622?hl=en (last visited Nov. 12, 2022).

[21] *Requirements for copyright infringement notifications: Videos*, *YouTube Help*, https://support. google.com/youtube/answer/6005900 (last visited Nov. 12, 2022).

[22] YouTube Creators, *Copyright Takedowns & Content ID - Copyright on YouTube* (Oct. 12, 2020), https://www.youtube.com/watch?v=4qfV0PRsCrs (last visited November 12, 2022).

[23] YouTube Creators, *How to use the Copyright Match Tool*, (Aug. 16, 2022), https://www.youtube.com/watch?v=R_zXuVReajA (last visited Nov. 12, 2022).

[24] *Id.*

[25] *Id.*

[26] *Use the Copyright Match Tool*, *YouTube Help*, https://support.google.com/youtube/answer/7648743?hl=en (last visited Nov. 12, 2022).

[27] *Submit a copyright removal request*, *supra* note 20.

[28] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 3.

fingerprints" from the program scans the entire platform to identify infringing uploads that match the reference files.[29] Copyright owners are then able to block, monetize, or track infringing videos.[30]

From July 1, 2021, to December 31, 2021, Content ID identified 759,540,199 videos on YouTube with infringing content.[31] The uploading user disputed 3,810,395 Content ID claims, but only 3,965 counter notifications were received.[32] Less than one percent of filed counter notifications resulted in a lawsuit.[33]

B. Recent CJEU Caselaw Regarding OCSSP Liability

Over the past two decades, YouTube and its parent company, Google, have been repeatedly dragged into European courts on various copyright infringement-related actions. In 2006, Copiepresse, a Belgian copyright management company for newspapers, sued Google, alleging copyright infringement.[34] Google provided links to cached copies of newspaper articles within its search results and published headlines and snippets of the articles on Google News.[35] The Belgian Court of Appeals affirmed the trial court's decision, which found Google liable for copyright infringement.[36]

In 2019, the CJEU addressed whether OCSSPs must disclose a user's personal information to the copyright owner after the user commits copyright infringement. Constantin Film Verleih GmbH sued YouTube, seeking access to the email addresses, IP addresses, and mobile telephone numbers of users who infringed upon Constantin Film's rights by illegally uploading protected cinematographic works.[37] Under Article 8(2)(a) of Directive 2004/48/EC, judicial authorities may order that the names and addresses of an intellectual property infringer must be provided to the rightsholder.[38]

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 10.

[32] *Id.* at 10-11.

[33] *Id.* at 11.

[34] Graham Smith, *Copiepresse v Google - the Belgian judgment dissected,* LEXOLOGY (Mar. 13, 2007), https://www.lexology. com/library/detail.aspx?g= befe6258-9709-4eb8-9557-d9ee0e99cff5 (last visited Nov. 13, 2022).

[35] *Id.*

[36] Bart Van Besien, *Copiepresse versus Google: a legal analysis of news aggregation and copyright infringement under Belgian law*, NEWMEDIA-LAW (Sept. 17, 2013, 06:47 AM), https://www.newmedia-law.com/news/copiepresse-versus-google-a-legal-analysis-of-news-aggregation-and-copyright-infringement-under-belgian-law/ (last visited Nov. 13, 2022).

[37] Case C-264/19, Constantin Film Verleih GmbH v. YouTube LLC, Google Inc., ECLI:EU:C:2020:542, ¶ 2 (July 9, 2020).

[38] Council Directive 2004/48/EC, art. 8, 2004 O.J. (L 157).

The CJEU held that email addresses, telephone numbers, and IP addresses are not within the definition of "addresses" within Article 8(2)(a).[39] Nonetheless, EU Member States have the option to require the disclosure of such information, provided the nation's measures comply with other general principles of EU law.[40] Germany's Federal Court of Justice is one national court that has followed the CJEU's ruling in *Constantin Film Verleih GmbH* and reaffirmed that YouTube does not have to disclose the email addresses, telephone numbers, and IP addresses of infringing users to rightsholders.[41]

The CJEU laid the groundwork for some of their later holdings in *Poland v. Parliament* regarding OCSSP liability in a 2019 defamation case. Eva Glawischnig-Piesczek, a member of Austria's National Council, sued Facebook after a user published a defamatory comment about her, and the platform refused to delete the comment.[42] Facebook knew the illegal content and did not act expeditiously to remove the content.[43] The CJEU held that courts could require OCSSPs to block content that is identical to content that has previously been declared illegal without violating the EU's prohibition against implementing a general monitoring scheme.[44]

Nonetheless, courts cannot require OCSSPs to actively "seek facts or circumstances underlying the illegal content."[45] The CJEU held that when an OCSSP searches for and blocks content identical to content that has previously been declared illegal, OCSSPs are not required to carry out an independent assessment, because they already have access to and use automated search tools and technologies.[46] Overall, OCSSPs are allowed to monitor, remove, and block content when they have been provided with the relevant and necessary information regarding the infringing content and have no obligation to perform an independent legal assessment.[47]

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[39] Case C-264/19, Constantin Film Verleih GmbH v. YouTube LLC, Google Inc., ECLI:EU:C:2020:542, ¶ 40.

[40] *Id.* ¶ 39.

[41] EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, RECENT EUROPEAN CASE-LAW ON THE INFRINGEMENT AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 136 (2023).

[42] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶¶ 10-14 (Oct. 3, 2019).

[43] *Id.* ¶ 27.

[44] *Id.* ¶ 37.

[45] *Id.* ¶ 42.

[46] *Id.* ¶ 46.

[47] Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?, 2* ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELL. PROP. J. 1, 16 (2020) [hereinafter Leistner].

The battle to hold YouTube liable for copyright infringement in the EU culminated in *Frank Peterson v. Google LLC*. Frank Peterson, a German music producer, sued YouTube over songs and the performance of songs from an album he produced.[48] Peterson owns the copyright to the songs that third parties allegedly uploaded.[49] This litigation is being decided under Directive 2000/31/EC (E-Commerce Directive), Directive 2001/29/EC (InfoSoc Directive), and Directive 2004/48/EC, not Directive 2019/790.[50]

The CJEU held that under InfoSoc Directive Article 3(1), OCSSPs do not make a "communication to the public" unless they have:

> [1] specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or [2] where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or [3] where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.[51]

The CJEU held OCSSPs violate Article 3(1) when a rightsholder notifies the platform that unlawful content has been uploaded, and the OCSSP does not immediately take action to prevent access to this unlawful content by deleting or blocking it.[52]

C. EU Copyright Law Before and After Directive (EU) 2019/790

While efforts to hold OCSSPs, like YouTube, liable for copyright infringements have ramped up over the past decade, copyright law in the European Union remained largely stagnant before the Directive. The Berne Convention for the Protection of Literary and Artistic Works is an international agreement that sets minimum standards of copyright law for its

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[48] Joined Cases C-682/18 & C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v. Cyando AG (C-683/18), ECLI:EU:C:2021:503, ¶¶ 18-24 (June 22, 2021).

[49] *Id.*

[50] *Id.* ¶¶ 1, 59.

[51] *Id.* ¶ 102.

[52] *Id.* ¶ 145.

179 contracting nations.[53] In the EU, original literary and artistic works are protected by copyright from the moment of creation until seventy years after the author's death.[54] Copyright protection grants the author of the work exclusive economic and moral rights which are automatically assigned upon creation.[55] Economic rights are broken down into three broad categories: reproduction, communication to the public, and distribution.[56]

Copyright law within individual EU Member States is governed by national law.[57] Therefore, the European Parliament harmonizes and standardizes national copyright law across the EU through the passage of numerous directives.[58] Once the European Parliament passes a directive, Member States have a certain timeframe to transpose the directive into national law.[59]

In 2000, the European Union sought to protect the free movement of information across OCSSPs by establishing national provisions to regulate OCSSP liability.[60] The following year, the European Union implemented its first major copyright directive in the digital age.[61] The InfoSoc Directive attempted to harmonize EU Copyright Law with the emerging technologies that gave rightsholders new ways to exploit their copyright interests. However, it simultaneously opened the floodgates for OCSSPs to commit copyright infringement with no legal recourse for rightsholders.[62] In 2014, the EU Commission began to develop a legislative plan for a new digital single market, which encompassed the new copyright framework enacted by the Directive.[63]

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[53] Berne Convention for the Protection of Literary and Artistic Works art. 1, July 14, 1967, 102 Stat. 2853, 828 U.N.T.S. 11850.

[54] EUROPEAN UNION, Copyright, https://europa.eu/youreurope/business/running-business/intellectual-property/copyright/index_en.htm#:~:text=Nobody%20apart%20from%20you%20has,a%20work%20of%20joint%20authorship. (last visited Nov. 12, 2022).

[55] *Id.*

[56] Council Directive 2001/29/EC, arts. 2-4, 2001 O.J. (L 167) [hereinafter *InfoSoc Directive*].

[57] EUROPEAN PARLIAMENT, COPYRIGHT LAW IN THE EUU: SALIENT FEATURES OF COPYRIGHT LAW ACROSS EU MEMBER STATES 1 (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf.

[58] *Id.*

[59] Council Directive 2016/C 202/171, art. 288, 2016 O.J. (L 59) 171, 171-72 (EU).

[60] Council Directive 2000/31/EC, art. 1, 2000 O.J. (L 178) [hereinafter *E-Commerce Directive*].

[61] *InfoSoc Directive*, *supra* note 56, art. 1.

[62] *InfoSoc Directive*, *supra* note 56, recitals 1-6.

[63] European Commission, A Digital Single Market Strategy for Europe, at 2, COM (2015) 192 final (June 15, 2015).

Under Article 17, Section 4, of Directive (EU) 2019/790, online content-sharing service providers (OCSSPs) shall be liable for unauthorized acts of communication to the public, unless they demonstrate they have:

> (a) made best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event, (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).[64]

Article 17(4) is based on the premise that OCSSPs are unable to obtain authorization for all copyrighted content uploaded by users.[65] Rightsholders are under no obligation to license their content to OCSSPs.[66] Thus, in the absence of an authorization and users upload unlawful content, the OCSSP must meet all Article 17(4) requirements to avoid liability.[67] The defendant OCSSP has the burden to prove the platform complied with the requirements set forth in Article 17(4).[68]

In 2019, the Directive made four noticeable changes to the InfoSoc Directive and the E-Commerce Directive: it redefined communication to the public, changed the preexisting notice-and-takedown regime to a notice-and-stay-down regime, enshrined copyright exceptions into law, and introduced a specific liability regime for OSCCPs.[69]

The Directive changed the InfoSoc Directive's original definition[70] of when OCSSPs make an act of communication to the public. Article 17(1) of the Directive clarified that an OCSSP performs an act of communication to the public when they unlawfully make copyright-protected works available to the public on their platform.[71]

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[64] *Directive*, *supra* note 5, art. 17(4), at 38.

[65] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 48 (Apr. 26, 2022).

[66] *Directive*, *supra* note 5, recital 61, at 19.

[67] *See* Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 49; *Leistner*, *supra* note 47, at 12.

[68] *Directive*, *supra* note 5, art. 17(4), at 38.

[69] *See Id.* art. 17(1) & 17(7), at 38, 39; Christopher Geiger & Bernd Justin Jütte, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, 70(6), GRUR INT'L, 1, 10 (2021) [hereinafter *Platform Liability Under Article 17*]; Bridy, *supra* note 7, at 354-55.

[70] *See* Joined Cases C-682/18 & C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v. Cyando AG (C-683/18), ECLI:EU:C:2021:503, ¶ 120 (June 22, 2021).

[71] *Directive*, *supra* note 5, art. 17(1), at 38.

The Directive also changed the E-Commerce Directive's notice-and-takedown regime into a notice-and-stay-down regime.[72] The E-Commerce Directive required OCSSPs to take down infringing content once they had knowledge of the illegal activity.[73] Under Directive Article 17, OCSSPs not only must take down infringing content once they are notified, but they must also make best efforts to prevent future uploads of the infringing content.[74]

Under InfoSoc Directive Article 5, Member States had the option to provide exceptions or limitations to copyright regarding the right of reproduction or communication to the public.[75] Now, Member States are required to recognize the enumerated exceptions in Article 17(7) of the Directive.[76]

The most controversial measure of this new directive was Article 17, which introduced a specific liability regime for OCSSPs. OCSSPs are now presumptively held liable for an unlawful communication to the public unless they prove otherwise.[77] For example, if a YouTube user uploads a clip of *Star Wars Episode III: Revenge of the Sith* without obtaining a license from The Walt Disney Company, both the user and YouTube could be held liable in a court of law for copyright infringement. Simply put, OCSSPs can now be found "directly liable for copyright infringements by user uploads."[78]

EU Member States had until June 7, 2021, to transpose the Directive into law.[79] On May 19, 2022, the European Commission sent reasoned opinions to Belgium, Bulgaria, Cyprus, Denmark, Greece, France, Latvia, Poland, Portugal, Slovenia, Slovakia, Finland, and Sweden for failing to fully transpose the Directive.[80] On February 15, 2023, the European Commission referred Bulgaria, Denmark, Finland, Latvia, Poland, and Portugal to the CJEU after the countries did not comply with the reasoned

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[72] Bridy, *supra* note 7, at 357.

[73] *E-Commerce Directive*, *supra* note 60, art. 14(1)(b).

[74] *Directive*, *supra* note 5, art. 17(4)(c), at 38-39.

[75] *InfoSoc Directive*, *supra* note 56, art. 5.

[76] *Directive*, *supra* note 5, art. 17(7), at 39.

[77] *Id.* art. 17(4), at 38-39.

[78] SEBASTIAN FELIX SCHWEMER & JENS SCHOVSBO, WHAT IS LEFT OF THE USER RIGHTS?-ALGORITHMIC COPYRIGHT ENFORCEMENT AND FREE SPEECH IN THE LIGHT OF THE ARTICLE 17 REGIME 572 (Paul Torremans ed., 4th ed. 2020) [hereinafter *What is Left of User Rights?*].

[79] European Commission Press Release IP/ 22/2692, Copyright: Commission urges Member States to fully transpose EU copyright rules into national law (May 19, 2022).

[80] *Id.*

opinion and failed to transpose the Directive.[81] Under Article 260(3) of the Treaty on the Functioning of the European Union, the CJEU may impose financial sanctions on a Member State that fails to transpose an adopted directive.[82] The financial penalty considers "the seriousness of the infringement, its duration, [and] the need to ensure that the financial sanction itself is a deterrent to further infringements."[83] The financial sanction is levied via a "lump sum" or a "penalty payment" and must be proportionate to both the established breach, and the penalized Member State's capacity to pay the fine.[84]

Although EU Member States still have concerns about the strict liability regime introduced by Article 17, the CJEU's judgment in *Poland* should encourage the remaining countries to transpose the Directive. The CJEU's judgment in *Poland v. Parliament* effectively prevents OCSSPs, like YouTube, from being held liable for copyright infringement under Article 17(4) because the Charter of Fundamental Rights of the European Union enables YouTube to create their own "best efforts" of content moderation, YouTube's current copyright management systems qualify as "best efforts" to remove infringing content once the platform is notified, and any external determination of copyright infringement precludes liability for YouTube.

II. YOUTUBE IS PERMITTED TO DETERMINE "BEST EFFORTS"

In compliance with the Charter of Fundamental Rights of the European Union (CFREU), nations are obligated to allow OCSSPs like YouTube to determine what qualifies as "best efforts" under Article 17.[85] In *Poland v. Parliament*, the CJEU recognized that the freedom to conduct business is furthered by permitting OCSSPs to define "best efforts" of content moderation.[86] To respect a fair balance between fundamental rights and OCSSPs' business practices, CFREU Article 11 (freedom of expression and information) and CFREU Article 17 (right to property) act together to protect YouTube's autonomy from government control.

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[81] European Commission Press Release IP/23/704, The European Commission decides to refer 11 Member States to the Court of Justice of the European Union for failing to fully transpose EU copyright rules into national law (Feb. 15, 2023).

[82] Consolidated Version of the Treaty on the functioning of the European Union art. 260, 2016 O.J. (C 202) 47 (EU).

[83] *Communication from the Commission for Financial sanctions in infringement proceedings*, at 2, COM (2023) 9973 final (Apr. 1, 2023).

[84] *Id.*

[85] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 75 (Apr. 26, 2022).

[86] *Id.*

The Charter of Fundamental Rights of the European Union enshrined the universal values of human dignity, freedom, equality, and solidarity into law within the context of societal progress and scientific and technological developments.[87] The Republic of Poland's annulment action against the EU regarding the Directive was based on alleged violations of CFREU Articles 11(1) and 17(2).[88]

CFREU Article 11(1) protects the right to freedom of expression.[89] This right includes the freedom to hold opinions and to receive and communicate information and ideas through any means without interference by public authorities.[90] Poland argued that to avoid liability by complying with Article 17(4) Points B and C, OCSSPs are forced to review every user's upload.[91] Such a process would seriously interfere with the right to freedom of expression and information because lawful content may be blocked, and it is unlawful to block such content before it is disseminated.[92]

Before the CJEU's judgment in *Poland v. Parliament*, commentators widely construed that Article 17's obligations do not allow for a proper balance between free expression and a lawful filtering system.[93] Some critics believed a fair balance between these competing interests is extraordinarily difficult, if not impossible, to accomplish.[94] Critics of the Directive believed implementing Article 17 forces OCSSPs to implement algorithmic filtering systems, which could make the "internet less diverse, interesting, equitable,

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[87] Charter of Fundamental Rights of the European Union art. 1, 2010 O.J. (C 83) 389 [hereinafter *CFREU*].

[88] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 1 (2022).

[89] *CFREU*, *supra* note 87, art. 11(1), at 394.

[90] *Id.*

[91] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 39-40 (2022).

[92] *Id.* ¶ 39-42.

[93] *See Leistner*, *supra* note 47, at 60 ("A bifurcated approach which construes art. 17(4) et seq. exclusively with regard to the balance of interests of rightsholders and [OCSSPs] while the protection of user freedoms . . . is mainly guaranteed through the user redress mechanism according to art. 17 (9) will not work."); João Pedro Quintais et. al, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10 U. AMSTERDAM J. INTELL. PROP., INFO. TECH. AND ELEC. COM. L. 277, 277-82 (2019 (discussing algorithmic copyright enforcement tools should only be used if they are proportionate according to Article 17(5), recognize mandatory exceptions and limitations to copyright, and "in no way affect legitimate uses" of copyrighted content); *What is Left of User Rights?*, *supra* note 78, at 16 ("Article 17 . . . constitutes a change…to a situation where over-enforcement via algorithmic content enforcement is deemed acceptable… So, what is left of user rights?").

[94] *Platform Liability Under Article 17*, *supra* note 69, at 47.

and useful."[95] As a result, the Directive could not only lead to censorship across OCSSP platforms but could limit the amount and type of OCSSPs that can operate within the EU.[96]

The CJEU previously held a filtering system that does not adequately distinguish between unlawful and lawful content, and does not respect the fair balance between the right to freedom and expression and the right to intellectual property.[97] In *Poland*, the CJEU reaffirmed that a filtering system that blocks lawful communications is incompatible with CFREU Article 11(1).[98] The CJEU also recognizes when an OCSSP implements a review and filtering system before publication, and it restricts the dissemination of online content.[99] Such a system constitutes a limitation on the right to freedom of expression and expression protected and guaranteed by CFREU Article 11.[100]

A limitation on any enumerated freedom protected by the CFREU must meet the requirements in CFREU Article 52(1) to be valid.[101] CFREU Article 52(1) states that a limitation on the exercise of the rights and freedoms recognized by the CFREU must be provided for by law, and must respect the essence of said rights and freedoms.[102] The limitation must be proportional and either genuinely and necessarily fulfill general interest objectives recognized by the EU, or derive out of a necessity to protect the rights and freedoms of others.[103]

The Republic of Poland argued that Article 17 does not meet CFREU Article 52(1)'s requirements because OCSSPs can implement any prior review and filtering mechanisms they want, which may infringe on users' rights.[104] Poland believed that giving OCSSPs' sole discretion over implementing algorithmic copyright enforcement mechanisms created a

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[95] Ally Boutelle & John Villasenor, *The European Copyright Directive: Potential impacts on free expression and privacy*, BROOKINGS INSTITUTE (Feb. 2, 2021), https://www.brookings.edu/blog/techtank/2021/02/02/the-european-copyright-directive-potential-impacts-on-free-expression-and-privacy/ (last visited Nov. 11, 2022).

[96] Alexandra Brooks*, Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users*, 52 GEO.WASH. INT'L L. REV. 129, 150 (2020) [hereinafter *Brooks*].

[97] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 86 (Apr. 26, 2022).

[98] *Id.*

[99] *Id.* ¶ 55.

[100] *Id.* ¶ 58.

[101] *CFREU*, *supra* note 87, art. 52, at 402.

[102] *Id.*

[103] *Id.*

[104] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 59-61 (Apr. 26, 2022).

great imbalance between rightsholders and OCSSP users.[105] However, the EU Council and Parliament intentionally did not define the specific measures that qualify as "best efforts."[106] Article 17(4)'s intentionally vague wording of "best efforts" was deliberately constructed to ensure the specific liability regime could be adapted to the specific circumstances of each OCSSP, regardless of future developments in industry practices and available technologies.[107]

OCSSPs like YouTube "must comply with the right to freedom of expression and information of internet users."[108] OCSSPs cannot implement measures that affect the fundamental rights of users who do not upload infringing content.[109] "Best efforts" under Article 17(4) must achieve a delicate balance: such measures must offer effective protections to copyright owners without affecting any lawful user of OCSSP platforms.[110] The European Commission clarified that OCSSPs are free to select the technical measures or other solutions to meet "best efforts" within Article 17 based on their specific situation.[111] Assessing whether or not an OCSSP has made "best efforts" under Article 17(4)(B) should occur on a case-by-case basis, taking into account the principle of proportionality outlined in Article 17(5), exceptions to copyright law in Articles 17(7)-(8), and redress mechanisms described in Article 17(9).[112]

OCSSPs are permitted to determine which specific measures should be implemented, to achieve a proper balance between the freedom of expression and rightsholders' copyright interests.[113] This explicit delegation allows OCSSPs to choose the "best efforts" that are best adapted to the resources and technologies available to them and congruent with the challenges and constraints that OCSSPs face in providing their services to the masses.[114]

CFREU Article 17(2) states that "[i]ntellectual property shall be protected."[115] Although CFREU Article 17(2) enshrines the protection of

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[105] *Id.*

[106] *Id.* ¶ 73.

[107] *Id.*

[108] *Id.* ¶ 81.

[109] *Id.* ¶ 80.

[110] *Id.* ¶ 81.

[111] *Commission Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, at 12, COM (2021) 288 final (Jun. 4, 2021) [hereinafter *Guidance on Article 17*].

[112] *Id.* at 13.

[113] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 75 (Apr. 26, 2022).

[114] *Id.*

[115] *CFREU*, *supra* note 87, art. 17(2), at 395.

intellectual property rights into EU law, this right is not inviolable.[116] Neither Article 17(2)'s wording nor the CJEU caselaw demonstrates that intellectual property rights are an absolute right, and must be protected without exception or limitation.[117]

Other proposed liability mechanisms do not offer the necessary and appropriate protections for intellectual property that Article 17(4) provides.[118] As an alternative to Article 17(4) points A, B, and C, Poland argued that Article17(4)(A), and the first part of Article 17(4)(C), provided sufficient safeguards for intellectual property rightsholders.[119] Poland's alternative proposal would be less restrictive than Article 17(4), because it would not require OCSSPs to make diligent best efforts to ensure the unavailability of specific works.[120] As a result, Poland's proposed mechanism would not be as effective as Article 17(4) in protecting intellectual property rights.[121] Therefore, upholding Article 17(4) in its entirety was necessary to comply with CFREU Article 17(2) and bolster a well-functioning and fair marketplace for copyright through strong protections for intellectual property rights.[122]

The obligation on OCSSPs to review content after content is uploaded to its platform and before it is published, must be accompanied by appropriate safeguards by the EU Parliament to ensure respect for the right to freedom of expression, information of OCSSP users, and the right to intellectual property.[123] The CJEU recognized that copyright protections offered by OCSSPs in compliance with CFREU Article 17(2) must inevitably be accompanied by a limitation on the right of OCSSPs users' freedom of expression and the information enshrined in CFREU Article 11.[124] Although CFREU Article 11 protects user sharing information on OCSSP platforms, the specific liability regime set forth in Article 17(4) is a legitimate "limitation on the exercise of the right to freedom of expression and information."[125]

Article 11 and Article 17 of the Charter of Fundamental Rights of the European Union work in tandem to protect YouTube's business practices and policies from government control. Overall, the CFREU demands that

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[116] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 92 (2022).
[117] *Id.*
[118] *Id.* ¶ 83.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* ¶ 82.
[123] *Id.* ¶ 98.
[124] *Id.* ¶ 82.
[125] *Id.*

YouTube be allowed to specifically determine the "best efforts" they take to ensure the quick removal of infringing content on its platform.

III. YOUTUBE'S COPYRIGHT POLICIES BALANCE USERS' FREEDOMS AND RIGHTSHOLDERS' INTERESTS

YouTube's two main copyright management systems, the Webform tool and Content ID, properly balance users' freedoms and rightsholders' interests because they comply with the requirements set forth in Article 17(4)(B). In *Poland v. Parliament*, the CJEU emphasized liability for OCSSPs only arises after the rightsholder provides the platform with relevant and necessary information about their own copyrighted content.[126] Therefore, YouTube can only be held liable for copyright infringement after the platform has been specifically notified that copyrighted content has been impermissibly uploaded.

In the absence of users notifying OCSSPs of their copyright interests, platforms cannot be held liable under Article 17(4).[127] Prior to *Poland*, critics of Article 17 believed OCSSPs would be forced to "take full responsibility for the infringing actions of their users in certain situations, regardless of knowledge."[128] There was widespread concern that OCSSPs, like YouTube, would be held liable whenever infringing content was uploaded and made accessible to the public through their platforms.[129] This is simply not the case. As explicitly stated in Recital 66 of the Directive, when rightsholders do not provide OCSSPs with the relevant and necessary information of their specific works or submit a notification to disable access or remove specific unauthorized works, OCSSPs cannot make "best efforts" to ensure the unavailability of specific works and therefore should not be held liable for copyright infringement.[130]

Copyright ownership over content within videos uploaded on YouTube can be asserted in two different ways: copyright removal requests and Content ID claims.[131] YouTube's Webform tool, open to all users, complies with the CJEU's requirement that a rightsholder's notification to an OCSSP that their copyrighted content has been impermissibly uploaded, must contain "sufficient information" to prove the use of the copyrighted

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[126] *Id.* ¶ 89.
[127] *Id.*
[128] *Brooks*, *supra* note 96, at 143.
[129] *Id.* at 144.
[130] *Directive*, *supra* note 5, ¶ 66.
[131] *What is a copyright claim?*, *YouTube Help*, https://support.google.com/youtube/answer/7002106?hl=en (last visited Nov. 12, 2022).

content is illegal.[132] This information is necessary so the OCSSP's removal of the content does not violate the user's freedom of expression and information.[133] Further, the notification must be sufficiently detailed so there is no need for the OCSSP to conduct a thorough legal examination.[134]

A copyright removal request is submitted by the copyright owner through the Webform tool to remove unlawfully uploaded content due to an alleged copyright infringement claim.[135] When YouTube determines that a copyright removal request is valid, the user's content is removed, and the channel receives a copyright strike.[136]

YouTube uses copyright strikes to punish users who unlawfully use copyrighted material on their platform. A user who receives their first copyright strike is required to go through "Copyright School."[137] YouTube's Copyright School is a four-and-a-half-minute animated video that briefly summarizes U.S. copyright law and YouTube's copyright policies.[138] After watching the video, the user is required to complete a quiz on copyright law based on the video.[139] If a user receives three copyright strikes, the user's account is subject to termination, all the user's uploaded videos are deleted, and the user cannot create any other YouTube channel.[140]

Content ID allows a select group of over nine thousand users to upload their copyrighted material into a database containing over eighty million active reference files of rightsholders' copyrighted material.[141] Every video uploaded to YouTube is scanned against the database, identifying and removing infringing videos.[142] Thus, YouTube can be held liable for Content ID claimed videos that it does not expeditiously remove because the rightsholder has already notified the platform about their copyright interests,

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[132] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 91 (Apr. 26, 2022).

[133] *Id.*

[134] *Id.*

[135] *What is a copyright claim?*, *supra* note 131.

[136] *Id.*

[137] *Copyright strike basics*, *YouTube Help*, https://support.google.com/youtube/answer/2814000?hl=en (last visited Dec.12, 2022).

[138] YouTube, *YouTube Copyright School* (Mar. 24, 2011), https://www.youtube.com/watch?v=InzDjH1-9Ns.

[139] Corynne McSherry, *YouTube Sends Users To Copyright School: Will Content Owners Have to Go, Too?* ELECTRONIC FRONTIER FOUNDATION (Apr. 15, 2011), https://www.eff.org/deeplinks/2011/04/youtube-sends-users-copyright-school-will-content.

[140] YouTube, *Copyright strike basics* Google Support, https://support.google.com/youtube/answer/2814000 (last visited Dec. 12, 2022).

[141] GOOGLE, HOW GOOGLE FIGHTS PIRACY 13 (2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf/ [hereinafter *How Google Fights Piracy*].

[142] *Id.*

and Content ID has provided a notice that infringing content was uploaded to YouTube.[143]

A Content ID claim is automatically generated by the Content ID system, not the copyright owner, over ninety-nine percent of the time.[144] Uploaded content that matches the digital fingerprint created by the Content ID system receives a Content ID claim.[145] The OCSSP user who impermissibly uploaded the Content ID claimed video has three options:[146] they can leave the content in the video, allowing the video's revenue to be given to the copyright owner if they are in the YouTube Partner Program, remove the claimed content from the video to automatically release the Content ID claim, or dispute the claim.[147]

The copyright owner can block, monetize, or track a video claimed by Content ID.[148] Blocking the video will remove the entire video from YouTube.[149]

By monetizing the content, the video remains viewable on YouTube, but the rightsholder can place ads on the video and receive ad revenue if the infringing user is a member of YouTube's Partner Program.[150] Over 90% of Content ID claims are monetized, which has resulted in seven-and-a-half billion dollars in ad revenue paid to rightsholders.[151] The video stays on YouTube by tracking the content, but the rightsholder can track the video's viewership statistics.[152] Unlike a copyright removal request, Content ID claims do not result in a copyright strike, even if the content is rightfully claimed for infringement.[153]

The Content ID dispute process reflects Article 17's requirements that OCSSP users must have access to both in-court and out-of-court redress mechanisms to resolve copyright disputes.[154] An escalation of a Content ID

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[143] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 89 (Apr. 26, 2022).

[144] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

[145] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[146] *Learn about Content ID claims*, *YouTube Help,* https://support.google.com/youtube/answer/6013276?hl=en&co=GENIE.Platform%3DDesktop#zippy=%2Cremove-the-claimed-content%2Cshare-revenue%2Cdispute-the-claim (last visited Nov. 13, 2022).

[147] *Id.*

[148] *Id.*

[149] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[150] *Id.*

[151] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 3.

[152] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[153] *Id.*

[154] *Directive*, *supra* note 5, art. 17(9), at 120-21.

dispute leads directly into legal proceedings. If the claimant blocked the user's content, they could appeal the claim without submitting a Content ID dispute.[155] If the user's content was monetized or tracked, the user can file a Content ID dispute.[156] The claimant has thirty days to respond to a Content ID dispute.[157]

The copyright owner can release, uphold, or let the claim expire.[158] The user can appeal the decision if the copyright owner upholds their Content ID claim.[159] After submitting an appeal, the copyright owner has seven days to release the claim, let the claim expire, or submit a copyright takedown request.[160] A valid takedown request results in the video's removal from YouTube and a strike against the user.[161] If the user still believes they are not committing copyright infringement, they can submit a counter notification.[162]

YouTube has invested over one hundred million dollars in creating and maintaining Content ID.[163] Content ID can identify impermissible uses of copyrighted content even when the user changes a video's aspect ratio or orientation, an audio track's speed or pitch, and the color or surroundings of a video.[164] Additionally, Content ID can "detect copyrighted melodies, video, and audio, helping identify cover performances, remixes, or reuploads" rightsholders may want to monetize, track, or block and remove from YouTube.[165]

In the wake of the Directive, many have promulgated Content ID's insufficiency in preventing infringing content from being uploaded onto YouTube.[166] Content ID "struggles to recognize the difference between copyrighted material and works belonging to the public domain."[167] Additionally, Content ID is often unable to identify content that contains a

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[155] YouTube Creators, *Content ID Claims & Dispute Process: Manage & Action Claims in Studio* (Sept. 13, 2022), https://www.youtube.com/watch?v=ybmRMEJG6LY&t =324s.

[156] *Id.*

[157] *Dispute a Content ID claim*, *YouTube Help*, https://support.google.com/youtube/answer/2797454# zippy= (last visited Nov. 13, 2022).

[158] *Content ID Claims & Dispute Process: Manage & Action Claims in Studio, supra* note 155.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *How Google Fights Piracy*, *supra* note 141, at 27.

[164] *Id.*; YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 13.

[165] *How Google Fights Piracy*, *supra* note 141, at 27.

[166] *Brooks*, *supra* note 96, at 145.

[167] Thomas Spoerri, *On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market*, 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 173, 182 (2019).

legal use of copyrighted content under an expectation or limitation to copyright law.[168] Due to the current technological limits of filtering algorithms like Content ID, such systems carry "the risk to create disproportionately many 'false positives,' i.e., takedowns of content which do not infringe or which is covered by an exception or imitation."[169] If true, the multitude of false positive would constitute an infringement on the right to freedom of expression.[170]

Litigants may argue that by allowing an infringing video flagged by Content ID to remain on YouTube, the platform violates Article 17(4)(C) because the video with infringing content may remain published on YouTube. Through "second level agreements," YouTube contracts with Content ID participants allowing rightsholders to benefit from impermissible infringement.[171] By permitting an unlawful use of their copyrighted material to remain on YouTube, rightsholders receive revenue from the use without an explicit license agreement between the user and rightsholder.[172]

As part of the Content ID program, YouTube makes licensing deals with organizations like the American Society of Composers, Authors, and Publishers (ASCAP), which represents over 875,000 songwriters, composers, and music publishers.[173] "YouTube pays ASCAP a licensing fee for the right to perform [ASCAP] members' music in YouTube videos."[174] When Content ID identifies a video that contains an unauthorized use of an ASCAP member's music, Content ID automatically places a Content ID claim on the video on behalf of the copyright owner.[175]

Unless the ASCAP member specifically requests ASCAP to block the video, the ASCAP Content ID claim will not mean the video is removed from YouTube.[176] Rather, the revenue collected from the ads on the Content ID claimed video, is distributed to the ASCAP member(s) instead of the

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[168] Sabine Jacques et. al, *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, 15 SCRIPTED 277, 287 (2018).

[169] *Platform Liability Under Article 17*, *supra* note 69, at 37 n. 225.

[170] *Id.*

[171] Abigail R. Simon, *Contracting in the Dark: Casting Light on the Shadows of Second Level Agreements*, 5 WM. & MARY BUS. L. REV. 305, 321-323 (2014).

[172] Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 512-13 (2016) [hereinafter *Accountability in Algorithmic Copyright Enforcement*].

[173] *FAQs for YouTube Content Uploaders*, https://www.ascap.com/ help/music-business-101/youtube-faq-uploaders (last visited Nov. 13, 2022).

[174] *Id*.

[175] *Id*.

[176] *Id*.

infringing YouTube user.[177] Thus, when infringing content identified by Content ID remains on YouTube, YouTube cannot be found liable under Article 17 because the rightsholder authorizes the content to remain online.

YouTube's current copyright policies comply with Article 17(4)(B) because once YouTube is made aware that a specific video contains infringing content, the video is either removed from YouTube or is allowed to remain online after YouTube receives authorization from the true rightsholder. Therefore, the platform cannot be liable for copyright infringement.

IV. ANY EXTERNAL DETERMINATION OF COPYRIGHT INFRINGEMENT PRECLUDES LIABILITY

Due to the nuances of copyright law, an independent legal assessment is often required to determine copyright infringement. In *Poland v. Parliament*, the CJEU stated OCSSPs are not required to prevent content from being uploaded and published when, to be found unlawful, the OCSSP would be required to conduct an independent legal assessment of the content by weighing information provided by the rightsholder and exceptions to copyright.[178]

A. OCSSPs Do Not Need to Conduct an Independent Legal Assessment to Avoid Liability

Article 17, Section 7, of the Directive ensures that OCSSP users can use copyrighted material for the purposes of quotation, criticism, review, caricature, parody, or pastiche.[179] However, none of these terms are defined in the InfoSoc Directive or Article 17(7).[180] Thus, the meaning and scope of these copyright exceptions is determined by considering their usual meaning in everyday language, the context in which they occur, and the purposes of the rules of which they are a part.[181] Additionally, Article 17(9) requires OCSSPs to inform their users in their platform's terms and conditions that users can use copyrightable material under exceptions and limitations to copyright law.[182]

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[177] *Id*.

[178] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[179] *Directive*, *supra* note 5, art. 17, at 120.

[180] *Guidance on Article 17*, *supra* note 111, at 19.

[181] *Id.*

[182] *Directive*, *supra* note 5, art. 17, ¶ 9.

The enumerated exceptions to copyright law in Article 17(7), encompassed within the fair use doctrine in the U.S., allow the use of copyrighted material without the rightsholder's permission.[183] While the EU does not use the term "fair use," YouTube explicitly states that only individual countries and the courts of each nation, not YouTube, can determine what constitutes fair use.[184] YouTube itself is unable to make determinations that "require a detailed factual or legal assessment" regarding whether the use of copyrighted content is fair, since the platform is not a court of law.[185] Therefore, YouTube's copyright management tools, procedures, and policies, in-line with applicable law, allow disputes to be resolved between rightsholders.[186]

The CJEU's independent legal assessment exception to OCSSP liability articulated in *Poland* derives from their decision in *Glawischnig-Piesczek*.[187] In *Glawischnig-Piesczek*, the CJEU held that the obligation of OCSSPs to block and remove illegally defamatory content does not require platforms to conduct an independent legal assessment of the content.[188] In *Poland*, the CJEU analogized *Glawischnig-Piesczek* to the present case and held Article 17 cannot require OCSSPs to conduct independent legal assessment's to identify unlawful content and prevent it from being uploaded and published.[189] Therefore, even when a rightsholder provides relevant and necessary information about their copyrighted content, the OCSSP need not perform an independent legal assessment to determine the legality of uploaded content to avoid liability under Article 17.[190] Imposing such a requirement would violate the EU's prohibition on implementing a general monitoring scheme.[191]

Suppose an OCSSP uses an automated or algorithmic filtering system to identify manifestly infringing content. In that case, such a system does not amount to the OCSSP conducting an independent legal assessment to

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[183] *Id.* art. 17, ¶ 7.

[184] YouTube Creators, *Fair Use - Copyright on YouTube* (Oct. 8, 2019), https://www.youtube.com/watch?v=1PvjRIkwIl8.

[185] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 9.

[186] *Id.*

[187] Eleonora Rosati, *What does the CJEU judgment in C-401/19 mean for the national transpositions and applications of Art. 17?*, THE IPKAT (Sept. 18, 2022), https://ipkitten.blogspot.com/2022/09/what-does-cjeu-judgment-in-c-40119-mean.html.

[188] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶ 53 (Oct. 3, 2019).

[189] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[190] *Id.*

[191] *Id.*

determine whether specific content violates copyright law.[192] Thus, when YouTube uses Content ID to identify infringing content, utilizing Content ID does not amount to YouTube performing an independent legal assessment.

Between the complicated process of analyzing copyright exceptions and a prohibition against implementing a general content monitoring scheme, OCSSPs are shielded from liability when an independent legal assessment is necessary to determine copyright infringement.[193] Since such a determination is obviously required to award relief in a court of law, Article 17 precludes holding YouTube liable for copyright infringement in every circumstance where the platform could only determine a valid copyright infringement claim through an independent legal assessment.

B. Developing Algorithmic Tools as a Means to Identify Infringing Content

A common critique to Article 17 is OCSSPs will ~~now~~ be required to over-filter content because algorithmic systems cannot distinguish between copyright exceptions and copyright infringement.[194] Because OCSSPs have a financial incentive to over-filter content on their platforms, there are concerns that filtering systems would block videos from being published for alleged copyright infringement, even though the content does not contain any copyrighted content.[195] Further, others have argued since Content ID cannot accurately consider and identify copyright exceptions, YouTube should be open to liability for misrepresentation and no longer be protected by OCSSP safe harbor provisions.[196] However, OCSSPs cannot be held liable under Article 17 simply because their algorithmic systems do not accurately distinguish copyright exceptions from copyright infringement and absent rightsholders, providing the relevant and necessary information about their copyrights to the OCSSP.[197]

In *Poland*, the CJEU made the policy decision to prioritize free speech over protecting copyrighted content by precluding liability for OCSSPs when copyright infringement is not obvious.[198] Thus, the OCSSP's user, not the OCSSP platform, has the duty to raise a copyright infringement claim

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[192] *Guidance on Article 17*, *supra* note 111, at 20-21.

[193] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (2022).

[194] Boutelle & Villasenor, *supra* note 95.

[195] *Id.*

[196] Laura Zapata-Kim, *Should YouTube's Content ID Be Liable for Misrepresentation under the Digital Millennium Copyright Act*, 57 B.C. L. REV. 1847, 1867-1873 (2016).

[197] *Guidance on Article 17*, *supra* note 111, at 20.

[198] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (2022).

through the submission of "relevant and necessary" information about their copyright interests,[199] and OCSSPs are not liable for unauthorized uploads. When rightsholders fail to provide OCSSPs with relevant and necessary information about their copyright interests, OCSSPs are not liable for unauthorized uploads.[200] Contrary to some scholars' earlier reading of Article 17's obligations, OCSSPs do not have to develop algorithmic tools that determine and distinguish when copyrighted material is used lawfully or unlawfully to comply with Article 17's requirements and avoid liability.[201]

YouTube concedes it is "impossible for matching technology to take into account complex legal considerations like fair use, fair dealing, or other copyright exceptions."[202] One recent large-scale analysis of YouTube's copyright enforcement system found Content ID worked "relatively well to remove apparently infringing content from YouTube."[203] However, the data raised "some concerns about potential misidentification and over blocking" of copyrighted content, particularly in the categories of sports highlights and recorded music.[204]

Developing algorithmic copyright filtering tools is extremely complicated because such tools must apply flexible legal standards on a mass scale, typically applied case-by-case to individual pieces of content.[205] OCSSPs are notorious for obscuring the development, training, and performance of algorithmic filtering tools behind the "veil of a proprietary code."[206] While the exact Content ID algorithm is unknown to the greater public, broadly speaking, its algorithms are "'trained' on existing content pieces to detect similar units in new content pieces."[207] On YouTube, the Content ID's filtering algorithm "seems to remain wild and free"[208] because it filters and blocks content "based on an entirely undisclosed, self-determined threshold."[209]

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[199] *Guidance on Article 17*, *supra* note 111, at 11.

[200] *Id.*

[201] *Id.* at 20.

[202] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

[203] Joanne E. Gray & Nicolas P Suzor, *Playing With Machines: Using Machine Learning To Understand Automated Copyright Enforcement At Scale*, 7 BIG DATA & SOC'Y, 1, 11 (2020).

[204] *Id.*

[205] *Accountability in Algorithmic Copyright Enforcement*, *supra* note 172, at 486.

[206] *Id.* at 513.

[207] Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive To Fostering Innovative Fair Use In Music Creation* 24 UCLA ENT. L. REV. 51, 68 (2017).

[208] *Accountability in Algorithmic Copyright Enforcement*, *supra* note 172, at 516.

[209] *Id.* at 506.

While calls have increased for greater transparency surrounding how filtering algorithms operate, full transparency may be an impossible standard. Full transparency is an impossible ask for OCSSPs, because secrecy is necessary to prevent intentional infringers from learning how to circumvent the system and to prevent competitors from copying their code.[210] Without careful oversight and precise training of algorithms used for copyright enforcement, there will be widespread under-enforcement or over-enforcement of copyright infringement.[211]Nonetheless, OCSSPs continue to employ copyright enforcement algorithms that are empowered to make determinations of copyright infringement.

While OCSSPs work on developing "perfect" algorithmic filtering systems, it has been suggested tools like Content ID should merely identify potentially infringing content and notify the respective rightsholder, who would then decide whether to pursue a claim.[212] However, in practice, this offers no meaningful difference from the current system. Currently, even when Content ID determines there is a match and a video contains an unlawful use of copyrighted material, the copyright holder can simply release the claim. This human review by the rightsholder allows for an immediate course correction when Content ID fails to distinguish a lawful use of copyrighted material under an exception to copyright. Rightsholders may benefit from the presumption a Content ID claim equates to a valid copyright infringement claim, unless the allegedly infringing user navigates through the Content ID dispute process and perhaps into a court of law. However, if OCSSPs used filtering tools like Content ID to merely identify potentially infringing content without preemptively blocking potentially infringing content, they would be subject to widespread liability under Article 17.[213]

C. Manifestly Infringing Content Versus Not Manifestly Infringing Content

The CJEU held that lawful uses of copyrighted material shall not prevent the availability of other uploaded works which do not infringe on copyright and related rights.[214] By drawing a distinction between manifestly infringing content and not manifestly infringing content, OCSSP liability is

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[210] *Id.* at 523.

[211] *Id.* at 492-93.

[212] Michael Bechtel, *Algorithmic Notification and Monetization: Using YouTube's Content ID System as a Model for European Union Copyright Reform*, 28 MICH. STATE INT'L L. REV. 237, 263-264 (2020).

[213] *Guidance on Article 17*, *supra* note 111, at 20-21.

[214] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

limited only to instances where manifestly infringing content is uploaded on its platform.[215] Uploads that are not manifestly infringing should be published online; only then, they may be subject to human review after the rightsholder opposes the use of their copyrighted material by sending a takedown notice.[216]

While not binding law, the European Commission's "Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market" (Guidance on Article 17) provides a framework to further limit OCSSP liability under Article 17 amidst the independent legal assessment exception.[217] Guidance on Article 17 details the manifestly infringing versus not manifestly infringing content distinction.[218] Manifestly infringing content contains exact matches or significant portions of copyright works.[219] For example, a fan-made lyric video of *Hope* by NF that plays the entire song is manifestly infringing content.[220] Not manifestly infringing content contains partial matches, small portions, or significant creative modifications to copyrighted works.[221] Thus, a fifteen-minute video discussing a user's top ten favorite movies of the year that includes a short, ten-second clip of each film is not manifestly infringing content.[222]

If an OCSSP uses an algorithmic system like Content ID to identify manifestly infringing content, then it does not qualify as the OCSSP conducting an independent legal assessment to determine the legitimacy of an upload containing copyrighted content.[223] Thus, manifestly infringing uploads should be preemptively blocked by the OCSSP, while not manifestly infringing content is allowed to be uploaded to the platform.[224]

The European Commission recommends copyright claim processes, which YouTube has already implemented through its takedown notice procedure and Content ID dispute process.[225] The European Commission foresees implementing this regime as follows:

Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations under

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[215] *Guidance on Article 17*, *supra* note 111, at 20-21.
[216] *Id.* at 20.
[217] *See generally Guidance on Article 17*, *supra* note 111.
[218] *Id.* at 20-24.
[219] *Id.* at 21.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 21-22.
[223] *Id.* at 20-21.
[224] *Id.* at 23.
[225] *Id.*

Article 17(4)(b) and (c) in light of Article 17 (7) if they have acted diligently as regards to content which is not manifestly infringing following the approach outlined in [Guidance on Article 17], taking into account the relevant information from right holders. By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations in light of Article 17 (7) and be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightsholders . . . .[226]

This regime reflects the CJEU's decision in *Glawischnig-Piesczek* that OCSSPs cannot be expected to conduct independent assessments to determine the legality of a user's impermissible use of copyrighted content.[227] Even if an algorithmic filtering system could be developed and implemented via a stay-down regime, it would likely impose a general monitoring scheme that violates EU law.[228] Therefore, to avoid violating the prohibition of implementing a general monitoring obligation, EU Member States should let uploads be initially available on OCSSPs, and then rightsholders can flag infringing content to the OCSSP.[229]

D. Counter Notifications and Out-of-Court Redress Mechanisms

In *Poland*, the CJEU reinforced that EU Member States must ensure all OCSSP users are given access not only to efficient judicial remedies to assert their rights but also to out-of-court redress mechanisms that allow for copyright disputes to be settled impartially.[230] When an OCSSP user asserts they have legally used copyrighted content due to an exception or limitation to copyright, the user must have access to a court or another relevant judicial authority to assert a claim.[231] YouTube's copyright claim and dispute process on YouTube reflects the legal process to resolve copyright infringements that arise on OCSSP platforms enshrined in U.S. copyright law.

YouTube's takedown notice and counter-notification procedures are directly taken from U.S. law. The six elements of a takedown notice are modeled after 17 U.S.C. §512(C)(3)(A)(i-vi). The elements of a counter-notification are modeled after 17 U.S.C. §512(G)(3)(A-D). Under

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[226] *Id.*

[227] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶ 17 (Oct. 3, 2019).

[228] Giancarlo Frosio, *To Filter, or Not to Filter? That is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L. J. 331, 348-49 (2017).

[229] *Guidance on Article 17, supra* note 111, at 23.

[230] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 95 (Apr. 26, 2022).

[231] *Id.*

§512(G)(2)(C), the OCSSP will cease disabling access to the infringing content not less than ten, but no more than fourteen business days after the submission of a counter-notification unless the rightsholder has filed an action in court against the infringing user.[232]

The copyright claim and dispute process on YouTube, culminating in the submission of a counter-notification, allows users to access a court to assert their legal usage of copyrighted material. A counter-notification on YouTube can only be filed when a user's video has been removed after the copyright owner submitted a valid takedown notice.[233] If the allegedly infringing user believes YouTube disabled their video due to a mistake or misidentification, the user can submit a counter-notification and legally request YouTube to reinstate their removed content.[234]

By submitting a counter-notification, the party asserting the takedown notice is forced to either withdraw their copyright claim on YouTube or initiate a lawsuit against the infringer within ten business days.[235] By filing a lawsuit, YouTube will keep the infringing content off its platform unless the alleged infringer wins the copyright infringement lawsuit.[236] If the copyright owner does not show evidence of legal action within ten U.S. business days, the video will be reinstated.[237]

Overall, YouTube offers both out-of-court redress mechanisms through its platform and the opportunity for users to pursue legal action where copyright infringement claims can be adjudicated in a court of law. Both routes provide the copyright owner with sufficient remedial measures against the infringer, all without YouTube being a party that can be held liable for the misappropriation.

YouTube concedes that it is currently impossible for algorithmic copyright matching systems like Content ID to consider complex legal considerations like fair use or fair dealing when attempting to identify whether a video uploaded containing copyrighted content is unlawful.[238] Consequently, to prevent OCSSPs from implementing a general monitoring

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[232] 17 U.S.C. § 512 (2022).

[233] *Submit a copyright counter notification*, *YouTube Help*, https://support.google.com/youtube/answer/2807684?hl=en (last visited Nov. 13, 2022).

[234] *Id.*

[235] *Respond to a counter notification*, *YouTube Help*, https://support.google.com/youtube/answer/12497556?hl=en (last visited Feb. 28, 2023).

[236] *Id.*

[237] *Id.* Evidence of legal action can be "[a]n action seeking a court order against the uploader to restrain the allegedly infringing activity (not just a claim for damages). A claim of copyright infringement against the uploader (if such uploader is based within the United States) with the US Copyright Office's Copyright Claims Board (CCB), where applicable."

[238] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

scheme in violation of EU law, the CJEU interpreted Article 17 as not imposing an obligation on OCSSPs to prevent content that includes copyrighted material from being uploaded and published when an independent legal assessment is necessary to determine copyright infringement.[239]

In short, when content requires an external determination to determine copyright infringement, YouTube cannot be held liable if copyright infringement is found.

CONCLUSION

Fears that Article 17 contravenes individual freedoms were largely dispelled by the CJEU's ruling in *Poland v. Parliament*. First, the Charter of Fundamental Rights of the European Union protect YouTube's ability to determine "best efforts" to obtain authorization and ensure the unavailability of specific copyrighted works on its platform. Second, YouTube's copyright policies already comply with Article 17, and once the platform is made aware by the rightsholder of manifestly infringing content, it acts swiftly to remove infringing content. Finally, since litigation is required to determine whether copyright infringement exists, the involvement of any external determination of copyright infringement bars holding YouTube liable for copyright infringement.

As the remaining EU Member States transpose the Directive into national law, countries should follow the CJEU's judgment in *Poland v. Parliament* to ensure the protection of fundamental freedoms, while promoting a lawful and robust online ecosystem. Although the CJEU in *Poland* promulgated a clear, fair, and balanced interpretation of the Directive, there will undoubtedly be more challenges to the legality of Article 17's requirements in the years to come. While it appears, that for now, the Directive will fail to accomplish its original goal to make YouTube pay for the sins of its users, the EU remains undeterred in its attempts to hold OCSSPs liable for the illegal activities of its users.

The EU continues to lead the world in regulating OCSSPs. With the passage of the Digital Services Act (DSA), which comes into force on February 17, 2024, the EU once again attempts to further protect the fundamental rights of online users and harmonize rules governing OCSSP liability.[240] Under the DSA, OCSSPs remain liable for illegal content on

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[239] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[240] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), art. 1, 2022 O.J. (L 277) 41.

their platform only when they have obtained knowledge of such content and fail to expeditiously remove the content.[241] OCSSPs can now be ordered to act against illegal content or provide information to national judicial or administrative authorities, create annual content moderation reports, and establish a compliance function to ensure the platform complies with the DSA.[242] The newly established European Board for Digital Services will assist in investigating and auditing OCSSPs to ensure compliance with the DSA.[243] Nonetheless, the Digital Services Act mentions that the specific rules and procedures established in the Directive remain unaffected by this new legislation.[244]

Creating a legal framework that fairly balances copyright rightsholders' interests, the freedom of speech and expression of OCSSP users, and the cost and feasibility of OCSSPs' business practices is a complex and daunting. By following the CJEU's judgment in *Poland v. Parliament*, the international community can implement an equitable legal system that accurately reflects the interdependent digital community of modern society, while continuing to offer necessary and substantial protections for artistic expression.

[241] *Id.* art. 6, at 45.
[242] *Id.* arts. 9-10, 15, 41, at 46-47, 50, 72.
[243] *Id.* art. 61, at 87.
[244] *Id.* recital 11, at 4.

INTERNATIONAL FREE SPEECH: HOW GUATEMALA'S FEMICIDE LAW IS USED TO RESTRICT THE FREE FLOW OF INFORMATION

Karla Muñoz*

INTRODUCTION

The misuse of a law predicated on the protection of a vulnerable group can result in the degradation of democratic ideals. The government in Guatemala has repeatedly misused the femicide law that it passed in 2008, which was meant to protect women from acts of violence and from consistently falling victim to a cycle of violence that often leads to their

* J.D., Southwestern Law School, 2024.

death.[1] While attempting to reflect a functioning democracy, the Guatemalan government exposes its true colors through unchecked corruption by public officials and its country's leaders.[2] Most recently, Guatemala has undermined democratic ideals by allowing female public officials to file legal claims using the femicide law to attack journalists and the press in response to critiques of their work as public officials.[3] Despite the clear purpose of the femicide law, the lawsuits filed by female public officials attempt to set a new standard that protects women in powerful positions of government and diverts legal protection and attention from vulnerable women in life-threatening situations.[4] Female public officials in Guatemala claim that they have suffered psychological violence from press publications which should warrant legal protections under the femicide law according to their lawsuits.[5]

In the United States, citizens enjoy an array of fundamental rights and constitutional protections, including the right to freedom of speech.[6] Unlike citizens from many Latin American countries, individuals in the United States enjoy a high level of protection of their right to free speech and to express their opinions and beliefs.[7] To determine protected and unprotected free speech in the United States, courts interpret different tests that have evolved over time.[8] In contrast, not all Latin American governments protect the freedom of speech in practice. To determine what constitutes protected speech, many countries in Latin America use legal standards provided by

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[1] Decreto 22-2008 del Congreso de la Republica de Guatemala*, Ley Contra el Femicidio y otras Formas de Violencia Contra la Mujer* [Decree 22-2008 of Congress of the Republic of Guatemala (Law Against Femicide and other Forms of Violence Against Women)] (2008), https://www.oas.org/dil/esp/ley_contra_el_femicidio_y_otras_formas_de_violencia_contra_la_mujer_guatemala.pdf.

[2] Ana María Méndez Dardón & Héctor Silva Avalos, *Press Freedom Under Siege In Central America*, WOLA ADVOCACY FOR HUMAN RIGHTS IN AMERICA (Aug. 24, 2022), https://www.wola.org/2022/08/press-freedom-under-siege-in-central-america/.

[3] Henry Pocasangre, *Rechazan uso de Ley de Femicidio para bloquear libertad de expresión*, REPÚBLICA (May 10, 2019), https://republica.gt/guatemala/2019-5-10-20-46-14-rechazan-uso-de-ley-de-femicidio-para-bloquear-libertad-de-expresion. *See also* Méndez Dardón & Avalos, *supra* note 2.

[4] Editorial, *Perversa manipulación de Ley contra Femicidio*, PRENSALIBRE (May 20, 2022), https://www.prensalibre.com/opinion/editorial/erversa-manipulacion-de-ley-contra-femicidio/. *See also* Douglas Cuevas, Otra funcionaria se escuda en la ley contra el femicidio para evitar la fiscalización de la prensa, PRENSALIBRE (Dec. 20, 2021), https://www.prensalibre.com/guatemala/justicia/otra-funcionaria-se-escuda-en-la-ley-contra-el-femicidio-para-evitar-la-fiscalizacion-de-la-prensa/.

[5] Cuevas, *supra* note 4.

[6] Jean-Marie Kamatali, *The U.S. First Amendment versus Freedom of Expression in Other Liberal Democracies and How Each Influenced the Development of International Law on Hate Speech*, 36 OHIO N. UNIV. L. REV. 721, 722 (2010).

[7] Kamatali, *supra* note 6, at 721.

[8] Kamatali, *supra* note 6, at 722.

international human rights law, including the Inter-American Human Rights system, which is composed of the American Convention of Human Rights (ACHR) and the Inter-American Court of Human Rights (IACtHR).[9] Other international bodies and courts that resemble the Inter-American system are the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR).[10]

Free speech, however, carries lesser protections when the speech rises to the level of hate speech.[11] A scholar describes hate speech as "an expressive act that communicates intense or passionate dislike of individuals or groups, based on ascriptive identity factors of those persons."[12] The United Nations recognizes that hate speech attacks people based on their religion, ethnicity, nationality, race, or gender.[13]

The ACHR describes hate speech as:

> Speech designed to intimidate, oppress or incite hatred or violence against a person or group based on their race, religion, nationality, gender, sexual orientation, disability or other group characteristic.[14]

While hate speech in modern U.S. culture is:

> A term of art in legal and political theory that is used to refer to verbal conduct – and other symbolic, communicative action – which willfully expresses intense antipathy towards some group or towards an individual on the basis of membership in some group or where the groups in question are usually those distinguished by ethnicity, religion, or sexual orientation.[15]

Although there are different definitions of what constitutes hate speech, there are similarities within the meanings that connotes a definition of hate speech as any communication(s) by an individual against another individual or group that denigrates or attacks their identity and beliefs.

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[9] Inter-American Human Rights System, INTERNATIONAL JUSTICE RESOURCE CENTER, https://ijrcenter.org/regional/inter-american-system/ (last visited June, 9 2024).

[10] European Convention on Human Rights, Nov. 4, 1950, Eur. Ct. H.R. https://www.echr.coe.int/documents/d/echr/convention_eng. *See also* Amaya Ubeda de Torres, *Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights*, 10 HUM. RTS. BRIEF, (2003), https://digitalcommons.wcl.Am..edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1401&context=hrbrief.

[11] Lucas Swaine, *Does Hate Speech Violate Freedom of Thought?*, 29 **VA. J. SOC. POL'Y & L.** 1, 5 (2022).

[12] *Id*. at 5.

[13] *Id.* at 6.

[14] *Chapter VII: Hate Speech and the American Convention on Human* Rights, **OFF. OF THE SPECIAL RAPPORTEURSHIP FOR FREEDOM OF EXPRESSION FOR THE INTER-AM. COMM'N H. R.,** https://www.oas.org/en/iachr/expression/showarticle.asp?artID=443&lID=1 (last visited Jan. 19, 2024).

[15] Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 L. & PHIL. 701, 701 (2013).

In Guatemala, the government implemented a femicide law to address a broader purpose that was meant to stop crimes of violence against women and ameliorate an ongoing problem of unresolved crimes against women that resulted in their death.[16] Although sometimes it may be appropriate to employ femicide laws to stop hate speech, Guatemala has gone far beyond that. The femicide law became part of a pattern among government officials, who use it as a shield to protect themselves from society holding them accountable in their official capacity as government representatives. Further, these government officials used the femicide law to achieve criminal prosecution of journalists who attempted to reveal unethical or corrupt actions by government officials.[17] Guatemala used the femicide law as a double edge sword by attempting to apply the law for an unintended purpose, and lost sight of the group of women that need protection.

The femicide law in Guatemala prevents violence against women in political, economic, social, cultural, and familial environments in the private and public spheres.[18] On a broader international level for the eradication of violence against women, many Latin American countries signed the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also known as the Convention of Belém do Pará.[19] The purpose of the Convention is to protect women from gender-based violence, including violence against their integrity and psychological well-being.[20] Guatemala was among the Latin American countries that adopted this convention, which helped introduce the crime of femicide into its law.[21]Though the government in Guatemala passed a femicide law to address rampant rates of violence and gender-based killings against women, the law has gained traction in recent years to attack freedom of speech and to criminally charge journalists and newspaper outlets that published articles about prominent female public officials.[22] This is dangerous in a country that

[16] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[17] Elsa Coronado & Kimberly Rocío López, *Periodismo y violencia contra la mujer: cuando el agravio es la fiscalización*, PLAZA PÚBLICA (June 14, 2022), https://www.plazapublica.com.gt/content/periodismo-y-violencia-contra-la-mujer-cuando-el-agravio-es-la-fiscalizacion-0. *See also* Editorial, *supra* note 4.

[18] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[19] Organization of American States, Inter-American Convention on the Punishment and Eradication of Violence Against Women "Convention of Belem do Para", June 9, 1994, O.A.S.T.S., https://www.oas.org/juridico/english/treaties/a-61.html.

[20] *Id.*

[21] *Id.*

[22] María Inés Taracena, *Guatemala's War on Truth*, THE NATION (Aug. 23, 2022), https://www.thenation.com/article/world/guatemala-journalist-arrest/.

already suffers from high impunity rates in the deaths of women and journalists.[23]

In recent years, however, female public officials have misused the femicide law in Guatemala to file legal claims against journalists and newspaper outlets that publish articles exposing their involvement in corrupt government actions.[24] When these prominent and powerful female public officials find the publications offensive, they claim a need for legal protection by alleging they suffered psychological violence protected under the femicide law.[25] The femicide law also protects women from acts of psychological violence.[26] By validating such claims under the femicide law, the law and the Convention lose their purpose. While it is appropriate for Guatemala's femicide law to protect women from hate speech that rises to a deliberate denigration of an individual because of her gender, speech that does not reach that threshold should not be blocked under Guatemala's law or the Convention of Belém do Pará (The Convention). The Convention and Guatemala's law were not intended to undercut free speech but rather to protect women from acts of hatred. International human rights law clearly protects journalists who criticize the conduct of prominent women, and international law distinguishes free speech from speech that amounts to a deliberate denigration of an individual.

The courts in Guatemala have reviewed several cases where public officials used the femicide law as a vehicle to restrict freedom of speech and criminally charge journalists for criticizing female government officials while exposing government corruption. For example, a judge granted the protections of a restraining order in favor of relatives of a former public official who claimed they suffered psychological violence under the femicide law due to a newspaper publication;[27] however, the same judge dismissed the case almost three months later, stating that the alleged victims were inevitably exposed to public criticism because of their familial relationship to a public official.[28] Despite eventually dismissing the case, the judge originally and immediately granted protections to the former public official who filed the lawsuit, allowing the public official to impede the press for three months.[29]

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[23] *Guatemala: Events of 2021*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2022/country-chapters/guatemala (last visited June 9. 2024).

[24] Coronado & López, *supra* note 17.

[25] *Id.*

[26] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[27] *Levantan censura en contra de periodistas*, ARTICULO 35 (2022), https://articulo35.com/a-1-3/.

[28] *Id.*

[29] ARTICULO 35, *supra* note 27.

This paper explains how the misuse of femicide law in Guatemala contributes to a larger problem of free speech restrictions in certain Latin American countries. Additionally, this paper discusses how the femicide law and the Convention of Belém do Pará were meant to address a humanitarian crisis, not undercut free speech. Further, it describes how international authorities provide protection for journalists who engage in critiques of public officials at the expense of their safety and welfare. The last part of this article attempts to demonstrate that international authority provides case law that supports a much-needed distinction between free speech and hate speech that requires a more careful analysis when the government imposes criminal sanctions against journalists, and those sanctions, in any event, should be plausible, necessary, and proportionate.

I. THE CONVENTION AND GUATEMALA'S FEMICIDE LAW WERE NOT INTENDED TO UNDERCUT FREE SPEECH BUT TO PROTECT WOMEN FROM ACTS OF HATRED

In their claims, female public officials are using the femicide law as a sword to thwart the legal system while limiting legal protections for vulnerable women who suffer from violence in their everyday lives and often make up the impunity rates in Guatemala.[30] In their claims, these government officials assert that journalists attack them because they are women and they suffer psychological violence from these publications, which contain gender-based hate speech.[31] Despite their efforts to apply the femicide law as a sword instead of a shield, female public officials through these lawsuits try to avoid public scrutiny of their actions as government officials. The government and the court system prioritize many of these legal claims, thus, it is important to delve into the intended purpose of the femicide law and the Convention of Belém do Pará, which protect women on a larger scale. The protections provided by the Convention of Belém do Pará intended to protect women from gender-based violence, including violence

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[30] ORGANIZATION OF AMERICAN STATES & MESECVI, GENERAL RECOMMENDATION OF THE COMMITTEE OF EXPERTS OF THE MESECVI: MISSING WOMEN AND GIRLS IN THE HEMISPHERE (NO. 2), (2018), http://www.oas.org/en/mesecvi/docs/RecomendacionMujeresDesaparecidas-EN.pdf?utm_source=Red+de+Jovenes&utm_campaign=eef162411c-EMAIL_CAMPAIGN_2019_08_08_06_31_COPY_41&utm_medium=email&utm_term=0_af8adfbacb-eef162411c-160267701.

[31] **Paola Nalvarte, *Canciller de Guatemala usa una ley de protección a mujeres para lograr que jueza calle críticas de un periodista*, TEXAS MOODY. (July 18, 2018), https://latamjournalismreview.org/es/articles/canciller-de-guatemala-usa-una-ley-de-proteccion-a-mujeres-para-lograr-que-jueza-calle-criticas-de-un-periodista/.**

that affects their integrity and psychological well-being.[32] As the first international treaty on violence against women, the Convention recognized violence against women as a human rights violation.[33] The Convention defines violence against women as any act or behavior that causes death, injury, or physical, sexual or psychological suffering in public and private spheres and is committed based on the gender of the victim.[34] Under Article 4 of the Convention, women have the right to freedom, and rights provided by international human rights law, including the right to live a life free of violence, a right to respect and protect a woman's physical, mental, and moral integrity, and right to have equal access to government positions in her country and have decision-making power.[35] Guatemala is among several countries that ratified the Convention and that committed to adhering to the obligations to prevent, punish, and eradicate violence against women.[36] To address violence against women in a country with one of the highest rates in the world of femicide – gender-motivated murders of women – Guatemala introduced the femicide law into their legislation.[37]

Similar to what the Convention aimed to achieve, the femicide law in Guatemala aims to prevent gender-based killings and eradicate psychological and emotional violence against women.[38] The law lists several circumstances in Article 7 that demonstrate when an individual commits violence against women in the private or public sphere that amounts to physical, sexual, or psychological violence.[39] A perpetrator commits violence against a woman if they take advantage of their familial, intimate, or work relationship and if it is derived from armed conflict, mutilation of the female body, and acts of misogyny.[40] The law differs in the levels of punishment that a perpetrator receives for engaging in violence against a woman. If the violence inflicted on a woman is physical or sexual, the perpetrator faces a five to twelve years prison sentence.[41] On the other hand, if the violence inflicted on a woman is psychological, the term of imprisonment is five to eight years.[42] Additionally, the femicide law created resources for victims of violence, including immediate access to legal

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[32] Organization of American States, *supra* note 19, at 1-2.

[33] Organization of American States & MESECVI, *supra* note 30, at 3.

[34] *Id*.

[35] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1, at 1, 4.

[36] Inter-American Convention on the Punishment and Eradication of Violence Against Women, *supra* note 19.

[37] Hector Ruiz, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemala's First Violence Against Women Law*, 29 **HASTINGS WOMEN'S L. J.** 101, 102.

[38] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1, at Article 3.

[39] *Id.* at Article 7.

[40] *Id.*

[41] *Id.*

[42] *Id.*

assistance and separate courts to directly address claims of femicide and violence against women.[43] The Convention and the femicide law in Guatemala are intended to protect vulnerable groups of women who suffer violence that stems from and perpetuates inequalities among men and women.

Public officials and their family members who benefit from their positions of power and are subject to good-faith investigations on government corruption are hardly the groups of vulnerable women that the Convention and the law of femicide intended to protect from violence in the private or public sphere. Female public officials enjoy positions of power that allow their legal claims to receive immediate attention and protection under the femicide law.[44] In contrast, the government does not investigate the genuine claims of thousands of women who lack government resources.[45] Moreover, the courts and judges that grant restraining orders to protect female public officials contribute to the misapplication of the femicide law. That sets a dangerous precedent.

While the Convention and the femicide law intend to protect women against psychological violence, the claims filed by women public officials in Guatemala under the femicide law carry an ulterior motive that places a gag on journalists. Powerful women can have cognizable claims under the femicide law, but the ones being asserted by many female public officials do not satisfy the requisite standard.[46] Instead, as discussed below, they are wielding the law to stop any investigations into their wrongful activities. In their claims, female public officials request significant protections against future publications and even request extending of protections to their family members. [47] Although the Convention and the femicide law intended to protect women from violence, public officials are using the femicide law in a disingenuous way and for political purposes.

The former Guatemalan vice president, Roxana Baldetti, was the first female public official to use the femicide law as a sword to censor free speech and scrutinize journalists and newspapers for engaging in critiques of public officials.[48] Baldetti filed a lawsuit against a well-known journalist and owner of the newspaper outlet *elPeriódico*, Jose Zamora when he

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[43] *Id.* at Article 13, 15.

[44] Editorial, *supra* note 4.

[45] *Id.*

[46] *Id.*

[47] Coronado & López, *supra* note 17.

[48] Comm. to Protect Journalists*, Guatemalan Official Files Criminal Suit Against 3 Journalists Under Violence Against Women Law*, CPJ: COMM. TO PROTECT JOURNALISTS (May 18, 2022, 3:34PM), https://cpj.org/2022/05/guatemalan-official-files-criminal-suit-against-3-journalists-under-violence-against-women-law/.

publicly denounced her corrupt actions as a public official.[49] Others soon followed. In another lawsuit filed by Sandra Jovel, the former Guatemalan Minister of Foreign Affairs, she alleged psychological violence suffered from a publication by Zamora that criticized her complacency and failure to act against unjust U.S. policies that separated families at the U.S.-Mexico border.[50] Jovel's lawsuit successfully secured a restraining order for three months against Zamora and *elPeriódico* that restricted them from publishing anything about her and staying away from Jovel's home and workplace.[51] As another example, the daughter of Guatemala's highest court president, Corte de Constitucionalidad, filed a lawsuit against a newspaper under the femicide law for psychological violence.[52] The judge initially granted her protection under the law.[53] The legal claim was ultimately deemed insufficient under the femicide law because a familial or employment relationship did not exist between the public official and the newspaper she was suing.[54] Protections afforded to women public officials like Jovel are inconsistent with the femicide law's purpose: to address Guatemala's high rate of impunity in the disappearances and deaths of women, girls, and journalists.

Rather than using the femicide law as a vehicle to suppress free speech in a country that suffers from a lack of accountability and high impunity rates, Guatemalan public officials should dedicate legislative efforts and financial support to protect vulnerable groups of women. The Convention of Belém do Pará and the femicide law in Guatemala stem from public outcries by international human rights bodies asking that parties to the Convention effectively address and implement solutions not only to punish violent acts against women but to prevent the violence from reaching fatal consequences. The Convention and Guatemala's femicide law were not intended to undercut free speech but to protect women from acts of hatred because of their gender.

II. INTERNATIONAL LAW DISTINGUISHES FREE SPEECH FROM SPEECH THAT DENIGRATES AN INDIVIDUAL

While female public officials in Guatemala aim to get their legal claims adjudicated under the femicide law by stating that they suffered

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[49] *Id.*

[50] Comm. to Protect Journalists*, Guatemalan Minister Uses Law Preventing Violence Against Women to Silence Critical Journalists*, CPJ: COMM. TO PROTECT JOURNALISTS (July 25, 2018, 5:55PM), https://cpj.org/2018/07/guatemalan-minister-uses-law-preventing-violence-a/.

[51] *Id.*

[52] *Id*.

[53] Coronado & Lopez, *supra* note 17.

[54] *Id.*

psychological violence from press publications, it is important to draw a line between free speech and speech that denigrates an individual. It is important to distinguish free speech from hate speech and how courts interpret free speech in many Latin American countries compared to U.S. case law. Journalists who are at the receiving end of these harmful lawsuits by female public officials benefit from this distinction. The distinction protects free speech in publications that inform the public of mismanagement and corrupt actions by public officials. Although several bodies of international law call for the protection of women from violence as a human right, those same bodies do not require that protection at the cost of free speech restrictions.

Many - if not all – claims filed by different female public officials who are misusing the femicide law state that they were victims of psychological violence because of journalists' published content. Judges' granting of restraining orders for these claims further infringes on newspaper outlets' and journalists' freedom of expression. The content of the publications nearly approaches an argument of hate speech by female public officials against journalists. At the same time, they disguise it as suffering psychological violence under the femicide law. Therefore, not only is the distinction between free speech and speech that denigrates an individual an important one, but emphasis is necessary for the analytical framework established by the Inter-American Court of Human Rights, the European Court of Human Rights, and U.S. case law.

The ACHR states that under Article 13, everyone has the right to freedom of thought and expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.[55] Further, the IACtHR ruled that any restrictions imposed on freedom of expression are required to show:

i) A compelling government interest;
ii) The means taken to be the least restrictive of the options available;
iii) The restriction is proportionate, and closely tailored to the accomplishment;
iv) The restriction is of a legitimate government objective.[56]

European support for restrictions on freedom of speech and expression is found in the EU Charter of Fundamental Rights, the ECHR, and the ECtHR. Article 11 of the Charter states that "everyone has the right to

[55] Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[56] Compulsory Membership In An Association Prescribed By Law For The Practice Of Journalism (Arts. 13 And 29 American Convention On Human Rights), Advisory Opinion Oc-5/85, Inter-Am. Ct. H.R. (ser A) ¶ 39 (Nov. 13, 1985).

freedom of expression… [t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[57] Article 10 of the ECHR states a similar provision for freedom of expression.[58] Further, the ECtHR adopted a 3-part test to conform with Article 10 of the ECHR. In a joint statement with the United Nations' Special Rapporteur and the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe's Representative on Freedom of the Media noted that laws governing hate speech, given their interference with freedom of expression,[59] should be (i) prescribed by law, (ii) pursue a legitimate aim, and (iii) necessary in a democratic society.[60]

Speech that amounts to hate speech lacks protection in both the Inter-American and European systems. Under Article 13, paragraph 5 of the American Convention, "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."[61] The Special Rapporteurship on Freedom of Expression states that the ACHR could use the principles set out by the International Criminal Tribunal for Rwanda (ICTR) as guideposts to interpret a ban on hate speech under Article 13(5) of the American Convention. The principles outlined by the ICTR, European courts, and the United Nations include three elements: 1) the intent of the language, 2) the context of the expression, and 3) causation.[62] Moreover, the ICTR described that it is important to analyze the purpose behind a material's transmission and stated that if the "material's transmission was of a bona-fide nature—used for historical research or to convey news or information, for example—it was not found to constitute incitement."[63]

The European system illustrates the three elements in practice through case law. The Inter-American court system can use the three elements to draw an appropriate line that makes a distinction between free speech and hate speech that amounts to a deliberate denigration of an individual because of their gender or other minority status. An analysis of several Turkish cases in the European courts, for example, in *Surek v. Turkey (No. 1)*, the court

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[57] 2000 O.J. (C 364) 1.

[58] Convention for the Protection of Human Rights, art. 10, Nov. 4, 1950, CETS No. 213, 213 U.N.T.S. 222.

[59] Simpson, *supra* note 15 at 702.

[60] Joint Declaration on Freedom of Expression and Gender Justice, Org. for Sec. and Co-operation in Europe, May 3, 2022 at 3.

[61] American Convention on Human Rights, *supra* note 55, at 24.

[62] *Id.*

[63] *Id.*

interpreted the element of intent in a newspaper publication of "letters to the editor decrying the Turkish authorities' actions in the troubled southeast of Turkey" that called the authorities a murder gang.[64] The court held that the newspaper was responsible for publishing letters from its readers that contained harmful language because it helped "fuel bloody revenge by stirring up base emotions and hardening already embedded prejudices."[65] Further, the court also noted that while interference with the right to freedom of expression by the government is not allowed for information that merely shocks or offends, this case exceeded that standard because it involved hate speech and a glorification of violence.[66] Judicial support for the intent element demonstrates the need for a holistic view of the language in the expression. The language itself is important to determine where the expression falls.[67]

The ECtHR interprets the second element, the context of the expression, in *Zana v. Turkey*. In *Zana*, a former mayor of the Turkish town of Diyarkabir, told journalists, from the prison in which he was sentenced, that he supported the 'national liberation movement' of the Kurdistan Workers' Party (PKK) but did not support massacres.[68] The court considered the context in which the statement was made to determine the individual's right to freedom of expression and the restrictions. According to the court, the restrictions were legitimate based on national security and public safety grounds due to the 'serious disturbances' taking place in southeast Turkey.[69] The expression's context was interpreted during a climate of violence where such statements could be restricted by the government, given their potential to incite more violence in society. Ultimately, the Court:

> [F]actored in contexts such as the role of political expression or criticism of the government, in which there is room for more protection, and the issue of national security, in which the Court has said there a 'wider margin of [appreciation]' for authorities to restrict freedom of expression.[70]

Finally, the ECtHR interprets the causation element to consider the likely impact of the expression, recognizing that causation in this context

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[64] Sürek v. Turkey (No. 1), App. No. 26682/95, Eur. Ct. H.R. ¶11 (1999); *Zana v. Turkey*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (July 8, 1999), https://globalfreedomofexpression.columbia.edu/cases/zana-v-turkey/.

[65] Sürek App. No. 16682/95, ¶1.

[66] *Id* ¶62.

[67] *Id.*

[68] Zana v. Turkey, App. No. 18954/91, Eur. Ct. H.R. ¶12 (1997). *See also Zana v. Turkey*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (July 8, 1999), https://globalfreedomofexpression.columbia.edu/cases/zana-v-turkey/.

[69] *Id*.

[70] Special Rapporteurship for Freedom of Expression, *supra* note 14, ¶42.

might be relatively indirect. Although protections for freedom of expression afforded by the ECHR are similar to those in the ACHR, the European approach to hate speech fails to provide adequate protection for political speech on controversial issues, including criticism of public officials and government institutions.[71] The definition of what speech constitutes hate speech differs in a case-by-case analysis by the ECtHR.

Additional European case law further distinguishes between free speech and unprotected hate speech. In *Atamanchuk v. Russia*, the court stated that:

> [I]nciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner.[72]

The court directly addressed what speech amounts to hate speech in *Lilliendahl v. Iceland*, where it held that hate speech falls into two categories.[73] Hate speech, according to the court, falls under either (i) the gravest forms of hate speech or (ii) less grave forms of hate speech.[74] The court included calls for violence, insults, ridicule, and slander as situations when the government can restrict an individual's freedom of expression.[75] Lastly, the court held that "determining whether speech constitutes hate speech is based on an assessment of the content of the expression and the manner of its delivery."[76]

Another form of hate speech interpreted by the European courts is the prohibition of symbols that amount to hate speech. For example, in *Vajnai v. Hungary*, "the applicant had been convicted for wearing a five-pointed red star, which, according to the Government, symbolized a one-party dictatorship."[77] The court held that the individual's right to freedom of expression was violated and considered the country's shift from a communist government to a democracy to emphasize how far-removed the blanket prohibition of the symbol is from a pressing social need to restrict

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[71] Jacob Mchangama & Natlie Alkiviadou, *Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?*, **HUM. RTS.** L. **REV.**, 1008, 1010 (2021) (citing Atamanchuk v. Russia, App. No. 4493/11, ¶2 (February 11, 2020), https://hudoc.echr.coe.int/eng?i=002-12721).

[72] *Id*. at 1015. *See also* Atamanchuk v. Russia, App. No. 4493/11, ¶ 2 (February 11, 2020), https://hudoc.echr.coe.int/eng?i=002-12721.

[73] Mchangama & Alkiviadou, *supra* note 71, at 1017 (citing Lillendahl v. Iceland, App. No. 29297/18, ¶ 33 (May 12, 2020), https://hudoc.echr.coe.int/fre?i=001-203199.).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Vajnai v. Hungary, App. No. 33629/06, ¶ 51-54 (October 8, 2008), https://hudoc.echr.coe.int/eng?i=001-87404.

this type of speech. In its decision, the court considered the effects of the country's long history under communist rule on its citizens; however, the court could not consider these sentiments alone to limit the right to freedom of expression.[78] In a different approach, compare the court's decision in *Vajnai* to a similar case in U.S. jurisprudence, *R.A.V. v. City of St. Paul,* interpreting symbols as hate speech.[79] *R.A.V. is* distinguishable from European case law because the First Amendment protects content based speech in the U.S., which otherwise European Courts would restrict.

It is important to make this distinction because the foundation of the First Amendment is to prevent the government from restricting free speech based on its content.[80] Regarding hate speech, U.S. courts take a content or point-of-view-based approach. In *R.A.V*., the Supreme Court declared unconstitutional Minnesota's Bias-Motivated Crime Ordinance prohibiting displays of symbols that a person knows or has reason to know arouses anger, alarm, or resentment in others based on race, color, creed, religion, or gender, including symbols such as a burning cross or a Nazi swastika.[81] In today's society, it is difficult to believe that engaging in the act of cross-burning on an African American homeowner's property would fall under the umbrella of protected speech. The Supreme Court stated that this form of speech often amounts to the fighting words doctrine, which was not a category of speech protected by the First Amendment.[82] Fighting words are those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.[83] Although the speech in *R.A.V.* was unprotected, the Supreme Court stated that the First Amendment limits the government's ability to draw content-based distinctions.[84] Despite what racial implications the burning of the cross may have symbolized, the government generally cannot regulate speech based on hostility or favoritism towards the underlying message expressed.[85]

The Inter-American and European court systems take on a case-by-case human rights approach. The U.S. also has a case-by-case approach, but instead of being human rights focused, has established several tests to determine what constitutes protected and unprotected speech, including the bad tendency test, the clear and present danger test, and the imminent lawless

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[78] *Id.*

[79] *Compare* Vajnai, *supra* note 77, *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 377 (1992).

[80] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1186 (6th ed. 2020).

[81] *See* R.A.V., *supra* note 79, at 377.

[82] *Id.*

[83] *See* Thomas Kleven, *Free Speech and the Struggle for Power*, 9 **N.Y.L. SCH. J. HUM. RTS.** 315, 347 (1992).

[84] *Id.*; *accord* ERWIN CHEMERINSKY, CONST. LAW; PRINCIPLES AND POLICIES 1056 (Richard A Epstein et al. eds., 6th ed. 2020).

[85] *See* CHEMERINSKY, *supra* note 84, at 1057.

action test.[86] Despite the evolution of its legal standard, "the United States remained consistent in refusing to distinguish protected from unprotected speech on the basis of the point of view espoused."[87]

III. INTERNATIONAL HUMAN RIGHTS LAW PROTECTS JOURNALISTS ENGAGING IN CRITIQUES OF THE CONDUCT OF PROMINENT WOMEN

International law supports freedom of expression when journalists critique female public officials. The ACHR and the ECHR have similar articles that protect freedom of expression for all individuals. Under Article 13 of the ACHR, everyone has the right and freedom of thought and expression. This right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.[88] Further, Article 13 states that although freedom of expression is not subject to prior censorship, it should be limited to meet the following: i) it must be provided for by law; ii) it must be directed at attaining a legitimate purpose and be suitable for such; iii) it must be necessary; iv) it must be proportional.[89]

Journalists in Latin America have long faced the consequences of reporting on government corruption and exposing actions by public officials that affect society's welfare. Freedom of information access, one of the aspects of expression, allows individuals to scrutinize the state acts.[90] Guatemala is an example of a country that exercises oppressive measures against journalists to censor the free flow of information. In Guatemala, like many countries in Latin America, the government's corruption and actions by public officials have rippling effects on its citizens. Moreover, the use of criminal laws against journalists creates a chilling effect on democratic values and rights to free speech. Further, these criminal laws limit the public's access to information, and the right to a life free from violence and oppression. They threaten the safety of journalists and their families. In Latin America, many journalists experience backlash and repercussions for exposing corrupt maneuvers by public officials that results in living their lives in exile.

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[86] Kamatali, *supra* note 6, at 722.

[87] *Id.*

[88] American Convention on Human Rights, *supra* note 55, at 148.

[89] Global Freedom of Expression, *Uson Ramirez v. Venezuela,* GLOB. FREEDOM OF EXPRESSION COLUM. UNIV (Nov. 20, 2009), https://globalfreedomofexpression.columbia.edu/cases/uson-ramirez-v-venezuela/.

[90] *See* Viviana Krsticevic, *How Inter-Am. Hum. Rts. Litig. Brings Free Speech to the Americas*, 4 **SW. J.L. & TRADE AM.** 2019, 210 (1997).

Judicial decisions by the IACtHR provide support for the right to limit the freedom of expression and restrict this right in a more subtle manner, instead of restricting speech directly. For example, in *Kimel v. Argentina*, the Court upheld protections for a journalist's right to freedom of expression after the government charged him criminally with defamation.[91] In *Kimel*, a journalist published a book where he criticized the conduct of a criminal judge who was in charge of investigating a massacre.[92] The Argentinian government criminally charged and convicted the journalist for the crime of false imputation of a publicly actionable crime (*calumnia*) and the crime of defamation (*injuria)*.[93] Due to harsh and often disproportionate criminal charges against journalists who publish opinions or information guidelines, the criminal charges must comport to guidelines by the IACtHR.

The test established in *Kimel* to determine appropriate free speech restrictions should similarly apply to determine what constitutes hate speech against female public officials and free speech by journalists in Guatemala. In *Kimel*, the Inter-American Court followed a standard three-part test to determine if the limitation and interference with the right to freedom of expression were permissible under the ACHR.[94] The test consists of: i) the limitation or restriction must be established by law; ii) it must seek to achieve a legitimate purpose and be suitable for attaining this end; iii) it must be necessary to achieve its purpose.[95] In applying the test, the Court held that the State satisfied the first part of the test because the crime of *injuria* and *calumnia* existed in Argentina's criminal law.[96] Further, the Court recognized the protections provided in Articles 11 and 13 of the ACHR, which include the protection of an individual's honor and reputation.[97] Nonetheless, the Court determined that the government's punishment against the journalist was unnecessary and disproportionate, and violated his right to freedom of expression.[98] To determine the proportionality of the punishment against the expression by the journalist, the Court stated that it was necessary to analyze the following elements: i) the degree of impairment of the rights at stake, establishing whether the extent of such impairment was serious, limited, or moderate; ii) the relevance of the satisfaction of the

[91] Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, 18 (May 2, 2008).

[92] *Id.* at 22. *See also* Special Rapporteurship for Freedom of Expression, *supra* note 14.

[93] Kimel*, supra* note 91, at 43. *See also* Global Freedom of Expression, *Kimel v. Argentia*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV (May 2, 2008), https://globalfreedomofexpression.columbia.edu/cases/kimel-v-argentina/.

[94] Kimel, *supra* note 91, at 56.

[95] *Id.* at 59-80.

[96] *Id.* at 67.

[97] *Id.* at 71.

[98] *Id.* at 78-80.

opposing right, and iii) whether the satisfaction of the latter justifies the restriction of the former.[99]

In applying a similar test to distinguish between hate speech and free speech, courts should look to the context in which the person made the expression, including whether the person is a government official. In their capacity as public officials, the government has a responsibility to protect the rights of their citizens and contribute to the welfare of society rather than using the laws in a state's criminal system against its citizens simply because public officials dislike critiques about their work and actions while in a position of power. The *Kimel* court discussed the content of the expression in the context of critiquing a public official and stated that expressions concerning the suitability of an individual for occupying public office or the acts carried out by public officials in the exercise of their duties enjoy a greater degree of protection.[100] As the Court in *Kimel* states, "in the democratic debate involving public interest matters, protection is extended not only to harmless expressions but also to expressions that shock, irritate or disturb public officials."[101] While the Inter-American court system follows strict guidelines to protect freedom of speech, it also established an important test in *Kimel* that serves to reel in disproportionate and unnecessary criminal sanctions against journalists who exercise their right to free speech. It is important for the Inter-American human rights system to recognize and impose precedential guidelines on Latin American governments that continue to criminalize free speech and disguise critiques of public officials under the pnishment of hate speech.

In Latin America, "[c]riminal libel law and its close relative, the insult law, are the most frequently utilized to attack the press."[102] More importantly, "criminalization of speech is the most serious problem that the media faces, [including] the large number of legal provisions regulating the media, the broad and ambiguous definitions contained therein, and the lack of legal defenses."[103] Despite previous reports that analyze the deterring effects of criminal laws that punish journalists for publications, including the ramifications they face legally and personally, "[c]riminal libel is most egregious when the criminal complaint is presented by public officials against media defendants."[104] While many existing criminal laws in Latin America reflect an oppressive government against its citizens, several countries have abolished insult or disrespect laws (*desacato*) from their

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[99] *Id.* at 84.
[100] *Id.* at 86.
[101] *Id.* at 88.
[102] Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 348 (2002).
[103] *Id.* at 356.
[104] *Id*. at 361.

criminal system. Countries like Chile, Paraguay, Costa Rica, and Peru have abolished *desacato* laws[105] to comport with Article 13 of the ACHR. According to the Special Rapporteurship:

> [I]t is necessary to decriminalize speech that criticizes state officials, public figures, or, in general, matters of public interest; the foregoing is so because of the paralyzing effect or the possibility of self-censorship caused by the mere existence of laws that provide criminal penalties for those who exercise the right to freedom of expression in such a context.[106]

In 2006, the Guatemalan Constitutional Court declared *desacato* [disrespect], provisions that criminalize free speech for the critique of public officials to be unconstitutional.[107] In its ruling, the court reasoned that their role as public officials subjects them to public scrutiny, and disrespect laws are an attack on the freedom of expression and limit the right to information for the public.[108] The court found support for its ruling in favor of the right to freedom of expression in U.S. case law, citing *New York Times v. Sullivan*: "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[109] The elimination of *desacato* laws by several Latin American countries is a step in the right direction to eliminate the oppressive culture that allows the government and public officials to use the laws in place as a sword to protect themselves against public criticism. However, the lawsuits filed by public officials under Guatemala's femicide law are essentially being used to work around this ruling and to manipulate the law in their favor to avoid scrutiny of their actions.

Public officials carry important roles used to strike balance in a democratic society. Many of the court decisions rendered by the Inter-American court system repeat verbatim that freedom of expression is an important cornerstone of a democratic government. Despite many Latin American governments rooted in authoritarian regime policies, international human rights law has placed a significant responsibility on these

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[105] Oliver Spencer, *Index on Censorship: Global Snapshot*, (May 1, 2009), https://journals.sagepub.com/doi/pdf/10.1080/03064220902938803.

[106] Special Rapporteurship for Freedom of Expression, *supra* note 14, at 22, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=310&lID=1#_ednref19.

[107] Comm. to Protect Journalists, *In Guatemala, a Welcome Decision to Strike Down 'Disrespect' Laws*, COMM. TO PROTECT JOURNALISTS (Feb. 3, 2006, 12:00 PM), https://cpj.org/2006/02/in-guatemala-a-.

[108] Global Freedom of Expression, *Action Challenging the Constitutionality of the Offense of Crim. Defamation in Guat.*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (Feb. 1, 2006), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/04/Judgment-1122-2005.pdf.; *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 254 (1992).

[109] N.Y. Times Co., 376 U.S. at 270.

governments to continue advocating for change regarding basic human rights. Like the Inter-American court system, support for journalists that engage in critiques of public officials, including female public officials, can be found in the ECHR and the ECtHR. The ECHR describes journalists as "watchdogs" of democracy who have a duty to disseminate information and not to overstep certain bounds by harming their reputation and infringing on the rights of others or disclosing confidential information.[110]

The ECtHR in *Cumpana and Mazdre v. Romania,* ruled that there was a violation of Article 10, freedom of expression, of the ECHR.[111] In *Cumpana*, two journalists published an article in a local newspaper that exposed the corrupt government activities of two public officials, a former deputy mayor and a female judge.[112] The government convicted the journalists for insult and defamation, and sentenced them to serve a 14-month prison sentence.[113] The Court held that it must "exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern."[114] Further, the court stated that it is imperative to analyze the chilling effect that disproportionate criminal sanctions have on the media and society.[115]

International human rights laws are designed to protect the right to freedom of expression, including the dissemination of information by journalists regarding government actions. If the government interferes with media and journalistic reports by prohibiting its purpose in society to inform the public of any wrongdoings by the government, then public officials receive leeway to remove any checks on their power and carelessly trample democratic values.

As is clear from the above, courts around the world recognize that the right to free speech is necessary to protect journalists for the important work they do in exposing corruption in governments. Guatemala is one of the countries that has acknowledged this right. However, female public officials in Guatemala are undermining this step forward by utilizing a law for the protection of women to criminalize speech by investigative journalists. The thrust of the femicide law is to protect women from the varying sorts of

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[110] Ubeda de Torres, *supra* note 10, at 8.

[111] Cumpana and Mazare v. Rom., 15 Eur. Ct. H.R. (2004). App. No. 33348/96, at 19 (Dec. 17, 2004), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67816%22]}.

[112] *Id.* at 115; *see also* Global Freedom of Expression, *Cumpana and Mazare v. Rom*, (Dec. 17, 2004), https://globalfreedomofexpression.columbia.edu/cases/case-cumpana-mazare-v-romania/.

[113] Cumpana and Mazare v. Rom., 15 Eur. Ct. H.R. (2004). App. No. 33348/96, ¶ 37 (Dec. 17, 2004), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67816%22]}.

[114] *Id.* at111.

[115] *Id.* at 114.

violence they suffer from in Guatemala. Not to stifle free speech or to prevent journalism. By perverting the law in this way, female public officials undermine their credibility, the femicide law, its purpose, and ultimately, democracy.

CONCLUSION

It is not enough that current international case law and international human rights conventions insist on the protection of violence against women, girls, children, and minorities in the face of alarming impunity rates in Latin American countries. Although the Inter-American Convention on Human Rights and European Convention on Human Rights provide appropriate guidelines to protect freedom of expression and international case law provides legal standards to determine what distinguishes free speech from hate speech, Guatemala's public officials have ignored this distinction. Instead, they weaponized Guatemala's efforts to eradicate violence against women for their own personal needs to censor investigations about their wrongdoings. Public officials who are misusing the femicide law that Guatemala adopted and implemented as another mechanism to address the impunity rates of missing and murdered women in the country, are contributing to the problem and not the solution. As leaders of the country, Guatemalan public officials should represent the interests of society and should promote and protect citizens' interests through the appropriate use of the laws and its judicial system.

Moreover, the adoption of the Convention of Belém do Pará is to address violence against women in vulnerable circumstances that often result in a woman's disappearance or murder. With respect to impunity rates, many Latin American countries also have high impunity rates for violence against journalists. Therefore, public officials should focus on using the laws as a shield to protect citizens and not as a sword to attack members of society because they disagree with critiques of their questionable work.

Guatemala must reexamine the provisions in the Convention and recognize the misuse of the femicide law by public officials who are often immediately and unjustly granted protections by the courts. Guatemala should not undermine or misapply the protections under the Convention to censor free speech. International law protects journalists who are exercising their right to freedom of expression and aims to prevent unlawful criminal charges against them as well. Additionally, the misapplication of the femicide law should not be used by public officials to inhibit the free flow of information.