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## TORT LIABILITIES AND TORTS LAW: THE NEW FRONTIER OF CHINESE LEGAL HORIZON

*Mo Zhang*<sup>1</sup>

### ABSTRACT

China did not have a single body of torts law until 2009. As a new piece of legislation in the country, the Torts Law of China, effective as of July 1, 2010, forms a comprehensive framework that regulates torts and provides a legal mechanism to govern liabilities and remedies. A product of the civil law tradition, common law practice and Chinese reality combined, adoption of the Torts Law is hailed in China as an important move toward a civil society that is ruled by law.

The Torts Law premises torts on the fault liability with a few exceptions where the non-fault liability is imposed. Structurally, the Torts Law is distinctive in that it stresses principles and rules of general application, and in the meantime prescribes peculiar tortfeasors and special torts that need to be dealt with differently. In substance, the Torts Law is ambitious because it intends to embrace not only traditional torts but also the newly developed area of torts. In many aspects, the Torts Law is also keen to maintain the Chinese characteristics.

Still, there is a substantial gap between the law on the paper and the law in action. Many ambiguities exist, which require both legislative and judicial interpretations. In addition, many unsolved issues may become obstacles to the application of Torts Law. More significantly, Torts Law enforcement remains a major challenge to the Chinese legal system in general and to the Chinese judiciary in particular.

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## I. INTRODUCTION

As part of its effort to adopt a comprehensive civil law (a general civil code), China enacted the Tort Liability Law – the first single piece of law on torts (the Torts Law) since 1949.<sup>2</sup> After more than 7 years of drafting, since 2002,<sup>3</sup> the Standing Committee of the National People's Congress (NPC) promulgated the Torts Law on December 26, 2009, effective July 1, 2010.<sup>4</sup> Despite lingering questions about whether the Standing Committee of the NPC may legitimately pass

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<sup>2</sup> At the very beginning of the economic reform in 1978, China had an ambitious plan to adopt a comprehensive civil code to replace the General Principles of Civil Law promulgated in 1986. But they never reached a consent among scholars and legislators on the substance of the civil code, and there were many issues that invited constant debates. In 1999, the Contract Law, which was supposed to be one chapter of the civil code, was adopted. In 2002, the first draft of the civil code was submitted to the Standing Committee of the NPC for review. Partly because of the wide disagreement over many provisions of the proposed civil code, the effort to adopt a comprehensive code at that time was abandoned. Instead, the attention was paid to the passage of separate law based on the each chapter of the proposed civil code. As a result, following the Contract Law, the Property Law was enacted in 2007. The adoption of the Tort Liability Law further exemplifies the legislative intention in this regard.

<sup>3</sup> The effort to draft the Torts Law was initiated in 2002. Although at that time, the torts law was considered as a chapter of the proposed civil code, the draft torts chapter laid the structural basis for the later drafting of the Tort Liability Law.

<sup>4</sup> Tort Liability Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), *available at* [http://www.gov.cn/flfg/2009-12/26/content\\_1497345.htm](http://www.gov.cn/flfg/2009-12/26/content_1497345.htm) [hereinafter Tort Liability Law]. A full text of the Torts Law in English translation is available at <http://www.cnnlaw.com/show.asp?id=663>.

Torts Law,<sup>5</sup> Torts Law adoption is acclaimed in China as a significant modern legislative achievement in civil rights protection.<sup>6</sup>

China is known as a country where the clan and rites based Confucian orthodox dominated its legal system for thousands of years.<sup>7</sup> But civil law tradition has strongly influenced China's recent legal history.<sup>8</sup> In the law regulating civil affairs, for example, the civil law concept of *obligatio* (obligations in English) has been deeply embodied in the basic structure of the law.<sup>9</sup> Under the Roman law, the *obligatio* represented an obligatory relationship that is legally binding,<sup>10</sup> and was divided into *ex contractu* (contract) and *ex delicto* (delict).<sup>11</sup> It also covered quasi contract and quasi delict.<sup>12</sup>

China does not use the term "*quasi contract*" or "*quasi delict*." Instead, *obligatio* in China is comprehended to include contract, torts,

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<sup>5</sup> See XIANFA at art. 58 (1982). The passage of the law took an unusual step: instead of being adopted by the NPC full session, the Torts Liability Law took a short cut and was passed by the Standing Committee of the NPC – the permanent body of the NPC. Under Article 58 of the 1982 Chinese Constitution (as amended 2004), the National People's Congress and its Standing Committee exercise the legislative power of the State. *available at* <http://www.lawinfochina.com/law/display.asp?id=3437>. Pursuant to Article 62 of the Constitution and Article 7 of the Legislation Law of China, however, the legislative power of the Standing Committee is limited to the law other than the basic law of the nation (e.g. according to Article 7 of the Legislation Law, the NPC enacts and amends basic laws governing criminal offenses, civil affairs, the state organ and other matters, while the Standing Committee of the NPC enacts and amends laws other than the ones enacted by the NPC. Legislative Law (China), *available at* [http://www.npc.gov.cn/pc/11\\_4/2007-12/11/content\\_1617613.htm](http://www.npc.gov.cn/pc/11_4/2007-12/11/content_1617613.htm). Therefore, many questioned about the Standing Committee's authority to adopt such a law as the Torts Law that is considered the basic law related to the civil affairs. See Hou Guoyue, The Standing Committee of the NPC Lacks the Power to Enact the Torts Law, *available at* <http://www.civil.law.com.cn/article/default.asp?id=47528>. See also Xu Xianmin, The Torts Law Should be Submitted to the NPC's National Conference for Review, *available at* [http://www.npc.gov.cn/nc/xnwen/tpbd/cwhhy/2009-12/23/content\\_1531743.htm](http://www.npc.gov.cn/nc/xnwen/tpbd/cwhhy/2009-12/23/content_1531743.htm).

<sup>6</sup> See WANG LIMING, COURSEBOOK OF THE TORT LIABILITY LAW OF CHINA 1 (People's Court Press, 2010).

<sup>7</sup> See WANG CHENGUANG, *An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW 4 (Zhang Xianchu & Wang Chenguang Ed., 1997); see also WILLIAM JONES, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 7-8 (C. Stephen Hsu ed., 2003).

<sup>8</sup> See JONES, *supra* note 7, at 18-22; see also George W. Conk, *A New Tort Code Emerges in China*, 30 FORDHAM INT'L L.J. 935 (2007).

<sup>9</sup> See LIMING, *supra* note 6, at 15.

<sup>10</sup> See generally WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, OBLIGATIONS 817 (John Murray, London 1875) [hereinafter SMITH'S DICTIONARY].

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

unjust enrichment and voluntary services (*negotiorum gestio*).<sup>13</sup> Thus, it is commonly held in China that an *obligatio* or obligations can be created by contract, tortious conduct, unjust enrichment or voluntary service.<sup>14</sup> In the recent decades, however, there has been a debate in China on whether the tortious conduct prompts an obligation or a liability.<sup>15</sup> Under Justinian's Institutes, *obligatio* was defined as "a legal bond, with which we are bound by a necessity of performing some act according to the laws of our state."<sup>16</sup> This definition apparently becomes an attribute to the debate.

The whole point of the debate is related to the word "releasing," meaning an obligation to give.<sup>17</sup> Some argue that *obligatio*, by way of "releasing" or "giving," implicates a property relationship, and unlike the contractual obligation which possesses the nature of property in terms of performance or monetary damage, torts does not necessarily involve such a relationship.<sup>18</sup> On this ground, they believe that a tort does not fall within the realm of the *obligatio*.<sup>19</sup> Others try to differentiate obligation from liability by emphasizing that the *obligatio* contains both rights and obligations, while torts law does not create any rights, but remedies.<sup>20</sup>

Because of this debate, Chinese tort legislation does not strictly adhere to civil law tradition. In fact, to the extent that the torts law is structured, it departs from the common pattern of the civil law legislation concerning torts.<sup>21</sup> The first law that evidences this departure is the General Principles of Civil Law, adopted in 1986 (referred to as the 1986 Civil Code). In Article 84 of the 1986 Civil Code, the "*obligatio*" is defined as a special relationship of rights and obligations established between the parties according to either the agreed terms of a contract or of legal provisions.<sup>22</sup> Article 84 further provides that the party enti-

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<sup>13</sup> See LIMING, *supra* note 6, at 15.

<sup>14</sup> See *id.*

<sup>15</sup> See JIANG PING, STUDY ON TORTS LAW 1 (China Democracy & Legality Press 2004).

<sup>16</sup> See SMITH'S DICTIONARY, *supra* note 10, at 817; see also André Tunc, *Introduction to XI/1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS 3-5* (1983).

<sup>17</sup> See PING, *supra* note 15, at 2.

<sup>18</sup> See *id.* at 1.

<sup>19</sup> *Id.* at 7-15.

<sup>20</sup> *Id.*; see also LIMING, *supra* note 6, at 17-18.

<sup>21</sup> See YANG LIXIN, DETAILED EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 2-3 (Property Rights Press 2010) (explaining that in civil law countries, torts and contract are all within the law of obligations because they are considered as the two main sources of the obligations); see Tunc, *supra* note 16, at 11.

<sup>22</sup> See General Principles of the Civil Law of the People's Republic of China (promulgated by the Nat'l People's Ct., Apr. 12, 1986, effective Jan. 1, 1987), *avail-*

tled to the rights shall be the creditor while the party assuming obligations is the debtor.<sup>23</sup>

Many in China believe that Article 84 specifies the legal causes for the *obligatio*, which include the “agreed terms of a contract” and the “legal provisions.” The former refers to the contractual obligations and the latter denotes non-contractual obligations.<sup>24</sup> Again, under civil law tradition, non-contractual obligations are those arising from torts, unjust enrichment and voluntary services.<sup>25</sup> The common feature of the non-contractual obligations is that all such obligations are created under the operation of law.<sup>26</sup>

Despite the definition of *obligatio* in Article 84, the 1986 Civil Code nevertheless separates tort liability from the provisions of the “*obligatio*,” and places it in a different chapter under the title of civil liability.<sup>27</sup> The message that the 1986 Civil Code intends to send is that torts primarily deal with civil liability, rather than the rights and obligations, and thus should be differentiated from *obligatio*.<sup>28</sup> The tort provisions in the 1986 Civil Code are considered innovative in China because they break the civil law tradition in confining torts within the *obligatio*.<sup>29</sup> Still, some insist that since the tortious conduct would result in rights and obligations between the parties concerned in terms of damages, torts remain as a major cause of the *obligatio* even though under the 1986 Civil Code, torts are provided separately as the civil liability.<sup>30</sup>

In this respect, the Torts Law, to a great extent, follows the blueprints of the 1986 Civil Code.<sup>31</sup> As a specific statute on torts, the Torts Law is different from its common law counterpart because in common law countries, in the United States for example, torts law “re-

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able at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165> [hereinafter Civil Law].

<sup>23</sup> See *id.*

<sup>24</sup> See WANG JIAFU & LIANG HUIXING, *THE Obligatio in Civil Law* 31-32 (Law Press, 1998).

<sup>25</sup> See SMITH'S DICTIONARY, *supra* note 10, at 871.

<sup>26</sup> See *id.* at 3.

<sup>27</sup> See Civil Law, *supra* note 22. In the 1986 Civil Code, Chapter 6, Section III provides Civil Liability for Torts, which contains seventeen articles, from Article 117 to Article 133. Article 84 is within Section II Creditor's Right of Chapter 5, Civil Rights.

<sup>28</sup> See LIXIN, *supra* note 21, at 2-3.

<sup>29</sup> See *id.*

<sup>30</sup> See JIAFU & HUIXING, *supra* note 24, at 32.

<sup>31</sup> See LIXIN, *supra* note 21, at 3. The independence of torts law might be affected when a comprehensive civil code is enacted in China. It may become part of the code or remain as a separate law depending on how the code is to be formed. At any rate, torts law in China is separated from the *obligatio*.

mains un-codified and in large part unaffected by statute.”<sup>32</sup> On the other hand, Torts Law is also distinctive from the civil law tort legislation since in major civil law countries, like Germany, “the law of torts is a set of rules that is part of the private law of obligation.”<sup>33</sup> The Torts Law, as its title (the Tort Liability Law of the People’s Republic of China) indicates, is the codified law explicitly governing tort liabilities.

In contrast to the 1986 Civil Code, the Torts Law is much more extensive in coverage and inclusive in substance. First, the Torts Law expands the tort provisions from 17 articles in the 1986 Civil Code to the currently 12 chapters and 92 articles. Secondly, the Torts Law not only covers torts in general, but also deals with special torts in particular, and contains the provisions pertaining to the liability of various tortfeasors as well. Thirdly, the Torts Law provides a set of rules of the tort liability imputation and the principles of compensation. Finally, the Torts Law creates new causes of action to deal with certain legal issues of growing importance. One such issue is the liability for medical damages.

A highly notable feature of the Torts Law is that it is a product of combination of the civil law tradition and the common law practice.<sup>34</sup> Many Torts Law provisions are actually a hybrid of civil law and common law.<sup>35</sup> As far as damages are concerned, the Torts Law allows restitution, in addition to monetary compensation, and also imposes punitive damages. Restitution is a common method of tort relief in the civil law system and punitive damages are mostly seen in common law.<sup>36</sup> In fact, American tort theories and practices were substantially referenced while drafting China’s Torts Law, particularly in the areas of special torts.<sup>37</sup>

Like both Contract Law<sup>38</sup> and Property Law,<sup>39</sup> Chinese Torts Law is an important piece of legislation to regulate civil matters. Chi-

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<sup>32</sup> See EDWARD J. KIONKA, *TORTS IN A NUTSHELL* 2 (West 1999).

<sup>33</sup> See J. ZEKOLL & M. REIMANN, *INTRODUCTION TO GERMAN LAW* 205 (Kluwer 2005).

<sup>34</sup> See LIXIN, *supra* note 21, at 9-15.

<sup>35</sup> See *id.* at 1, 10-13. Some scholars in China describe the Torts Law as “civil law body mixed with common law concepts and Chinese judicial practices.”

<sup>36</sup> See ZEKOLL & REIMANN, *supra* note 33, at 222-23. In Germany for example, repairs of damages in kind is a basic method of compensation. Under the German law of damage, compensation in the sense of *restitutio ad integrum* is a basic principle and punitive damages are not allowed.

<sup>37</sup> See LIXIN, *supra* note 21, at 13-15.

<sup>38</sup> Contract Law (promulgated Mar. 15, 1999, effective Oct. 1, 1999) (China), available at [http://www.foreignercn.com/index.php?option=com\\_content&view=article&id=1131:contract-law-of-the-peoples-republic-of-china&catid=55:chinese-law&Itemid=99](http://www.foreignercn.com/index.php?option=com_content&view=article&id=1131:contract-law-of-the-peoples-republic-of-china&catid=55:chinese-law&Itemid=99).

nese Torts Law responds to the increasingly urgent need for a unified torts law system that provides well-defined causes of action and mechanisms for torts to effectively redress civil grievances in the courts.<sup>40</sup> Together with Contract Law and Property Law, the Torts Law helps lay legal foundations for a civil society that China would need to develop in its commitment to the rule of law.<sup>41</sup>

This article offers in-depth study and analysis of the Torts Law and discusses the issues essential to its application. The article focuses on the basic principles and rules set forth in Chinese Torts Law, analyzing both their conceptual grounds and practical significance. This analysis will also address some pressing issues to be encountered in Torts Law application. In addition, Torts Law provisions will be viewed from a comparative perspective, mainly between Chinese and American laws.

Section II examines the concept of torts in the Chinese context and the functions of the Torts Law in China. It analyses the basic elements for the finding of tort liabilities, the subjects the Torts Law regulates, and the substance that tort liability covers. Section III concentrates on imputation of tort liabilities. It provides an analytical review of the principles under which tort liability is sought, and tort liability imposition on various tortfeasors. Section IV discusses joint torts, the peculiar tortfeasors that the Torts Law classifies, and their applicable rules. Section V examines the legal grounds for tort liability defenses. Section VI addresses the remedies available under the Torts Law and the rules of damages. Section VII looks into the special torts and analyzes their distinctive factors and liability imputation. The focus is on those special torts that are believed to have significant impacts on the development of torts law in China.

In conclusion, Section VII argues that despite the best efforts in the drafting of Torts Law, there are still many unresolved issues. In addition, given the considerable breadth of its coverage, more legislative interpretations and judicial explanations are necessarily needed to help fill the gaps. More importantly, the fair application and effec-

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<sup>39</sup> Property Rights Law (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China), available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html> [hereinafter Property Law].

<sup>40</sup> See WANG SHENGMING, EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 2 (China Law Press, 2010). In 2007, the tort cases brought to the people's courts reached 830,000, and in 2008, this number increased to 992,000; see also PETER NEUMANN & CALVIN DING, *China's New Torts Law: Dawn of the Product Liability Era*, in THE CHINA BUSINESS REVIEW ONLINE, available at <http://chinabusinessreview.net/public/1003/neumann.html>.

<sup>41</sup> See LIMING, *supra* note 6, at 1-3.

tive enforcement of the Torts Law remain yet to be seen, particularly when the damage awards become an issue.

## II. CONCEPT OF TORTS AND ROLES OF THE TORTS LAW: UNDERSTANDING OF TORTS IN CHINA

“Torts” is an imported concept in China.<sup>42</sup> In Chinese legal history, because of the dominance of criminal law, little attention was ever paid to civil matters.<sup>43</sup> Not until the late Qing Dynasty (1644-1911) when foreign forces broke the tranquility of Chinese society, did western legal concepts begin to be introduced into China.<sup>44</sup> Torts, as a legal concept, was first used in the drafting of the Qing Civil Code as “*Qin Yuan Xing Wei*” (conduct of infringement of civil rights) in Chinese.<sup>45</sup> Ever since, the term of torts has widely been accepted and has become a common legal vocabulary in the country.<sup>46</sup>

### A. *Torts in Chinese Conception*

Nowadays, a “tort” is generally understood in China as a conduct of civil wrong.<sup>47</sup> Chinese scholars have tried to articulate a definition for torts but there is hardly any one that is satisfactory.<sup>48</sup> In at least two respects, scholars fail to reach any consent.

First is the question of whether there should be a difference between rights and interests. Some assert that rights are created by law, and thus any infringement of the rights shall be held liable; while interests are not necessarily legally provided and therefore harm to interests may not fall within torts.<sup>49</sup> Others disagree, arguing that in-

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<sup>42</sup> See *id.* at 1. Interestingly, it has been observed that the civilian jurists do not have exactly the concept of a tort but speak rather in terms of liability. See Tunc, *supra* note 16, at ch. I §12.

<sup>43</sup> See ZHANG JINFAN, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* 23 (Law Press 2005).

<sup>44</sup> See Jerome Cohen, *Foreword* to *THE RULE OF LAW, PERSPECTIVES FROM THE PACIFIC RIM*, at xi (Mansfield Ctr. for Pacific Aff. 2000).

<sup>45</sup> See PING, *supra* note 15, at 60; see also ZHANG XINBAO, *STUDY ON THE LEGISLATION OF THE TORTS LIABILITY LAW* 143 (People’s Univ. Press 2009). In the first draft of the Qing Civil Code, Article 945 provided that a person who unlawfully inflicts harm to other’s rights, intentionally or negligently, shall be liable for compensating the damages caused thereby.

<sup>46</sup> See LIMING, *supra* note 6, at 1.

<sup>47</sup> See JIAFU & HUIXING, *supra* note 24, at 407. It has been observed that the word “tort” derives from the Latin “tortus,” meaning twisted or crooked, and it has found its way into the English language as a general synonym for “wrong.” See Tunc, *supra* note 16, at 7.

<sup>48</sup> See PING, *supra* note 15, at 60-62.

<sup>49</sup> LIU SHIGUO, *A STUDY IN THE MAJOR KNOTTY ISSUES OF THE TORT LIABILITY LAW* 1 (China Legal Publishing House 2009).

terests are actually the substance of rights because there would be no right without any interest. They argue further that even if there exists a difference between rights and interests, the difference is too obscure to tell.<sup>50</sup>

Second is the question of “unlawfulness,” or the legal nature of tortious conduct. This issue asks whether “unlawfulness” is an element of a tort.<sup>51</sup> In other words, should a tort liability be imposed upon the fault or upon the unlawful conduct of the tortfeasor?<sup>52</sup> Under the unlawfulness approach, to hold someone liable for a tort, his harm causing conduct must also be unlawful even if he is proved to be at fault.<sup>53</sup> The fault theory takes the position that since the fault itself already infers something unlawful, there is no need to make unlawfulness an additional criteria for a tort.<sup>54</sup> On the other hand, the fault theory argues that given the complexity of civil matters, it is very difficult, if not impossible, to define what is lawful and what is unlawful.<sup>55</sup>

Both the 1986 Civil Code and the Torts Law contain no definition of tort. Article 106 of the 1986 Civil Code provides that citizens or legal persons who, through their fault, encroach state or collective property, or the property or person of other people, shall bear civil liability.<sup>56</sup> Although Article 106 is confusing with regard to the terms “citizens” and “state or collective property,”<sup>57</sup> it implies that a tort is a faulty conduct of infringing other’s property or personal rights. Thus unlawfulness is not required for imposing tort liabilities.<sup>58</sup> But, it is unclear whether civil interests are included in these rights.

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<sup>50</sup> See SHENGMING, *supra* note 40, at 10.

<sup>51</sup> See PING, *supra* note 15, at 88-93.

<sup>52</sup> See WANG LIMING, STUDY IN THE PRINCIPLES OF LIABILITY IMPUTATION OF TORTS LAW 394-410 (China Univ. of Political Sci. & Law Press 1992) [hereinafter LIABILITY COMPUTATION].

<sup>53</sup> See *id.* at 400-01; see also PING, *supra* note 15, at 61. Historically, the unlawfulness as an element of torts originated from the *Lex Aquilia* in which the term “*iniuria*” meaning “unlawfully” was used to define torts. The *Lex Aquilia* was concerned with damages done from *dammum iniuria datum*, “damages unlawfully inflicted.” See SMITH’S DICTIONARY, *supra* note 10, at 383; see also JEAN LIMPENS, *Liability for One’s Own Act*, in XI/1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS § 2-15, at 9.

<sup>54</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 52, at 398.

<sup>55</sup> *Id.*

<sup>56</sup> See Civil Law, *supra* note 22, at art. 106.

<sup>57</sup> See *id.* The term “citizen,” for example, causes confusion because it is not only a political term, but also does not include foreigners.

<sup>58</sup> See LIMING, LIABILITY COMPUTATION *supra* note 52, at 398 (Before the 1986 Civil Code was adopted, tort was commonly defined in China as “an *obligatio* relationship between actor and victim that occurred by the operation of law as a result of the actor’s unlawful harm to the property right and personal right of the victim, whereby causing property damages to the latter.”).



The Torts Law addresses torts in a more general fashion. Under Article 2 of the Torts Law, those who infringe upon civil rights and interests shall be subject to tort liability.<sup>59</sup> Once again, in Article 2, a tort liability is not based on the unlawfulness of the tortious conduct. In addition, pursuant to Article 2, Torts Law grants protection to not only one's civil rights but also one's civil interests. The implication of Article 2 is that a tort is a conduct that injures or damages another person's civil rights and interests and the legal consequences of a tort is the imposition of a civil liability upon the tortfeasor according to the law.

It is interesting to note that in addition to Article 2 of the Torts Law, Article 3 also provides that the victim of a tort shall be entitled to request the tortfeasor to assume tort liability.<sup>60</sup> Some regard Article 3 as a repetition of Article 2 because they believe that the two articles are basically the same.<sup>61</sup> Many, however, argue that the two articles are different because Article 2 states the liability of the tortfeasor while Article 3 emphasizes the victim's right of claim.<sup>62</sup> In civil law, the right of claim is the right to request the other person to do something or to refrain from doing something. It is the right that can only be realized by another person's action or omission.<sup>63</sup>

The provision of the right of claim under the Torts Law serves a twofold purpose. On the one hand, it differentiates the tort liabilities from the right of claim on torts.<sup>64</sup> Thus, when a tort occurs, it produces a liability on the tortfeasor and, in the meantime, creates a right for the injured to make a claim. On the other hand, it helps identify the plaintiff in a tort action because only the person whose civil rights and interests were harmed may make the claim.<sup>65</sup> Further, the holder of the right of claim may directly request the tortfeasor to stop the harm and compensate for damages, or ask a court to protect his right and interest by bringing a lawsuit.<sup>66</sup>

There is no doubt that to impose a tort liability, the conduct of a tortfeasor must be culpable under the Torts Law. In some cases, however, the tortious conduct when committed may also be in violation of another law, such as administrative law (e.g. violation of environmental protection law), or even criminal law (e.g. personal injury). In this situation, an issue of "concurrent liability" will necessarily arise.

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<sup>59</sup> Tort Liability Law, *supra* note 4, at art. 2.

<sup>60</sup> *Id.* art. 3.

<sup>61</sup> See LIXIN, *supra* note 21, at 32.

<sup>62</sup> See SHENGMING, *supra* note 40, at 28-30.

<sup>63</sup> See LIMING, *supra* note 6, at 41.

<sup>64</sup> See LIXIN, *supra* note 21, at 32.

<sup>65</sup> See SHENGMING, *supra* note 40, at 28-29.

<sup>66</sup> See *id.*

At the heart of the issue is whether the tort liability should be merged into another liability. An additional issue asks which liability takes priority if there is no merger.

The Torts Law recognizes the concurrent liability but does not allow the merger. Under Article 4 of the Torts Law, where a tortfeasor shall assume administrative liability or criminal liability for the same conduct, no prejudice shall be made to the tort liability that shall be legally assumed.<sup>67</sup> Article 4 further provides that where the assets of a tortfeasor who shall assume tort, administrative and criminal liabilities for the same conduct are not adequate for payments, the tortfeasor shall first satisfy the tort liability.<sup>68</sup>

Apparently, Article 4 of the Torts Law stands on two doctrines: Independence of tort liability and superiority of tort liability.<sup>69</sup> The independence doctrine holds that in case a tort liability co-exists with another liability, the tort liability shall remain intact.<sup>70</sup> The superiority doctrine opines that when different liabilities compete for compensation, tort liability takes priority and precedes all other liabilities by being paid first.<sup>71</sup> In fact, the superiority of tort liability is viewed in China as to originate from a civil law rule that a civil liability is of precedence over all other liabilities when compensation for damages is at issue.<sup>72</sup>

A further expression of the superiority doctrine is the protection of private rights. Some in China argue that what underlies the tort liability as opposed to the administrative liability (or criminal liability) is the idea that torts involve primarily the private interests rather than the government or state interests.<sup>73</sup> Therefore, the essence of the tort liabilities is to grant a safeguard to the compensation for civil damages, and thus effectively protect private interests.<sup>74</sup> The doctrine also implies that in civil compensation, the private interests should come first while the government interests should be considered secondary.<sup>75</sup>

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<sup>67</sup> Tort Liability Law, *supra* note 4, at art. 4.

<sup>68</sup> *Id.*

<sup>69</sup> The preference of tort liability is also termed as the priority of tort claim right. See LIXIN, *supra* note 21, at 31.

<sup>70</sup> See LIMING, *supra* note 6, at 18-23.

<sup>71</sup> See SHENGMING, *supra* note 40, at 31-32.

<sup>72</sup> *Id.* at 32-33.

<sup>73</sup> See LIXIN, *supra* note 21, at 35.

<sup>74</sup> See *id.*; see also CUI JIANYUAN, STUDY IN THE TOUGH ISSUES FACING THE LEGISLATION OF THE PROPERTY LAW OF CHINA 242 (Tsinghua Univ. Press, 2005).

<sup>75</sup> See LIXIN, *supra* note 21, at 35.

### B. *Functions of the Torts Law*

During the drafting of the Torts Law, a classic question emerged for debate again: what is the torts law? At one end, the torts law is categorized as the law of conduct. At the other end, however, the torts law is viewed as the law of adjudication. This question is closely related to the definitional difficulty of torts, and the answer to this question also affects the defining of the functions of the Torts Law. The reason seems to be self-evident. If the nature of the Torts Law is characterized differently, the functions that the Torts Law is supposed to serve would reflect those differences accordingly.

The theory classifying torts law as a law of conduct finds its origin from the Latin "*delictum*,"<sup>76</sup> meaning fault or wrong done to the property or person of another that does not involve breach of contract.<sup>77</sup> It is believed that since the term was introduced into China in the late Qing Dynasty (early 1900's), it had been understood to refer to those actions that violate the social and public norm of conduct.<sup>78</sup> Thus, the law of torts is considered as the law regulating and governing conduct. In that context, the law of torts is also called the law of civil wrong.<sup>79</sup>

The law of adjudication doctrine contends that the law of torts in the modern time has shifted its focus from conduct to liability and damages.<sup>80</sup> The argument is that with the vast development of technology and economy, the major source of civil harms is no longer the conduct of individuals but rather the conglomeration of industries.<sup>81</sup> It is also argued that the deletion of the requirement of unlawfulness in the contemporary legislation of torts echoes the change of torts in this regard because social responsibility and liability have become a major concern of torts.<sup>82</sup> Therefore, the law of torts should mainly deal with, or adjudicate, the liabilities and the allocation of damages.<sup>83</sup>

Between the two ends is an eclectic approach, which holds that the law of torts is both the law of conduct and the law of adjudica-

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<sup>76</sup> See LIMING, *supra* note 6, at 45.

<sup>77</sup> See *Dilectum*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, available at <http://www.answers.com/topic/delictum>.

<sup>78</sup> See JIAFU & HUIXING, *supra* note 24, at 408.

<sup>79</sup> See LIMING, *supra* note 6, at 45.

<sup>80</sup> See BRUEGGEMEIER & ZHU YAN, DRAFT BILL FOR THE CHINESE LAW OF TORTS, TEXT AND COMMENTS 15-34 (Peking Univ. Press 2009).

<sup>81</sup> *Id.*; see also SHIGUO, *supra* note 49, at 2-3.

<sup>82</sup> See BRUEGGEMEIER & ZHU YAN, *supra* note 80, at 26-30.

<sup>83</sup> See *id.* at 34. Some scholars suggested calling the Torts Law the "Law of Tort Damages" on the ground that the tortious conduct is held liable mainly because it causes harms to others and the law of torts is designed to provide compensation for the harm in forms of damages. See LIMING, *supra* note 6, at 45.

tion.<sup>84</sup> It is also the approach that constitutes the theoretic underpinnings of the Torts Law. This can be seen in the name of the Torts Law itself. As noted, the Torts Law does not take the conventional name of the Law of Torts but rather the Law of Tort Liability. It is obvious that in addition to conducts, the Torts Law has a focus on the liabilities.<sup>85</sup> Moreover, the stated purposes of the Torts Law as provided in Article 1 explicitly indicate what the Torts Law is intended to achieve.

In accordance with Article 1, the Torts Law has four major functions: to protect the legitimate rights and interests of parties in civil relations, to specify tort liabilities, to prevent and punish tortious conduct, and to promote social harmony and stability.<sup>86</sup> Note, however, that the Torts Law's function in promoting social harmony and stability has a more political than legal meaning as it directly addresses the Communist Party's 2004 requirement to build a harmonious society,<sup>87</sup> and therefore contains little legal substance.

The function of protection is basically the function of redress.<sup>88</sup> It protects people from being harmed by anyone, and in the meantime, compensates those who suffer a loss or harm as a result of another's conduct. Redress in the form of compensation to victims is considered the core value of the Torts Law, and many provisions in the Torts Law are said to embody an idea of "protecting victim as the center piece."<sup>89</sup> To that end, it is considered important for the Torts Law to ensure that the tort victim's compensation is adequate.<sup>90</sup> On that ground, the Torts Law contains several other remedial methods in addition to the regular monetary damages.

The allocation of liability function deals with two fundamental questions: what conduct constitutes a tort and what liability should be

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<sup>84</sup> See LIMING, *supra* note 6, at 44; see also LIANG HUIXING, GENERAL PROVISIONS OF CIVIL LAW 31 (Law Press, 1995).

<sup>85</sup> See LIMING, *supra* note 6, at 44. Some try to define the Torts Law as the law consisting of legal rules regulating tortious conducts and providing liabilities arising therefrom. See LIMING, *supra*.

<sup>86</sup> Tort Liability Law, *supra* note 4, at art. 1.

<sup>87</sup> See JOSEPH FEWSMITH, *Promoting the Scientific Development Concept*, in CHINA LEADERSHIP MONITOR, [http://media.hoover.org/documents/clm11\\_jf.pdf](http://media.hoover.org/documents/clm11_jf.pdf) (last visited Oct. 28, 2011). The Central Committee of the Communist Party of China (CPC) in its Fourth Plenary Session of the 16th National Conference of the CPC in 2004 set the building of a harmonious society in China as a national policy. See Press Release, China Publishes Resolution on Building Harmonious Society, XINHUA NEWS AGENCY (Oct. 18, 2006). In 2006, the CPC passed a resolution that made it a goal to create harmonious socialist society in China in 2020, *available at* <http://english.cri.cn/2946/2006/10/18/176@152257.htm>.

<sup>88</sup> See SHENGMING, *supra* note 40, at 18; see also LIMING, *supra* note 6, at 81-82.

<sup>89</sup> See LIMING, *supra* note 6, at 53.

<sup>90</sup> *Id.*

imposed thereupon?<sup>91</sup> These questions occupy much of tort legislation and involve almost all major tort rules.<sup>92</sup> In the US, the law of torts is viewed as to be concerned with the allocation of losses arising out of human activities.<sup>93</sup> Thus, a goal of US torts law is to place the cost of the compensation on those who, in justice, are to bear it, but only on such persons.<sup>94</sup> The same idea is discernable in Chinese Torts Law as well, but is rephrased differently in the term “liability.” From the viewpoint of Chinese legislature, only when liability is clearly specified, does a tortfeasor know what he would need to do to compensate the harm caused, and only at that point is a victim able to prudently exercise his right of claim under the law.<sup>95</sup>

The function of prevention and punishment is aimed at future losses and harms. Because of the basic belief that the law of torts is designed to provide remedies, the main purpose of the Torts Law is not to punish, but to prevent tortious conduct.<sup>96</sup> The legislative consideration to make both the prevention and punishment a function of the Torts Law is that the two are complementary to each other. The reason is simple and logical: without punishment, the future harm may not be effectively prevented, and without prevention, punishment would become meaningless.<sup>97</sup>

When interpreting tort liability punishment, however, Chinese scholars tend to be cautious. On the one hand, they believe that the imposition of tort liability has a nature of punishment, particularly for mental damages.<sup>98</sup> But, on the other hand, they stress that the punishment in the sense of torts should remain compensatory and should be measured by money or property.<sup>99</sup> The underlying rationale seems to be clear: that is, unlike criminal law, the law of torts does not have a function of punishing a tortfeasor in such a way as to physically restrict him.<sup>100</sup>

### C. Coverage of the Torts Law

What rights and interests will the Torts Law protect? This question may appear elementary, but in fact involves the complicated issue of how to structure the scope of a torts law. In civil law coun-

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<sup>91</sup> See SHENGMING, *supra* note 40, at 1.

<sup>92</sup> *Id.*

<sup>93</sup> See PROSSER & KEETON ON TORTS (West, Hornbook Serial No. 6, 5th ed. 1984).

<sup>94</sup> See KIONKA, *supra* note 32, at 5.

<sup>95</sup> See SHENGMING, *supra* note 40, at 19.

<sup>96</sup> See LIMING, *supra* note 6, at 53, 81.

<sup>97</sup> *Id.*

<sup>98</sup> See LIXIN, *supra* note 21, at 27.

<sup>99</sup> *Id.*

<sup>100</sup> See LIMING, *supra* note 6, at 54, 89.

tries, there are two kinds of major tort legislation models with regard to the scope of protection. The first one is the German model, which enumerates specific rights that must be protected. This model is also called the “list” model. For example, under §823 I of the German Civil Code (Second Book), a person who, contrary to the law, deliberately or negligently causes harm to the life, person, health, liberty, property, or other right of another person must compensate that person for any damage arising there from.<sup>101</sup>

The second model is the French model or the model of general provision. Under the French model, no specific rights or interests are particularly mentioned, but instead a general scope is provided to cover all tort liabilities. According to Article 1382 of French Civil Code, for instance, any act which causes damage to another, obliges the one by whose fault it occurred, to compensate it.<sup>102</sup> Article 1383 further provides that everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.<sup>103</sup>

A majority of Chinese scholars and legislators favor the “list” model.<sup>104</sup> A widely accepted opinion is that the “list” model helps define specifically the boundary of the rights and interests to be protected by the Torts Law and, in particular, helps differentiate tort liability from contractual obligation, despite the possibility that the list may turn out to be far from complete.<sup>105</sup> Many agree that the general model is practical as it includes the necessary rights and interests that need to be covered. But the vagueness of the general model causes serious concerns about legal certainty in its application.<sup>106</sup>

As a result, the Torts Law provides as its coverage a laundry list of rights and interests, far exceeding those provided in the German Code or perhaps any other code worldwide.<sup>107</sup> Pursuant to Article 2 of the Torts Law, as many as 18 civil property and personal rights and interests are on the protection list, including “the right to life, right to health, right to name, right to reputation, right to honor, right to portrait, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to trademark use, right to discovery, equities, and right of succession.”<sup>108</sup>

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<sup>101</sup> See ZEKOLL & REIMANN, *supra* note 33, at 209.

<sup>102</sup> CODE CIVIL [C. CIV.] art. 1382 (Fr.), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=494>.

<sup>103</sup> *Id.* art. 1383.

<sup>104</sup> See SHENGMING, *supra* note 40, at 23-24.

<sup>105</sup> See LIMING, *supra* note 6, at 60.

<sup>106</sup> *Id.* at 61.

<sup>107</sup> *Id.* at 63.

<sup>108</sup> Tort Liability Law, *supra* note 4, at art. 2.

The list, though very impressive, seems a bit long-winded. It can, however, be grouped into five categories: right of personality,<sup>109</sup> right of personal status,<sup>110</sup> real right,<sup>111</sup> intellectual property right,<sup>112</sup> equities and succession. In addition, the list implicates major interests such as personal interests (also called interests of personality), property interests, business interests and other lawful interests.<sup>113</sup> The terms seem to be abstract, but are deemed by many in China to mainly include equality, personal dignity and liberty.<sup>114</sup>

Note that the Tort Liability Law does not cover the contractual liability, and thus no claim may be brought in a tort action on the basis of a breach of a contract.<sup>115</sup> But, a practical issue here is the liability of a third party for the harm caused to the contractual right. Though it is unclear whether the Torts Law should govern such third party liability, many in China regard it as a tort liability on the grounds that it falls within an economic harm.<sup>116</sup>

### III. LIABILITY IMPUTATION PRINCIPLES: THE FOUNDATION OF CHINESE TORTS SYSTEM

Tort law is considered one of the oldest areas of law in common law countries.<sup>117</sup> As it has been observed, however, common law scholars have long debated without a solution on whether there is a general principle of tort liability or whether there are only the laws of the individual torts.<sup>118</sup> This is probably because it is not easy to find a single guiding principle<sup>119</sup> and common law tort systems contain individually named torts, each with its own unique rules. Additionally, except for negligence, there has been little synthesis of categorizing torts.<sup>120</sup> The tradition followed in most standard treatises on United States tort law organizes torts beginning with the intentional torts.<sup>121</sup>

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<sup>109</sup> *Id.* (including the right to life, health, name, reputation, honor, portrait, privacy and marital autonomy).

<sup>110</sup> *Id.* (referring to guardianship as well as other family relations).

<sup>111</sup> Tort Liability Law, *supra* note 4, at art. 2 (representing real property rights which include ownership, usufruct, and security interest.).

<sup>112</sup> *Id.* at art. 2 (detailing that creditor rights consist of copyright, patent-rights, trademarks, and discovery).

<sup>113</sup> See LIMING, *supra* note 6, at 72-76.

<sup>114</sup> See *id.* at 74.

<sup>115</sup> See SHENGMING, *supra* note 40, at 26-27.

<sup>116</sup> *Id.* at 27; see also LIMING, *supra* note 6, at 76.

<sup>117</sup> See RICHARD A. EPSTEIN, *CASES & MATERIALS ON TORTS*, at xxvii (Aspen 2004).

<sup>118</sup> See KIONKA, *supra* note 32, at 1.

<sup>119</sup> See PROSSER AND KEETON ON TORTS, *supra* note 93, at 6.

<sup>120</sup> See KIONKA, *supra* note 32, at 2.

<sup>121</sup> See EPSTEIN, *supra* note 117, at 1.

Civil law countries take a different approach. First, tort laws are generally part of the law of obligations.<sup>122</sup> Thus, they are governed not only by the particular rules set forth for each type of tort but also by the general provisions of the law of obligations.<sup>123</sup> Second, there are certain rules normally provided in the general provisions to serve as guiding principles for the systematic application of the law.<sup>124</sup> Such principles are of theoretical abstraction and “contribute to the scientific purity of legal analysis.”<sup>125</sup> Third, the classification of torts is commonly made on the basis of imputable liability.<sup>126</sup>

The Torts Law in China is also a principle-based or rule-oriented legislation. Although China has pulled torts out of the general law of obligations (*obligatio*), the civil tradition remains markedly in the Torts Law. In addition to the general provisions, the Torts Law contains a special chapter (Chapter II) that provides, among others, the tort liability basis which serves as the legal ground on which a tort liability is to be imposed.<sup>127</sup> The importance of Chapter II rests with the principles it contains to govern the tort liability basis. The four major principles that are provided for the imputation of tort liability, include “fault,” “presumption of fault,” “liability without fault” and “liability on the basis of fairness.”

These four principles are the cornerstones of China’s torts system.<sup>128</sup> At first, they deal with the legal cause for imposing tort liability. Without such a cause, no tort liability would arise.<sup>129</sup> Additionally, each principle governs a different type of tort, and thus prescribes the factors that constitute the tort of the kind.<sup>130</sup> Moreover, the principles also determine the defenses available to the claim of a tort liability because certain defenses may only be asserted under a particular principle of liability imputation.<sup>131</sup>

It is worthy to note that in many civil law countries, the general tort liability is provided in the civil code, which only provides for

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<sup>122</sup> See ZEKOLL & REIMANN, *supra* note 33, at 205.

<sup>123</sup> See LIMPENS, *supra* note 53, at 5-10.

<sup>124</sup> See *id.* at 3 (observing that it is certainly easier to discover the “general rules of liability” in systems like French law, which have taken the unification of rules governing tortious liability very far, than in systems like English law, which are still happy to rely on fragmentary solution based on the traditional casuistic method).

<sup>125</sup> See ZEKOLL & REIMANN, *supra* note 33, at 10-11.

<sup>126</sup> See *id.* at 207 (noting how in Germany, for example, the types of torts are essentially characterized by the requisite degree of fault).

<sup>127</sup> Tort Liability Law, *supra* note 4, at arts. 6-25.

<sup>128</sup> See LIMING, *supra* note 6, at 121-22.

<sup>129</sup> See *id.* at 121.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 122.



fault-based liability.<sup>132</sup> The liability for a special type of tort, such as strict liability, are provided in special statutes and are therefore outside the thrust of the general liability rules in the civil code.<sup>133</sup> China does not yet have a comprehensive civil code and the Torts Law is intended to serve as a core statute that applies extensively to all tort liabilities.<sup>134</sup>

#### A. General Principle of Fault

Under the Torts Law, the primary legal basis for imposition of tort liability is fault, and is thus the most important principle of the tort liability imputation. According to Article 6 of the Torts Law, a person who is at fault for infringement upon a civil right or interest of another shall bear the tort liability.<sup>135</sup> Therefore, no tort would be considered as committed without the requisite finding of fault. It is commonly held in China that Article 6 is the core of the Torts Law because it provides a general principle for tort liability imputation and bases the imputation mainly on the concept of fault.<sup>136</sup>

The Chinese legislative adoption of the fault principle in torts began with the 1986 Civil Code. As noted, Article 106 of the 1986 Civil Code makes fault a criterion for bearing civil liability.<sup>137</sup> Article 6 of the Torts Law is a restatement of Article 106 of the 1986 Civil Code. Compared to Article 106, however, Article 6 seems more precise in addressing the issue and more general in coverage. This is because Article 6 not only deletes the term “citizen” but also replaces the phrase of “the state, collective, and others property” with the notion of “civil rights or interests.”<sup>138</sup>

Of course, the starting point of the fault principle is the definition of fault. Unfortunately, neither the 1986 Civil Code nor the Torts Law has offered anything that will help explain what the fault is for the purpose of torts. In the general tort literature, there are two major approaches in the defining of fault. The first is known as the “objective approach” which considers fault as the breach of duty or a conduct that would not have been committed by a prudent man in the same “exter-

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<sup>132</sup> See ZEKOLL & REIMANN, *supra* note 33, at 207. For example, the German Civil Code only covers the traditional fault liability as well as the rule of presumption of fault. See LIMPENS, *supra* note 53, at 5-6. In French-based legal systems, the single-rule approach makes fault liability rule the only rule that governs all torts.

<sup>133</sup> See generally ZEKOLL & REIMANN, *supra* note 33.

<sup>134</sup> See LIMING, *supra* note 6, at 123.

<sup>135</sup> See Tort Liability Law, *supra* note 4, at art. 6.

<sup>136</sup> See LIXIN, *supra* note 21, at 6; see also LIMING, *supra* note 6, at 124-25.

<sup>137</sup> See Civil Law *supra* note 22, at art. 106.

<sup>138</sup> *Id.*; see also Tort Liability Law, *supra* note 4, at art. 6.

nal” circumstances.<sup>139</sup> The second is the “subjective approach,” under which the fault is defined as a state of mind, which, with reference to a particular kind of damage, can be blameworthy.<sup>140</sup>

It has been observed that in the civil law system, many countries favor the objective approach.<sup>141</sup> This observation also reveals that a common standard adopted in those countries to determine fault is the so-called “good family father” standard.<sup>142</sup> A good family father is a man, careful, diligent, and mindful of others.<sup>143</sup> Under this standard, a deviance from what would have been, under the same situation, the behavior of a good family father, will constitute a fault.<sup>144</sup> It is not clear yet what approach the Tort Liability Law takes. Although there are certain voices in support of the objective approach in China,<sup>145</sup> most scholars seem to advocate a mixed approach that requires a look at fault from both subjective and objective perspectives.<sup>146</sup>

Under the mixed approach, fault is both a state of mind and an overt act.<sup>147</sup> The whole idea is that the state of mind is the mentality of a person towards his own conduct, and the liability arises from the impropriety and unjustness of such mentality.<sup>148</sup> But, the law cannot regulate the state of mind, only the conduct.<sup>149</sup> Therefore, the judgment on the state of mind can only be made through the overt conduct of a person and the standard should be objective.<sup>150</sup> This is because the intolerance and blamefulness of the conduct are not decided by what the person in question would think, but rather by what a reasonable person in the same situation would do, or what society would require the person in question to do.<sup>151</sup>

Despite the lack of definition of fault, one consensus among Chinese scholars and legislators to the fault principle is that fault may occur either intentionally or negligently, though the Tort Liability Law itself does not explicitly say so.<sup>152</sup> Intentional fault directly involves

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<sup>139</sup> See LIMPENS, *supra* note 53, at 13-14.

<sup>140</sup> *Id.*

<sup>141</sup> See Tunc, *supra* note 16, at 71.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See JIAFU & HUIXING, *supra* note 24, at 457-58; see also SHENGMING, *supra* note 40, at 40.

<sup>146</sup> LIMING, *supra* note 6, at 203.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> See SHENGMING, *supra* note 40, at 41.

the knowledge of the tortfeasor. The key is the intent, which is defined in Chinese tort law textbooks as “knowing and willing.”<sup>153</sup> Thus, the intent of a person occurs when the person has foreseen the consequences of his conduct and still wants to see it to happen or lets it drift. Conduct here includes both act and omission. From a Chinese viewpoint, the determination of intent focuses on the state of mind of the tortfeasor.<sup>154</sup> The decisive factors are whether the tortfeasor has foreseen the outcome of his conduct and whether the happening of the outcome is what he has either hoped for or to which he has turned a blind eye.<sup>155</sup> In judicial practices, intent is often inferred from the conduct of the tortfeasor.<sup>156</sup>

Negligence represents a vast majority of cases involving fault. But, in China, negligence is rarely used as a tort cause of action, but rather as an indication of fault. Further, negligence is understood to consist of neglect and slackness.<sup>157</sup> Neglect refers to a failure to foresee something that is or should be able to be foreseen, while slackness is an absent-minded credence or belief in the avoidance of a certain outcome that has been foreseen.<sup>158</sup> Based on this understanding, a civil negligence is viewed in China as a fault where a person should have been or is able to foresee the consequences of his conduct, or has foreseen such consequences but carelessly believes that the consequences can be avoided.<sup>159</sup>

The Tort Liability Law does not tell what would constitute negligence. A prevailing argument, however, is that negligence is a conduct that violates a duty of care that a reasonable person should normally exercise.<sup>160</sup> It is further held that the reasonable person’s duty of care is the level of care most people would have under the same circumstance.<sup>161</sup> Some suggest that the duty of care should also meet the requirements set forth by the law.<sup>162</sup> Another suggestion takes into consideration certain factors in the application of the reasonable person standard when the case involves professionals as opposed to laymen.<sup>163</sup>

Depending on the degree of seriousness, negligence can be further divided into general negligence and gross negligence. Normally, if

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<sup>153</sup> See LIMING, *supra* note 6, at 207.

<sup>154</sup> See *id.* at 41.

<sup>155</sup> See LIXIN, *supra* note 21, at 59-60.

<sup>156</sup> See SHENGMING, *supra* note 40, at 41.

<sup>157</sup> See LIXIN, *supra* note 21, at 60.

<sup>158</sup> See *id.*

<sup>159</sup> See LIMING, *supra* note 6, at 211; see also SHENGMING, *supra* note 40, at 41.

<sup>160</sup> See SHENGMING, *supra* note 40, at 41-42.

<sup>161</sup> See *id.*

<sup>162</sup> See LIMING, *supra* note 6, at 217-18.

<sup>163</sup> See *id.*

a person has not only failed to exercise the duty of care a reasonably prudent person would have exercised, but has also failed to reach the minimum level of care a regular person should have exercised, the person is found to be grossly negligent.<sup>164</sup> The Torts Law, however, limits the application of gross negligence to the situation of contributory negligence when the defendant's liability may be reduced because the fault principle is premised on general negligence.<sup>165</sup> However, the Torts Law does recognize the concept of gross negligence.<sup>166</sup>

Pursuant to the fault principle, a tort has at least four components: (a) conduct causing harm, (b) fault, (c) damage and (d) causation.<sup>167</sup> Among these factors, conduct (act or omission) is the cause, fault (intention or negligence) is the liability basis (unless otherwise provided by the law), damage is the result, and causation is the necessary nexus between the conduct and the damage.<sup>168</sup> Hence, if any of the four components are missing in a given case, no tort liability may be imposed.<sup>169</sup>

But, causation is unsettled in the Torts Law. Indeed, causation is a concept that looks simple but actually is the most confusing and controversial part of the tort.<sup>170</sup> At the early stage of the Torts Law drafting, the drafters attempted to introduce a causation clause.<sup>171</sup> For example, in the first draft of the Torts Law, there was a provision that required plaintiffs to prove the causation between the alleged tortious conduct and the injury suffered. It was also provided that if, under the law, the tortfeasor tries but fails to prove the non-existence of the causation but fails, such causation shall be deemed to exist.<sup>172</sup>

This attempt was later abandoned because it was realized that causation is too complicated to be provided in a single provision, especially in the case where there seems to have multiple causes of damage or multiple damages resulting from a single cause.<sup>173</sup> In addition, no consent could be reached with regard to the issue whether the causation means actual cause or legal cause, or whether the cause must be

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<sup>164</sup> See *id.* at 222.

<sup>165</sup> See Tort Liability Law, *supra* note 4, at art. 78. For example, under Article 78, where a domestic animal causes harm to another person, the keeper or manager of the animal shall assume the tort liability, but may assume no liability or reduced liability if it can be proved that the harm is caused by the victim intentionally or by the gross negligence of the victim.

<sup>166</sup> LIMING ET. AL, *supra* note 6, at 222-23.

<sup>167</sup> See SHENGMING, *supra* note 40, at 39-45. See also LIMING, *supra* note 6, at 183.

<sup>168</sup> See *id.*

<sup>169</sup> See LIXIN, *supra* note 21, at 53.

<sup>170</sup> KIONKA, *supra* note 32, at 29.

<sup>171</sup> See SHENGMING, *supra* note 40, at 43-44.

<sup>172</sup> See *id.* at 44.

<sup>173</sup> See *id.*

direct or proximate.<sup>174</sup> Since the Torts Law sidesteps the causation issue, it is ultimately left to the courts to decide on an *ad hoc* basis.<sup>175</sup>

It should be pointed out, however, that the Torts Law adopts a concept of presumption of existence of causation, which is applied to the liability for environmental pollution. Article 66 provides that where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by the law or to prove that there is no causation between its conduct and the harm.<sup>176</sup>

### B. *Presumption of Fault*

In certain cases, fault may be presumed as prescribed by law. This presumption of fault was first provided in the 1986 Civil Code. Under Article 106 of the 1986 Civil Code, civil liability shall be assumed even in the absence of fault if the law so stipulates.<sup>177</sup> This presumption becomes a principle of liability imputation in torts through Article 6 of the Torts Law, and constitutes a supplement to the general principle of fault.

According to Article 6, a person who is presumed to be at fault according to the law and cannot prove otherwise shall be subject to tort liability.<sup>178</sup> It is not difficult to see that under the Torts Law, the presumption of fault has several distinctions. First, it is a statutory fault. The presumption may only be made on the basis of law. Second, the presumption is rebuttable. The defendant may offer evidence to prove that he committed no fault. Third, the presumption is still considered fault-based liability because the underlying legal cause for the imposition of liability is fault. Again, without fault, there would be no liability.<sup>179</sup>

A major difference between fault and presumption of fault is the burden of proof. In the case of fault, the burden of proof falls on the plaintiff. Under the presumption of fault, however, the burden of proof is reversed and the defendant must rebut the presumed fault with evidence to avoid liability.<sup>180</sup> The very purpose of this presumption of fault is to protect the tort victim by shifting the burden of proof over to

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<sup>174</sup> See LIMING, *supra* note 6, at 240-52; see also JIAFU & HUIXING, *supra* note 24, at 475-91.

<sup>175</sup> See SHENGMING, *supra* note 40, at 44.

<sup>176</sup> Tort Liability Law, *supra* note 4, at art. 106.

<sup>177</sup> See Civil Law, *supra* note 22, at art. 106.

<sup>178</sup> See Tort Liability Law, *supra* note 4, at art. 6.

<sup>179</sup> See LIMING, *supra* note 6, at 140-43.

<sup>180</sup> *Id.* at 141-42.

the defendant.<sup>181</sup> Under the Torts Law, the presumption of fault applies mostly to cases where the victim is in a weak position.<sup>182</sup>

A practical issue relating to the presumption of fault is whether a court has the discretion to make the presumption in cases where the law is not clear. In China, the courts do not have the power to interpret law. Under the Chinese Constitution, the authority of interpretation of law rests with the Standing Committee of the NPC.<sup>183</sup> But, the Supreme People's Court is empowered to interpret the application of law.<sup>184</sup> Although the line between interpretation of law and interpretation of application of law is never clearly drawn,<sup>185</sup> courts in China in their adjudicative work all follow the judicial interpretations of the Supreme Peoples Court's form of explanations, provisions, replies or periodically issued decisions.<sup>186</sup>

In 2002, the Supreme People's Court adopted the Several Provisions of Evidence Concerning Civil Litigation Rules (Civil Evidence Rules).<sup>187</sup> Under the Civil Evidence Rules, absent clear provision of law or applicable judicial interpretation, the courts may make a determination of burden of proof according to the principle of fairness and

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<sup>181</sup> See SHENGMING, *supra* note 40, at 45.

<sup>182</sup> See Tort Liability Law, *supra* note 4, at arts. 38, 58, 85. The cases in which presumption of fault applies involves, for example, the liability of educational institutes to the person who is lack of civil capacity, liability of certain medical malpractice, or liability arising from the falling object.

<sup>183</sup> See XIANFA, *supra* note 5, at art. 67 (1982). Under Article 67 (4) of the Constitution of China, the Standing Committee of the National People's Congress exercises the power to interpret laws. (China), available at [http://www.gov.cn/gongbao/content/2004/content\\_62714.htm](http://www.gov.cn/gongbao/content/2004/content_62714.htm), translated in Constitution of the People's Republic of China (1982, as amended 2004), available at <http://www.usconstitution.net/china.html>.

<sup>184</sup> See Organic Law of People's Court of China (as amended 2006) (China), available at [www.novexc.com/organc-law.html](http://www.novexc.com/organc-law.html). Article 33 of the Organic Law provides that the Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings.

<sup>185</sup> *Id.* Literally, the Standing Committee's interpretation is called legislative interpretation, and the Supreme People's Court interpretation is labeled as judicial interpretation.

<sup>186</sup> See Provisions of the Supreme People's Court Concerning the Judicial Interpretation (promulgated by Sup. People's Ct. Mar. 23, 2007, effective Apr. 1, 2007) (China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=5970>.

<sup>187</sup> See Several Provisions of Evidence Concerning Civil Litigation Rules (promulgated by Sup. People's Ct.) (China), available at [http://www.law-lib.com/law/law\\_view.asp?id=16829](http://www.law-lib.com/law/law_view.asp?id=16829) [hereinafter Civil Evidence Rules]. See generally MO ZHANG & PAUL ZWIER, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419 (2003) (providing a general discussion on the Civil Evidence Rules).

good faith, taking into account the party's ability to prove.<sup>188</sup> Relying on the Civil Evidence Rules, some argue that, notwithstanding the statutory nature of the presumption of fault, the courts under certain circumstances should have discretionary power to expand its application to particular cases, especially when the law leaves a loophole.<sup>189</sup>

Opponents, however, regard the provision in the Civil Evidence Rules to be applicable to the determination of causation rather than of fault.<sup>190</sup> Two reasons are offered. First, since presumption of fault aggravates defendant's burden of proof that he would otherwise not bear, to allow the court to discretionally decide may result in an unwanted expansion of the use of presumption of fault, potentially rendering it immeasurable.<sup>191</sup> Second, the Torts Law intends to make the presumption of fault strictly statutory by specifying the situations when the fault may be presumed. Therefore, in this regard, the Torts Law leaves no room for the courts to exercise their discretionary power.<sup>192</sup>

A related issue that attributes to the above debate is the effect of judicial interpretation. In China, only the Supreme People's Court, the top judicial body of the country, may make judicial interpretation.<sup>193</sup> Although the interpretation is limited to the application of law, it has legal effect.<sup>194</sup> While the substance of this legal effect may be questioned, it is binding on all courts and may be relied upon as legal authority when issuing a judgment.<sup>195</sup> Therefore, until the Supreme People's Court further interprets this matter, the confusion caused by the provision of the Civil Evidence Rules pertaining to the judicial expansion of the application of presumption of fault will remain.

### C. *Liability Without Fault*

The third liability imputation principle provided in the Torts law is the principle of non-fault liability. In accordance with Article 7 of the Torts Law, a person who causes harm to a civil right or interest of another person, whether at fault or not, shall bear civil liability if so provided for by law.<sup>196</sup> The thrust of Article 7 is liability without fault. Thus, in an Article 7 case, if the tortfeasor's conduct injures the personal or property rights or interests of another person, the tortfeasor is

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<sup>188</sup> See Civil Evidence Rules, *supra* note 187, at art. 7.

<sup>189</sup> See LIMING, *supra* note 6, at 150.

<sup>190</sup> See *id.* at 151.

<sup>191</sup> See *id.* at 150-51.

<sup>192</sup> *Id.*

<sup>193</sup> See Organic Law of People's Court of China (as amended 2006), art. 2 (China), available at [www.novexcn.com/organc-law.html](http://www.novexcn.com/organc-law.html).

<sup>194</sup> *Id.* art. 5.

<sup>195</sup> *Id.* art. 27.

<sup>196</sup> Tort Liability Law, *supra* note 4, at art. 7.

tortiously liable regardless of fault, if no exception under the law applies.

This liability without fault is well received in China as a special tort liability principle outside fault. Obviously, this principle places a much heavier burden on the tortfeasor. Its focus is on the risk or danger the tortfeasor creates and it is aimed at making the tortfeasor readily liable for the source of such risk or danger that generates harm to others, especially to the public in general.<sup>197</sup> While many countries term this kind of liability as strict liability,<sup>198</sup> Chinese scholars prefer to call it liability without fault or non-fault liability.<sup>199</sup>

Except for terminology differences, no major difference exists between strict liability and liability without fault. In fact, these two terms are often used interchangeably to mean the same thing.<sup>200</sup> Since it was first adopted in Article 106 of the Civil Code in 1986, the liability without fault principle has been applied to a particular type of tort case, e.g. the highly dangerous activities cases.<sup>201</sup> But Article 106 is criticized to have caused confusion because it fails to reflect the essence of the liability without fault principle. Under Article 106, a civil liability shall still be borne, even in the absence of fault, if the law so stipulates.

Critics argue that the gist of liability without fault is the burden of proof.<sup>202</sup> To be more specific, liability without fault is not simply to mean that the tortfeasor assumes liability in the absence of fault. Rather it means that for the determination of the tortfeasor's liability, the plaintiff does not need to prove the tortfeasor's fault no matter whether the tortfeasor is at fault or not.<sup>203</sup> The whole point is that if the focus is on the absence of fault, the liability without fault may be misunderstood to imply that it applies only when the tortfeasor has no fault. According to the critics, the "without fault" principle is purposed to hold the tortfeasor liable without inquiring as to the tortfeasor's fault, but not to impose liability on someone who acts without fault.<sup>204</sup>

Under this circumstance, Article 7 of the Torts Law revises Article 106 of the 1986 Civil Code. But the application of Article 7 is subject to certain exceptions. For example, in accordance with Article 81 of the Torts Law, a zoo is presumed to be at fault when a zoo animal

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<sup>197</sup> See SHENGMING, *supra* note 40, at 46-47.

<sup>198</sup> See KIONKA, *supra* note 32, at 37-39.

<sup>199</sup> See SHENGMING, *supra* note 40, at 46-47; *see also* LIXIN, *supra* note 21, at 49-52.

<sup>200</sup> See LIXIN, *supra* note 21, at 49-52.

<sup>201</sup> See Civil Law *supra* note 22, at art. 106.

<sup>202</sup> See SHENGMING, *supra* note 40, at 47-48.

<sup>203</sup> *Id.* at 48.

<sup>204</sup> See *id.*



causes harm to another person.<sup>205</sup> But, if it is proved that the zoo has fulfilled its duty of management, no liability shall be imposed.<sup>206</sup> Thus, in imposition of the tort liability without fault, four elements must be present: conduct, injury, causation and no legal ground for exemption. Because of the availability of the exemptions provided in the Torts Law, many in China do not regard the liability without fault as an absolute liability.<sup>207</sup>

Note again that liability without fault in China is imposed on the basis of the statute. First, the imposition of liability without fault must be made within the provision of law. Under the Torts Law, the liability without fault mainly applies to product liability, liability for environmental pollution, and liability for ultra-hazardous activity.<sup>208</sup> Second, courts are given no power to expand the scope of such liability without authorization of law.<sup>209</sup> Third, in the determination of the liability without fault, a court must take into account any applicable statutory exemption.<sup>210</sup>

#### D. Fairness Principle

The fairness principle is the rule of thumb for proper damages allocation in those cases where injury or damage occurs, yet none of the parties involved are found to be at fault. The Torts Law states this principle in Article 24, which provides that if neither the victim nor the actor is at fault for the occurrence of damages, both may share the damages based on the actual situations.<sup>211</sup> Most cases in which the fairness principle may apply involve damages that are caused by the person who lacks civil capacity (e.g. minors or the mentally retarded), or by an object falling down from a building, for which no one may be found responsible.<sup>212</sup> Other cases where the fairness principle becomes applicable concern the damages caused by a conduct of necessity in an emergency situation.<sup>213</sup>

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<sup>205</sup> See Tort Liability Law, *supra* note 4, at art. 81.

<sup>206</sup> See *id.*

<sup>207</sup> See SHENGMING, *supra* note 40, at 49. Liability without fault is sometimes called absolute liability. See KIONKA, *supra* note 32, at 38-39.

<sup>208</sup> See Tort Liability Law, *supra* note 4, at arts. 41, 65, 69.

<sup>209</sup> See SHENGMING, *supra* note 40, at 50.

<sup>210</sup> See LIMING, *supra* note 6, at 166.

<sup>211</sup> Tort Liability Law, *supra* note 4, at art. 24. Article 24 of the Torts Law is based on Article 123 of the 1986 Civil Code, under which the parties may share civil liability according to the actual circumstance if none of them is at fault in causing damage. See, e.g., Civil Law, *supra* note 22, at arts. 24, 123, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165> (noting that Article 24 changes “share civil liability” to “share the damage.”).

<sup>212</sup> See SHENGMING, *supra* note 40, at 116.

<sup>213</sup> See LIMING, *supra* note 6, at 167.

The trigger of the fairness principle is the damage resulting from the fault for which no one can be blamed. The purpose is to determine tort liability in a way that damage may be fairly allocated, because even though it is impossible to identify who is at fault, damage indeed occurred and the victim needs to be compensated.<sup>214</sup> Since the fairness principle is applied to handle certain damages that regular torts may not necessarily cover and compensate, it is deemed as a gap-filler for the purpose of achieving social justice.<sup>215</sup> For the same reason, the fairness principle is considered supplementary in nature.<sup>216</sup>

The determination of damage under the fairness principle is entirely discretionary. Article 24 authorizes courts to determine the fair share of damages on a case-by-case basis. Factors the courts consider include the type of conduct, circumstance of occurrence, degree of damage, relation of the parties, knowledge of the parties, social impacts, as well as financial status of the parties.<sup>217</sup> In some cases, courts also take into consideration the benefit done to one party or two parties.<sup>218</sup> One typical example is that a person volunteers to help his friend do some yard work and is injured during the work. In an action for damage, the court may order the friend to pay a fair amount, although the damage was not caused by the friend's conduct or fault, because the friend benefited from the person's work.<sup>219</sup>

There are three issues concerning the fairness principle and each of them is debatable. All three issues are related to the nature of Article 24, and pose a question to which an answer may affect how the fairness principle is addressed in court proceedings and applied to particular cases. The question is whether the fairness principle set forth in Article 24 is a principle of tort liability imputation?

The first issue is whether the Article 24 liability is a legal liability.<sup>220</sup> One argument is that Article 24 stresses a moral obligation because it applies to a situation where no one is supposed to compensate another for anything. Therefore, sharing the damage is no more than an offer of moral support. Although the court decides the amount of sharing, it actually reflects the good will of the party involved.<sup>221</sup> Many, however, characterize Article 24 liability as a morality-based legal liability. They argue that Article 24 is designed to require the

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<sup>214</sup> *Id.*

<sup>215</sup> See LIXIN, *supra* note 21, at 96.

<sup>216</sup> See LIMING, *supra* note 6, at 125.

<sup>217</sup> See *id.* at 167-70; see also LIXIN, *supra* note 21, at 97-98.

<sup>218</sup> SHENGMING, *supra* note 40, at 116.

<sup>219</sup> See Opinions on Several Questions Concerning Implementation of the General Principles of Civil Law of the People's Republic of China (1988), art. 157 (China), available at <http://www.dffy.com/faguixiazai/msf/200311/20031110212524-6.htm>.

<sup>220</sup> See LIMING, *supra* note 6, at 167.

<sup>221</sup> See *id.* at 167-68.

defendant to pay for certain damages that he otherwise would not have to pay, and that it creates a cause of action on which the victim may bring an action against the defendant for compensation.<sup>222</sup> More importantly, unlike a voluntarily performed moral obligation, Article 24 liability is legally enforceable.<sup>223</sup>

The second issue is whether the fairness principle is a rule of equity. Equity is not a Chinese concept nor is it a common practice in Chinese judicial proceedings. Derived from common law tradition, equity is a court created mechanism to mitigate the vigor of common law, which allows courts to use their discretion to provide fairness.<sup>224</sup> In the U.S., equity is a court fashioned relief, which is, “not a matter absolute right to either party” but, “a matter resting in the discretion of the court to be exercised upon a consideration of all the circumstances of each particular case.”<sup>225</sup> In many cases, the equitable relief will only be available when legal remedies are inadequate.<sup>226</sup>

In China, ever since the enactment of the 1986 Civil Code in which the fairness principle was adopted for civil liability, there has been the assertion that fairness and equity are the same.<sup>227</sup> Many, however, have shown their disagreement by attempting to draw a line between fairness and equity.<sup>228</sup> The major argument is that fairness as a legal principle deals with liability, while equity as a remedy is concerned with compensation. Thus, in some Chinese torts law books, the fairness principle is discussed as a liability rule while equity is viewed as a rule of compensation.<sup>229</sup>

With regard to Article 24 of the Torts Law, the practical importance of the debate on fairness *vis-à-vis* equity is directly related to whether Article 24 is a rule of liability or rule of compensation. If it is the former, fairness constitutes a principle of tort liability imputation despite the fact that the Torts Law does not include it in the liability provisions. If it is the latter, Article 24 will lose its status as a rule of

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See GERALD N. HILL & K. T. HILL, REAL LIFE DICTIONARY OF THE LAW 157 (GPG, 1997); see also MARY ANN GLENDON, COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 161-62 (West 3d ed., 2008).

<sup>225</sup> See *Willard v. Tayloe*, 75 U.S. 557, 565 (1869).

<sup>226</sup> See generally JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 550-556, at §16.1-16.4 (West 6th ed. 2009) (demonstrating that specific performance in contract cases will not be granted if legal remedies are adequate).

<sup>227</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 50, at 94-101.

<sup>228</sup> See Mi Jian, *Rethinking of Fairness as the Principle of Liability Imputation*, 1 China-Foreign Jurisprudence, 1997, available at <http://www.jurist.org.cn/doc/lawyer200601/lawyer20060101.pdf>; see also LIXIN, *supra* note 21, at 96.

<sup>229</sup> See SHIGUO, *supra* note 49, at 15-16.

imputation. Presently, many in China are in favor of making the fairness principle a liability imputation principle.<sup>230</sup>

The third issue is whether the fairness principle also applies to situations other than the Torts Law. As noted, the fairness principle is within the realm of the court's discretion. But, the question remains about how far a court may go in the application of the fairness principle. Some argue that the application of the fairness principle in torts is limited to cases specified in the law, because the application of the principle is confined within certain special types of torts.<sup>231</sup> The opposite view is that as a principle, fairness is a standard applicable to all cases, and therefore, Article 24 is not a special provision but instead one of general application.<sup>232</sup> Between these two extremes is the opinion that fairness, as employed in torts, supplements other liability rules with judicial discretion to allocate damages. Therefore, though Article 24 is a special provision, its application should not be restricted to the cases as provided by law.<sup>233</sup>

#### IV. MULTIPLE DEFENDANTS AND PECULIAR TORTFEASORS: A CHINESE CLASSIFICATION

In a tort action, a plaintiff may have claims against more than one tortfeasor. Tort liability may arise from joint tortfeasors who have either together or individually contributed to causing the plaintiff injury.<sup>234</sup> In the U.S., a tort where multiple defendants are involved is also called a joint tort.<sup>235</sup> A joint tort may occur in different ways. The actors can agree to engage in a course of tortious conduct or the independent conduct of two or more actors may combine to injure the plaintiff.<sup>236</sup> The joint tort also includes the case in which vicarious liability is imposed.<sup>237</sup>

In China, the 1986 Civil Code describes the joint tort as two or more persons jointly infringing upon another person's rights and causing him damage.<sup>238</sup> But, the Civil Code does not specify what would constitute a joint tort. A clearer definition of joint tort became available in 2003 when the Supreme People's Court issued an interpreta-

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<sup>230</sup> See LIMING, *supra* note 6, at 170-72.

<sup>231</sup> See LIMING, LIABILITY IMPUTATION, *supra* note 50, at 120.

<sup>232</sup> See Jiang Songping, *Liability Based on Fairness Shall Become the Principle of Liability Imputation*, 7 *People's Justice* 2-25 (1989).

<sup>233</sup> See LIMING, *supra* note 6, at 172-73.

<sup>234</sup> See JOSEPH GLENNON, *THE LAW OF TORTS* 357 (Aspen 2d ed., 2000).

<sup>235</sup> See KEETON, *supra* note 93, at 322.

<sup>236</sup> See GLENNON, *supra* note 234, at 357-58.

<sup>237</sup> See EPSTEIN, *supra* note 117, at 221.

<sup>238</sup> See Civil Law, *supra* note 22, at art. 30.

tion.<sup>239</sup> According to the Supreme People's Court, a joint tort exists when two or more persons with a joint intention or joint negligence cause injury to another person, or the harmful conduct of two or more persons together causes injury to another person even though no joint intention or negligence existed.<sup>240</sup>

Developed from the 1986 Civil Code and the 2003 Supreme People's Court's interpretation, the Torts Law divides the joint tort into three categories: joint conduct, joint danger, and joint cause. In addition to the imposition of different liabilities upon the joint tortfeasors, the Torts Law also contains special provisions that govern those who are in the special position when a tort occurs. The special position person in a tort case is classified in the Torts Law as the peculiar tortfeasor.

### A. *Joint Torts*

The first category of joint torts under Chinese Torts Law is the joint commission of a civil wrong. In this category, the joint conduct of the tortfeasors is crucial. From the definitional respect, the Torts Law follows both the 1986 Civil Code and the 2003 Supreme People's Court's interpretation in holding that a joint tort is committed when two or more people act together to cause injury to another person.<sup>241</sup> But under the Torts Law, the joint conduct also includes the act of abetting or assisting another person in committing a tort.<sup>242</sup> Additionally, the Torts Law allows for action against a guardian who fails to fulfill his duties when a person under his guardianship, who is without civil capacity or with limited capacity, commits the tort.<sup>243</sup>

The joint conduct involves multiple defendants, and a typical feature in a joint conduct case is that the defendants take action together in committing the tort.<sup>244</sup> But the difficulty in determining joint conduct is how to define and identify the "joint" action. The Torts Law is evasive in this regard, partly because there is no credible answer. Chinese legislation is often deliberately vague if there is anything in a provision of the law that is subject to more debate. The "joint" issue is a perfect example of this problem.

In Chinese torts law, at least four different theories attempt to address the "joint" issue. The first is the "joint mind" theory, which

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<sup>239</sup> See Interpretation to Several Questions on the Application of Law in Adjudicating Personal Injury Damage Cases (Sup. People's Ct. 2003), available at [http://www.law-lib.com/law/law\\_view.asp?id=81918](http://www.law-lib.com/law/law_view.asp?id=81918) [hereinafter Interpretations].

<sup>240</sup> *Id.* art. 3.

<sup>241</sup> See Tort Liability Law, *supra* note 4, at art. 8.

<sup>242</sup> *Id.* art. 9.

<sup>243</sup> *Id.*

<sup>244</sup> See SHENGMING, *supra* note 40, at 51.

opines that the prerequisite condition for the joint tort is the concerted desire or motive of the multiple tortfeasors.<sup>245</sup> Under the joint mind theory, because two or more tortfeasors agree to engage in a course of tortious action, they are regarded as having joint intent to commit a wrong and to injure another person. Therefore, in the view of the joint mind theory, the term “joint” means thinking and acting together.<sup>246</sup> Since the joint mind theory bases the joint torts on the tortfeasors’ motion in concert, it is considered a subjective theory.<sup>247</sup>

The second theory is also subjective, but views joint torts in the light of fault other than the mental status of the tortfeasors, and is therefore called joint fault approach.<sup>248</sup> According to the joint fault approach, the joint mind theory is lopsided because it fails to include the joint tort in negligence.<sup>249</sup> In contrast to the joint mind theory, the joint fault approach argues that the commission of a joint tort can take place either intentionally or negligently.<sup>250</sup> A joint tort by negligence occurs when an injury is caused by the joint conduct of tortfeasors who should have known but failed to know or predict the consequences of their conduct.<sup>251</sup> Joint tort negligence also includes a case in which no joint intent of the tortfeasors can be ascertained with respect to their joint conduct causing injury to the other person.<sup>252</sup>

The third theory is the doctrine of conduct in concert. It holds that neither the joint mind nor joint fault is a prerequisite for a joint tort because the standard on which the joint tort is based should be objective.<sup>253</sup> Thus, as long as the tortfeasors act together to cause injury to the other person, a joint tort is committed, leaving it unnecessary to inquire into the tortfeasor’s state of mind.<sup>254</sup> This objective doctrine rests with a belief that it is difficult to prove that the multiple tortfeasors in a joint tort share a common intent because each may pursue a different motive.<sup>255</sup> Hence, under the objective theory, to constitute a joint tort, the decisive factor is whether the conduct of the alleged tortfeasors, viewed objectively, is in concert.

The fourth theory does not have a particular name but is an approach that combines both subjective and objective theories. To the extent that a joint tort is formed, this combined theory advocates that

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<sup>245</sup> See *id.* at 55.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See LIMING, *supra* note 6, at 354.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 355.

<sup>251</sup> See SHENGMING, *supra* note 40, at 55.

<sup>252</sup> *Id.* at 56.

<sup>253</sup> See *id.*; see also LIMING, *supra* note 6, at 354.

<sup>254</sup> LIMING, *supra* note 6, at 354.

<sup>255</sup> See *id.*

the court consider not only the internal mind of the alleged tortfeasors but also their external conduct.<sup>256</sup> Internally, there should be a fault, either in intention or in negligence; externally, the tortfeasors' conduct should be concerted, and of an interrelated nature.<sup>257</sup> The Supreme People's Court endorsed this approach in its 2003 interpretation.<sup>258</sup>

As noted, it is unclear on what doctrinal basis the Torts Law stands in determining the joint tort. Many scholars disagree with the Supreme People's Courts' 2003 interpretation approach. They suggest that the joint tort under the Torts Law means a tort of joint fault.<sup>259</sup> But, the term "joint" should be construed to imply three things: joint intent, joint negligence and concerted conduct.<sup>260</sup> In any case, this debate and its surrounding confusion is expected to continue. But as many hope, the Supreme People's Court may help clarify this issue when the time becomes ripe.<sup>261</sup>

Another joint tort category in the Torts Law is joint danger. Joint danger refers to the conduct of two or more persons engaged in an action that endangers the personal or property safety of another person and where an injury occurs. However, there is no meaningful way to determine who actually causes the injury.<sup>262</sup> In China, this is also called *quasi* joint conduct.<sup>263</sup> As compared with joint conduct, which targets the action of the multiple tortfeasors, joint danger focuses on the source of the danger that causes the injury. This is because the circumstances may make it impossible to identify the connection between the injury and the tortfeasor's particular conduct.

For the purpose of the Torts Law, a joint tort arising from joint danger should have the following four elements: (a) two or more persons, (b) engagement in a dangerous conduct, (c) injury to a victim caused by the conduct of some of the persons, and (d) inability to identify the person whose conduct actually results in the injury.<sup>264</sup> The distinction of joint danger is that there is no joint intent to commit a tort but the conduct of two or more persons creates a danger that may cause injury to another person, and when injury is caused, liability cannot be assigned to an individual person.<sup>265</sup>

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<sup>256</sup> *Id.* at 355; see also SHENGMING, *supra* note 40, at 55.

<sup>257</sup> LIMING, *supra* note 6, at 355.

<sup>258</sup> See Interpretations, *supra* note 239.

<sup>259</sup> See SHENGMING, *supra* note 40, at 57-58.

<sup>260</sup> See *id.*

<sup>261</sup> See LIXIN, *supra* note 21, at 25; see also LIMING, *supra* note 6, at 7.

<sup>262</sup> Tort Liability Law, *supra* note 4, at art.10.

<sup>263</sup> See LIMING, *supra* note 6, at 378; see also LIXIN, *supra* note 21, at 65.

<sup>264</sup> See SHENGMING, *supra* note 40, at 65.

<sup>265</sup> See LIMING, *supra* note 6, at 382. An example often used to illustrate the joint danger situation is the case where a group of four went to hunting, at the time they all opened fire at the same target in the bushes, a person at the other side of

It should be noted that in a joint danger case, joint fault is not a required element under the Torts Law. This omission is based on two considerations. First, the joint danger rule's purpose is to prevent the frustration of the plaintiff's claim when the plaintiff who suffered injury from a joint dangerous conduct of multiple defendants is unable to tell who injured him.<sup>266</sup> Second, the joint danger rule may also apply to cases where liability is imposed on presumption of fault or even without fault.<sup>267</sup>

Also worth noting is that the term "joint" in joint danger, essentially means "the same." To apply the joint danger rule in a tort case requires that the dangerous conduct of multiple defendants happen at the same time and in the same location.<sup>268</sup> Thus, if defendants each act at a different time or in a different place, no joint danger is present. One last point is the proof of causation. Given the particularity of joint danger, the Supreme People's Court requires a reversed burden of proof; that is, the defendant must prove that the causation between his conduct and plaintiff's injury does not exist.<sup>269</sup>

The third category of joint torts is joint causes. Under the Torts Law, a joint tort arising from joint causes occurs when two or more persons commit torts, respectively, causing the same harm.<sup>270</sup> The major distinction of joint causes, as compared with other joint tort categories, is that the injury in joint causes is caused by the independent conduct of each tortfeasor. Additionally, among the tortfeasors involved, there must be no common plan or joint fault, nor may they be related to each other in terms of tortious conduct. In other words, joint causes deal with the same injury caused by multiple, unrelated conducts.

Another distinction of joint causes is that the harm caused may be either divisible or indivisible. Divisible harm is concerned with cases where the attribution of each conduct to the injury is measurable and each tortfeasor's liability may be proportionally ascertained. Indivisible harm involves the situation in which each tortious conduct is sufficient to cause the entire harm. The only difference between the divisible harm and indivisible harm is the type of liability imposed on defendants.

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the bushes was hit by one bullet and injured. Another example is the case where several played fireworks together and one firework fell on the roof of the neighbor's house and damaged it.

<sup>266</sup> See SHENGMING, *supra* note 40, at 65.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Several Provisions of Evidence Concerning Civil Litigation Rules (promulgated by Sup. People's Ct.), art. 4 (China), available at [http://www.law-lib.com/law/law\\_view.asp?id=16829](http://www.law-lib.com/law/law_view.asp?id=16829).

<sup>270</sup> Tort Liability Law, *supra* note 4, at art. 11.



### B. Joint Tort Liability

In joint tort cases, the Torts Law imposes two different liabilities upon tortfeasors. The most common one is joint and several liability. This liability makes each of the multiple defendants accountable for the entire result. This liability was first provided in the 1986 Civil Code to protect creditor's rights. Under Article 87 of the 1986 Civil Code, when joint and several liability is imposed in accordance with the law or agreement of the parties, each of the joint creditors are entitled to demand that the debtor fulfill his obligations, and that each of the joint debtors is obliged to perform the entire debt.<sup>271</sup>

The Torts Law appears to focus more on the liability of the tortfeasors. Article 13 of the Torts Law explicitly provides that when tortfeasors establish joint and several liability, the victim is entitled to require some or all of the tortfeasors to assume liability.<sup>272</sup> It is understood that some of the tortfeasors in Article 13 also means any of the tortfeasors.<sup>273</sup> Although joint and several liability may apply in contractual obligations by agreement of the parties, such a liability in tort may only be imposed under the provision of law. Therefore, joint and several liability, once applicable, is compulsory and may not be modified or changed by any agreement among the tortfeasors.<sup>274</sup>

Because of its compulsory nature, the imposition of joint and several liability is limited to such cases as specified in the Torts Law. With regard to joint tort, it applies to (a) the joint conduct case,<sup>275</sup> including one who abets or assists another person in committing a tort,<sup>276</sup> (b) the joint danger case if the particular tortfeasor cannot be identified,<sup>277</sup> and (c) a joint causes case if each tort is sufficient to cause the entire harm.<sup>278</sup> In addition, joint and several liability also applies to certain special tort cases which will be discussed later in this article.

Since joint and several liability in a joint tort results in payment by a single defendant for the full amount of the plaintiff's damages, there exists the issue of indemnity, or reimbursement of proportionate shares from other defendants. To deal with this issue, the Torts Law provides a rule of contribution, and in the meantime, grants the tortfeasor who has over paid a right of recourse. Both the contribution rule and the right of recourse are aimed at ensuring a fair

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<sup>271</sup> See Civil Law, *supra* note 22, at art. 87.

<sup>272</sup> Tort Liability Law, *supra* note 4, at art. 13.

<sup>273</sup> See LIMING, *supra* note 6, at 404.

<sup>274</sup> See *id.*

<sup>275</sup> Tort Liability Law, *supra* note 4, at art. 8.

<sup>276</sup> *Id.* art. 9.

<sup>277</sup> *Id.* art. 10.

<sup>278</sup> *Id.* art. 11.

contribution and avoiding unjust enrichment among the liable tortfeasors. Under Article 14 of the Torts Law, the amount contributed by each of the tortfeasors who are jointly and severally liable shall be determined proportionally according to the seriousness of liability of each tortfeasor, or evenly if the seriousness of liability is difficult to differentiate.<sup>279</sup> Article 14 also provides that a tortfeasor whose payment for the compensation exceeds his share of contribution shall be entitled to be reimbursed by other jointly and severally liable tortfeasors.<sup>280</sup>

Generally, the primary standard to determine the seriousness of a tortfeasor's liability is the degree of his fault.<sup>281</sup> Likewise, although joint and several liability may only be imposed by the operation of law, the contribution may be made under the agreement reached among the tortfeasors to bypass the seriousness standard.<sup>282</sup> Moreover, there is a consensus that the right of recourse will be vested with a tortfeasor on two conditions: (a) the tortfeasor has paid in whole or in part the amount of compensation and (b) the payment is in excess of the contribution he is supposed to bear.<sup>283</sup>

The second kind of joint tort liability is proportionate liability or the liability according to the degree of fault. The general rule of proportionate liability is provided in Article 12 of the Torts Law, which applies to the case of joint causes. The rule states that when two or more persons commit torts respectively, causing the same harm, if the seriousness of the liability can each be determined, the tortfeasors shall assume the corresponding liability respectively. If the seriousness of the liability of each tortfeasor is hard to determine, then the tortfeasors shall evenly assume the liability for compensation.<sup>284</sup>

The thrust of the proportionate liability rule is that each tortfeasor is liable only for the portion of damage caused to the other person and the portion is dependent on the seriousness of liability the tortfeasor should bear. In cases in which the proportionate liability rule applies, the plaintiff may not sue a specific defendant for the entire amount of the damage, but only for the amount proportionate to the liability of such defendant. Under Article 12, the portion of damage allocated to each tortfeasor could be either an identified amount or an equal amount.

Again, the seriousness is basically the degree of fault. But, many in China suggest that in addition to the degree of fault, courts

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<sup>279</sup> *Id.* art. 14.

<sup>280</sup> *Id.*

<sup>281</sup> See SHENGMING, *supra* note 40, at 75.

<sup>282</sup> See Wang LIMING, *supra* note 6, at 407.

<sup>283</sup> See *id.* at 408.

<sup>284</sup> Tort Liability Law, *supra* note 4, at art. 12.

should consider the scale of cause to the damage.<sup>285</sup> The idea is that since the joint tort on the basis of joint causes heavily depends on the source leading to the damage, the stronger the cause appears to be the higher the portion of damage should be shared.<sup>286</sup> It is further suggested that if both the degree of fault and scale of cause are unidentifiable, the determination of seriousness shall be made in consideration to market share liability before the equal share is imposed under the Torts Law.<sup>287</sup>

### C. *Peculiar Tortfeasors*

The Torts Law contains special provisions that regulate peculiar tortfeasors. In most cases, a peculiar tortfeasor is the person who has a special relationship with the actor directly causing the injury to another person or with the victim, and is liable for the injury under the law on the basis of such relationship. The peculiar tortfeasor under the Torts Law may also be someone who has a full civil capacity but limited ability to apprehend the consequences of his conduct when committing a tort. In short, there are two major kinds of peculiar tortfeasor: the special relationship tortfeasor and the limited capacity tortfeasor. In addition, the Torts Law categorizes the person committing Internet related tort as a peculiar tortfeasor.

#### 1. *Special Relationship Tortfeasors*

A special relationship tortfeasor involves such a person as a guardian, employer, public facility manager, mass activity organizer, and educational institute. Given the distinction of each type of the special relationship tortfeasors, the Torts Law imposes the tort liability on two different grounds. In respect with guardian and employer, the liability arises from the doctrine of *respondeat superior*, under which the guardian or employer is held vicariously liable for the injury to a third person. For example, under Article 32 of the Torts Law, where a person without civil capacity or limited civil capacity causes harm to another person, the guardian assumes the tort liability. Even if the guardian has fulfilled his duties of guardianship, his tort liability remains but may be reduced.<sup>288</sup>

The employer, as used in the Torts Law, consists of an employing unit, labor dispatcher, and individual labor service recipients. Individual labor service refers to a labor relationship created by two individuals and is characterized as individually based private hir-

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<sup>285</sup> See LIMING, *supra* note 6, at 411.

<sup>286</sup> See SHENGMING, *supra* note 40, at 70.

<sup>287</sup> See LIMING, *supra* note 6, at 411.

<sup>288</sup> Tort Liability Law, *supra* note 4, at art. 32.

ing.<sup>289</sup> According to Article 35 of the Torts Law, when a labor relationship forms between individuals, if the party providing labor services causes harm to another person as the result of such services, then the party receiving labor services shall assume the tort liability. If the labor services provider injures himself during the services, both parties shall each assume the liability corresponding to their respective faults.<sup>290</sup>

The other liability ground is failure to act, which can be further divided into failure to exercise the duty of safety protection and failure to perform the duty of education and management. The safety protection duty is imposed on public facility managers and the mass activity organizers. Under Article 37 of the Torts Law, the manager of such a public facility as a hotel, shopping center, bank, station, or entertainment place, or the organizer of a mass activity is liable for the harm caused to another person resulting from his failure to fulfill the safety protection duty.<sup>291</sup> Pursuant to Article 37, in the case where the injury is caused by a third party, the manager or organizer, if violating the duty of safety protection, bears the corresponding complementary liability.<sup>292</sup>

A literal interpretation of the public facility also includes airport, port, park, and restaurant facilities.<sup>293</sup> Article 37 is self-evident that the duty of safety protection is intended to avoid any injury caused to another person by the conduct of the peculiar tortfeasor itself, and also to protect another person from being harmed by a third party. The difference between the two is that when a breach of the duty to safeguard against a third party tortfeasor results in an injury to another person, the peculiar tortfeasor's liability to compensate is complementary, which means that the liability will be assumed only when the third party tortfeasor cannot be found or is unable to pay for the damage.<sup>294</sup>

The duty of education and management concerns the educational entity such as a kindergarten, school or any other educational institution. Three articles in the Torts Law govern tortious injury to school kids. Article 38 deals with personal injury sustained by a person without civil act capacity during the period of studying or living in an educational entity, for which the educational entity is liable unless it can prove that it has fulfilled the duties of education and manage-

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<sup>289</sup> See LIXIN, *supra* note 21, at 159.

<sup>290</sup> Tort Liability Law, *supra* note 4, at art. 35.

<sup>291</sup> *Id.* art. 37.

<sup>292</sup> *Id.*

<sup>293</sup> See SHENGMING, *supra* note 40, at 201.

<sup>294</sup> See *id.* at 201-02.

ment.<sup>295</sup> Article 39 handles the personal injury to a person with limited civil act capacity and tort liability is imposed on the educational entity if it fails to meet its duties of education and management.<sup>296</sup> Article 40 covers the injury caused by a third party to a person with or without limited civil act capacity, but the liability imposed is complementary when the educational entity has failed to perform its duties of education and management.<sup>297</sup>

In China, a person 18 or above is an adult and has full capacity for civil conduct. A person who is over 10 but under 18 has limited capacity for civil conduct, and anyone under 10 has no capacity for civil conduct. But, a person who is between 16 and 18 and lives mainly on his own work income is regarded as a person with full capacity for civil conduct. Also, a mentally ill person is considered to have no capacity for civil conduct if he is unable to realize his own conduct, or is deemed to have limited capacity if he cannot fully account for his own conduct.<sup>298</sup>

The imposition of the duty of education and management upon the educational entity under the Torts Law is a direct response to recent incidences of school violence and the spiraling number of in school accidents that cause children personal injury.<sup>299</sup> However, the duty of education and management appears broad and ill defined. There are actually two duties: duty of education and duty of management. One

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<sup>295</sup> *Id.* Article 38 provides that where a person without civil act capacity sustains a personal injury during the period of studying or living in a kindergarten, school or any other educational institution, the kindergarten, school or other educational institution shall be liable unless it can prove that it has fulfilled its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 38.

<sup>296</sup> SHENGMING, *supra* note 40, at 201-02. Under Article 39, where a person with limited civil act capacity sustains a personal injury during the period of studying or living in a school or other educational institution, the school or other educational institution shall be liable if failing to fulfill its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 39.

<sup>297</sup> *See* SHENGMING, *supra* note 40, at 201-02. It is provided in Article 40 that if during the period of studying or living in a kindergarten, school of other educational institution, a person without civil act capacity or with limited civil conduct capacity sustains a personal injury caused by any person other than those of the kindergarten, school or other educational institution, the person causing the harm shall assume the tort liability; and the kindergarten, school or other educational institution shall assume the corresponding complementary liability if failing to fulfill its duty of education and management. *See also* Tort Liability Law, *supra* note 4, at art. 40.

<sup>298</sup> *See* Civil Law, *supra* note 22, at art.11-13.

<sup>299</sup> *See* SHENGMING, *supra* note 40, at 205; Edward Wang, *Fifth Deadly Attack in a School Haunts China*, N.Y. TIMES, May 12, 2010, available at [http://www.nytimes.com/2010/05/13/world/asia/13china.html?pagewanted=1&r=1&ref=school\\_shootings](http://www.nytimes.com/2010/05/13/world/asia/13china.html?pagewanted=1&r=1&ref=school_shootings) (reporting on Chinese school violence).

interpretation is that the duty of education is the duty to educate and supervise students. Thus, if one student injures another student in school, the school is presumably negligent and is therefore liable.<sup>300</sup> But, no one seems clear about the distinction and interplay between education and supervision.

The duty of management includes the school facility maintenance, student activity guides, school safety measures, and other preventive means.<sup>301</sup> For example, food poisoning at school renders the school liable for the harm caused to the poisoned students. Likewise, a school is liable for injury caused to students by an intruder. In that case, the victim has a cause of action on tort against the school for damage if the school is found to have failed to exercise its duty of management.

Others favor a more general term “duty of care” in describing the duty of education and management. They argue that one determinative element to the educational entity’s liability for the student injury is the educational entity’s fault. Thus, in determining whether the educational entity is at fault it becomes necessary to determine whether it has fulfilled its duty of care. Questions essential for the determination include (a) whether it owed a duty of care, (b) whether it has fulfilled the duty of care, and (c) whether it was able to or should be able to exercise the duty of care?<sup>302</sup>

## 2. *Limited Capacity Tortfeasor*

Limited capacity tortfeasor is a type of tort frequently seen in practice, but for the first time provided in the Torts Law.<sup>303</sup> It relates to a tort liability of someone who is fully capable for civil conduct but temporarily loses his consciousness or control and causes harm to another person. The lack of applicable rules both in the legislation and in the judicial interpretation is largely due to the unsolved issue of whether a person who suffers a temporary loss of consciousness or control should be held liable for his tortious conduct.

With regard to limited capacity tortfeasor, when his civil liability is based on fault, a dilemma may appear: if a person loses his consciousness, he cannot be blamed for any fault because he has no mind; but if no liability is sought, then the damage the victim sustains will go uncompensated, which will ultimately be unfair and unjust.<sup>304</sup> To deal with this dilemma, the Torts Law adopts a fault-in-advance ap-

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<sup>300</sup> See LIMING, *supra* note 6, at 447-48.

<sup>301</sup> See *id.*

<sup>302</sup> See LIXIN, *supra* note 21, at 183-84.

<sup>303</sup> See *id.* at 147.

<sup>304</sup> See SHENGMING, *supra* note 40, at 163.

proach and compensation-on-fairness method to determine the liability and allocate the victim's losses.

The fault-in-advance approach goes to the cause of loss of consciousness or control. Under this approach, if the loss of consciousness or control was caused by the fault of the tortfeasor, he is liable for the tortious conduct he committed during that period of loss. The Torts Law states three causes for the loss of consciousness or control: general fault, intoxication, and under the influence of drugs. Under Article 33 of the Torts Law, if a person with full civil act capacity causes harm to another person as a result of his temporary loss of consciousness or control, he shall assume the tort liability if he is at fault. A tort liability will also be imposed if the loss is due to alcohol intoxication or abusive use of narcotic or psychoactive drug.<sup>305</sup>

The phrase "at fault" in Article 33 seems awkward or even confusing, but it refers to the neglect or negligence that leads to the loss of consciousness or control.<sup>306</sup> Often, the neglect is associated with the tortfeasor's health situation or mental condition. To illustrate, if a person takes medication for a muscular problem with his arm and causes injury to another because he forgot his medication, Article 33 holds him liable.

The referred to intoxication is mainly concerned with drunk driving. In China, driving under the influence is punishable under the traffic safety law and may become a criminal offense as well if it causes injury.<sup>307</sup> But, a civil claim for compensation accompanies most traffic accidents caused by drunk driving that injure another person. Although there is no law to apply, it is a common court practice to order the defendant in an intoxication case to compensate the plaintiff.<sup>308</sup> Article 33 is new in making intoxication a cause of action for a tort claim.

Under the Torts Law, to find tort liability in the drug related loss of consciousness or control requires two conditions. First, the drug used must be a narcotic or psychoactive drug, which directly affects the central nervous system. Second, the use of such drug must be abusive. Since abuse of narcotic or psychoactive drugs is illegal in China, a person who loses his consciousness or control due to the abuse of narcotic or psychoactive drugs is deemed to have committed double

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<sup>305</sup> Tort Liability Law, *supra* note 4, at art. 33.

<sup>306</sup> See SHENGMING, *supra* note 40, at 164.

<sup>307</sup> See Law on Road Traffic Safety of China, art. 91 (adopted on Oct. 28, 2003, effective May 1, 2004) 8 P.R.C. LAWS & REGS, available at <http://www.gov.cn/english/laws/2005-09/07content.29966.htm>; see also Criminal Law of China (as amended 2009) art. 133, available at <http://www.dffg.com/faguixiazhai/xngfa/200311/200311102.13247-6.htm> [hereinafter Criminal Law].

<sup>308</sup> See SHENGMING, *supra* note 40, at 166.

wrongs of fault and illegality. His conduct is considered even more dangerous.<sup>309</sup>

The compensation-on-fairness method is a mechanism to compensate the victim for damage sustained in a no-fault case. Article 33 provides that when a person with full civil conduct capacity causes harm to another person because of his temporary loss of consciousness or control, if not at fault, he should compensate the victim appropriately according to his economic condition.<sup>310</sup> In this regard, Article 33 is viewed as an implementing clause of the fairness principle.

Note, however, that the compensation in a nobody-at-fault case under Article 33 actually means “making-up.”<sup>311</sup> Since the very purpose of compensation is to restore the victim to be pre-injury condition,<sup>312</sup> the defendant is required to pay as much damages as the plaintiff sustained. But, the making-up is merely a partial to full-damage payment made on the basis of the defendant’s financial ability. More importantly, under Article 33 the making-up is made on the principle of fairness, not per legal obligation.

### 3. *Internet Related Tortfeasor*

China now has the largest number of Internet users in the world. As of June 30, 2010, there are over 420 million netizens in China.<sup>313</sup> In the meantime, Internet related tort cases have increased dramatically in recent years. In Shanghai, for example, courts in 2009 adjudicated a total of 534 Internet related tort cases, and more than 31 percent of all cases involved infringement of intellectual property rights.<sup>314</sup>

The Internet related tort is a new area and differs from the conventional tort. The Internet related tort hardly has any physical place and the tortfeasor’s identity is often invisible. Thus, the Torts Law classifies the Internet related tortfeasor as a peculiar tortfeasor and provides a special legal recourse for tort liability under Article 36. This special legal recourse contains one general rule and two sub rules. The general rule is the rule of liability, which applies to both the Internet user and the Internet service provider (ISP). According to Ar-

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<sup>309</sup> See *id.* at 166-67.

<sup>310</sup> Tort Liability Law, *supra* note 4, at art. 33.

<sup>311</sup> See SHENGMING, *supra* note 40, at 165.

<sup>312</sup> See KIONKA, *supra* note 32, at 346.

<sup>313</sup> See The Chinese CNNIC, *The 26th Statistical Report on Internet Development in China*, July 15, 2010, available at [http://www.gov.cn/english/laws/2005-09/07/content\\_29966.htm](http://www.gov.cn/english/laws/2005-09/07/content_29966.htm).

<sup>314</sup> See Report on Shanghai High People’s Court’s, *White Paper on the Judicial Protection of Intellectual Property Rights*, April 22, 2010, available at [http://www.ce.cn/tech/07hlw/guonei/201004/22/t20100422\\_20371428.shtml](http://www.ce.cn/tech/07hlw/guonei/201004/22/t20100422_20371428.shtml).



ticle 36 of the Torts Law, an Internet user or service provider who infringes upon the civil rights or interests of another person through the Internet bears tort liability.<sup>315</sup> The Internet user is commonly called a netizen, including both a natural person and a legal person.

The Torts Law classifies a tort committed by netizens on the Internet as an infringement of another person's right of personality, property interests or intellectual property rights. The infringement of the right of personality covers such conducts as unauthorized use of another person's name or portrait, dissemination of defamatory materials, or invasion of privacy by illegally hacking and downloading another person's personal information. Property interest infringement concerns the conduct of compromising bank accounts and stealing funds. Damage to intellectual property mostly relates to copyrights and trademarks.<sup>316</sup> For the purposes of Article 36, Internet service consists of Internet technical support and Internet contents supply.<sup>317</sup> Technical support is meant to provide Internet access, cache memory, information storage space, search, or link, etc., while contents supply is the service that makes the Internet's materials and information available and accessible to the Internet user. Under the general rule of liability, a tort liability will arise when the civil rights or interests of another person are harmed by the Internet activity of either the Internet user or the ISP.

The two sub rules are the notice rule and the knowledge rule. The notice rule operates as a warning to the ISP about the occurrence of infringement and as a demand for the ISP to take certain actions. Under Article 33, when an Internet user commits a tort through Internet services, the victim shall be entitled to notify the ISP to take such necessary measures as deletion, block or disconnection. If, after being notified, however, the ISP fails to take the necessary measures in a timely manner, it is jointly and severally liable with the Internet user for any additional harm.<sup>318</sup>

In fact, the notice rule has a double-faceted function. First, it serves as a safe harbor to shelter the ISP from liability when the ISP has taken the necessary measures at the victim's request. Second, it provides a legal ground for the victim to hold the ISP jointly and severally liable if the ISP ignores the victim's request. But, the ISP's liability, though joint and several, is limited to the additional harm that was caused by the ISP's failure to take action after notice.

In the application of the notice rule, there is a presumption that the ISP has no knowledge of the infringing activities in which the

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<sup>315</sup> Tort Liability Law, *supra* note 4, at art. 36.

<sup>316</sup> See SHENGMING, *supra* note 40, at 189.

<sup>317</sup> See *id.* at 189-90.

<sup>318</sup> See Tort Liability Law, *supra* note 4, at art. 33.

Internet user has engaged. Otherwise, the knowledge rule will kick in. Article 33 further provides that if the ISP has the knowledge that an Internet user is infringing upon a civil right or interest of another person through its Internet services, and fails to take necessary measures, it shall be jointly and severally liable with the Internet user.<sup>319</sup> Here, the term “knowledge” is intended to refer to both “know” and “should know.” But, due to the complexity of the activities on the Internet, the Torts Law provides no standard to determine the knowledge and leaves it to the court to decide on an individual case basis.<sup>320</sup> Nonetheless, it should be noted that under the knowledge rule, the ISP may be liable jointly and severally for the entire damage caused to the victim if it has knowledge about the infringement, not just the “additional harm” as is the case under the notice rule.

## V. DEFENSES TO TORT LIABILITY: ON-GOING DEBATES

Like many other civil law countries, China does not separate intentional tort from negligence. The fault-based tort liability essentially comprises both of them. The same is true with regard to the defenses to the tort liability. They are not associated particularly with either intentional torts or negligence as is the case in the United States, but rather, they apply to the tort liability in general.

The defenses, as provided in the Torts Law, are termed as the circumstances under which no liability will be imposed or liability is to be reduced. In some other countries, the defenses are also called justifications.<sup>321</sup> There has been an attempt to distinguish justification from the extraneous cause because they differ fundamentally in concept though they often produce the same result of a tortious claim dismissal.<sup>322</sup> Partly due to the confusion that the term “defense” may cause, the Torts Law adopts a more generic term, “circumstance,” which is deemed to have a broader range of coverage.<sup>323</sup>

The Torts Law prescribes several circumstances. Each of them serves as a legal ground on which a defendant may rely to assert a defense. These possible defenses include the plaintiff’s concurrent fault, the plaintiff’s intentional conduct, third-party conduct, *force*

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<sup>319</sup> *Id.*

<sup>320</sup> See SHENGMING, *supra* note 40, at 195.

<sup>321</sup> See LIMPENS, *supra* note 53, at 81.

<sup>322</sup> *Id.* The distinction is said to be that, “if the damage is due to an extraneous cause, it has been caused not by the (alleged) behavior of the defendant, but by an independent cause unconnected with him, such as an accident, *force majeure*, the act of a third party or act of the victim. Where there is a justification, the damage is the direct result of the defendant’s behavior, but this behavior is justified by recognized lawful excuse. . . .”

<sup>323</sup> See SHENGMING, *supra* note 40, at 124-25.

*majeure*, self-defense, and necessity. These defenses are the statutory excuses and are applicable in general to all tort claims. The legal result from these defenses is either an extinction or reduction of tort liability. But, because the defenses either appear to be abstract or are subject to different interpretation, further debates are expected.

#### A. *Concurrent Fault of Plaintiff – Fault Offset Rule*

The concurrent fault of the plaintiff is the circumstance in which a plaintiff is also at fault as to the injury caused by the defendant's tortious conduct. Since the plaintiff's fault also contributes to the injury, it is unfair to require the defendant to pay for the entire compensation. On this ground, Article 26 of the Torts Law provides that where the victim of a tort is also at fault with respect to the occurrence of harm, the liability of the tortfeasor may be mitigated.<sup>324</sup>

Here, the mitigation is purposed to offset the defendant's liability with the plaintiff's concurrent fault, so that the defendant's liability will be reduced proportionally to the level of the plaintiff's fault. In this sense, Article 26 is also called the rule of fault offset.<sup>325</sup> The offset concept is similar to the comparative negligence concept as used in the United States.<sup>326</sup> These concepts differ from each other in that the comparative negligence is a defense to the negligence liability while the offset is applicable to both negligence and intentional torts.<sup>327</sup>

Does the fault-offset rule apply only to fault liability, or may it also apply to non-fault tort liability? One argument is that the rule has no application to non-fault liability. This argument is premised on the word "also" used in Article 26. It is believed that the Article 26 expression implies that the tortfeasor is at fault first because if the tortfeasor's fault were irrelevant, there would be no need to describe the victim's fault as "also."<sup>328</sup>

The counter argument rebuts that although the imposition of non-fault liability is made without considering whether or not the tortfeasor is at fault, nothing supports not taking the plaintiff's fault into account. Therefore, the reduction of the defendant's tort liability according to the degree of the plaintiff's fault does not contradict the fundamental notion of the non-fault liability. It is asserted that application of the offset rule to the non-fault liability case, the same as in

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<sup>324</sup> Tort Liability Law, *supra* note 4, at art. 26.

<sup>325</sup> See LIXIN, *supra* note 21, at 107.

<sup>326</sup> See KIONKA, *supra* note 32, at 125-26. Under comparative negligence, a plaintiff's damages are calculated and then reduced by the proportion which his fault bears to the total causative fault of his harm.

<sup>327</sup> See SHENGMING, *supra* note 40, at 139-40.

<sup>328</sup> See *id.* at 138.

the fault liability case, is in fact to simply offset defendant's liability with plaintiff's fault.<sup>329</sup>

### B. *Intentional Conduct of Plaintiff – Liability Exemption Rule*

In a tort case, if the harm or injury to the plaintiff was caused by the plaintiff's intentional conduct, then there is an issue as to whether the defendant remains liable. Article 27 of the Torts Law explicitly provides that the actor is not liable for any harm that the victim causes intentionally.<sup>330</sup> In addition, there are several cross provisions in the Torts Law that exempts the defendant from any tort liability. Under Article 71, for example, when a civil aircraft causes harm to another person, the operator of the civil aircraft assumes the tort liability unless it can prove that the victim intentionally caused the harm.<sup>331</sup>

Article 27, however, appears to cause confusion. One such confusion is its relationship with Article 26. It is believed that the plaintiff's fault that constitutes a ground for reduction of defendant's tort liability under Article 26 could be an intentional wrong or negligence.<sup>332</sup> The confusion arises when the damage is related to plaintiff's intentional conduct. The issue is how to differentiate Article 27 from Article 26 with regard to defendant's liability, since Article 27 exempts the defendant from tort liability while Article 26 only reduces the defendant's liability.

The Torts Law makes no distinction in this regard. Many, however, argue that the application of Article 26 or Article 27 depends on whether the plaintiff's wrong is the sole cause to the damage.<sup>333</sup> That is, if the wrong causing damage is associated with the defendant's fault, Article 26 applies and the defendant remains liable though the liability may be reduced. If, however, the damage was caused solely by the plaintiff's intentional conduct, then it is an Article 27 case and the defendant's liability is extinguished.<sup>334</sup>

A difficult case exists when the plaintiff acts intentionally and causes damage, but the defendant is also found to have a minor fault. Some suggest that Article 27 should apply in this case. They argue that the emphasis of Article 27 is on the plaintiff's intentional conduct and the defendant's negligence, if not material, should not trigger the application of Article 26.<sup>335</sup> Others, however, insist that the applica-

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<sup>329</sup> See SHENGMING, *supra* note 40, at 138.

<sup>330</sup> Tort Liability Law, *supra* note 4, at art. 27.

<sup>331</sup> *Id.* art. 71.

<sup>332</sup> SHENGMING, *supra* note 40, at 139-40; *see also* LIXIN, *supra* note 21, at 111.

<sup>333</sup> See SHENGMING, *supra* note 40, at 141.

<sup>334</sup> See *id.* at 139-40.

<sup>335</sup> See LIXIN, *supra* note 21, at 118.

tion of Article 27 is on a presumption that plaintiff's intentional conduct is the only source causing damage.<sup>336</sup>

Further confusion is created with the issue of whether the plaintiff's intentional conduct may be interpreted extensively to also include the plaintiff's gross negligence? This is an issue because there is a concern that the damage could be caused by the plaintiff's gross negligence, without any fault of the defendant.<sup>337</sup> In China, intentional conduct is often divided into direct or willful conduct and indirect or wanton conduct.<sup>338</sup> Since it can hardly draw a line between wanton misconduct and gross negligence, many consider them equivalent to each other, and thus view gross negligence as *quasi-intentional* conduct.<sup>339</sup>

Opponents insist that no matter how gross the negligence, it is still not an intentional conduct. They argue that Article 27 should not cover plaintiff's gross negligence because the Torts Law tends to treat negligence differently from intentional torts.<sup>340</sup> Under this argument, plaintiff's gross negligence may only be used to mitigate the defendant's liability, and should not become an excuse to exempt the defendant from liability. The third source of confusion is more related to the definitional scope of the plaintiff's intentional conduct. Since the Torts Law makes no reference to the assumption of risk and consent of victim, which are the common defenses to tort liability in many other countries,<sup>341</sup> it becomes questionable whether the plaintiff's intentional conduct may be inferred by his assumption of risk or consent. The concern is that since the assumption of risk in many cases may be involuntarily, though intentional, when assuming the risk, the plaintiff may not know of the consequences or may not even want to see its occurrence.<sup>342</sup> With regard to the plaintiff's consent, some argue that consent may lead to no liability or non-formation of liability, but is not the legal ground for the extinction or exemption of liability.<sup>343</sup>

### C. *Conduct of Third Party – Non Joint Tortfeasor Rule*

The tort liability of a defendant may become extinct if the plaintiff's injury resulted from the conduct of a third party. According

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<sup>336</sup> See SHENGMING, *supra* note 40, at 141.

<sup>337</sup> LIXIN, *supra* note 21, at 117-18.

<sup>338</sup> See SHENGMING, *supra* note 40, at 140-41.

<sup>339</sup> See LIMING, *supra* note 6, at 223.

<sup>340</sup> *Id.* at 224.

<sup>341</sup> See KIONKA, *supra* note 32, at 131, 180. In the United States for example, presumption is a defense to negligence and consent of victim constitutes a defense to an intentional tort.

<sup>342</sup> See LIMING, *supra* note 6, at 273-74.

<sup>343</sup> See *id.* at 272-73.

to Article 28 of the Torts Law, if a third party causes the harm, then the third party shall assume the tort liability.<sup>344</sup> It was generally understood in China that Article 28 refers to the fault of the third party that caused injury to the plaintiff either an intentional misconduct or negligence.<sup>345</sup> The burden of proof of the third party's fault is on the defendant.

But, the assertion of Article 28 as a defense is restricted to the case in which the fault of the third party was the only cause to the plaintiff's injury. In other words, Article 28 is applicable only if defendant is not a joint tortfeasor.<sup>346</sup> Thus, if the third party is at fault and the fault is only a partial cause to the plaintiff's injury, the third party will become a joint tortfeasor and the defendant will remain liable.

It is obvious that Article 28 holds the third party liable for its fault causing injury to the plaintiff. In both fault and presumption of fault situations, the defendant bears no liability as long as he can prove that the plaintiff's injury was exclusively the fault of a third party. In the non-fault situation, however, the law furnishes the plaintiff with different compensation options based on the nature of the case. The first option is to have the defendant pay first, even if the injury is solely due to the third party's fault.<sup>347</sup> The second option is to allow the plaintiff to choose to get paid first by the defendant or the third party.<sup>348</sup>

There is one issue left open in the Torts Law. The issue is whether the third party's conduct should be unpredictable and unforeseeable in order to become a valid defense for the defendant. One argument is that since Article 28 applies to the case where the third party's fault is the only cause of the plaintiff's injury, the fault should be unpredictable and unforeseeable to the defendant. Otherwise the defendant, to a certain extent, will be deemed at fault as well.<sup>349</sup> The other argument weighs more on causation between the plaintiff's injury and the third party's conduct. The underlying reason is that since the main theme of Article 28 is to determine whether or not the third party is fully liable as this decides whether or not the defendant can be dis-

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<sup>344</sup> Tort Liability Law, *supra* note 4, at art. 28.

<sup>345</sup> See LIXIN, *supra* note 21, at 119.

<sup>346</sup> *Id.* at 120.

<sup>347</sup> It applies to the damage caused by extraordinary incident such as a nuclear accident.

<sup>348</sup> See, e.g., Tort Liability Law, *supra* note 4, at arts. 68, 83 (concerning damage as a result of environmental pollution and injury caused by domestic animals, respectively).

<sup>349</sup> See LIXIN, *supra* note 21, at 120.

charged,<sup>350</sup> the foremost concern is what actually causes the plaintiff's injury.<sup>351</sup>

#### D. Force Majeure and Self-Defense – Statutory Excuses

Similar to torts legislation in many other countries, China's Torts Law recognizes both *force majeure* and self-defense as statutory excuses for the defendant to assume no tort liability. The former is related to an act of nature and the latter refers to an act of the defendant. The extent to which these defenses may be asserted often becomes troublesome. Under Article 29 of the Torts Law, if the harm to another person is caused by a *force majeure*, the tortfeasor shall not be liable, except as otherwise provided for by law.<sup>352</sup> Thus the default rule is that the tortfeasor shall bear no liability for damages or injuries caused to the other person in case of *force majeure*. If, however, the law does not allow any exception, the rule does not apply. But, it is critical that to claim *force majeure* as a tort liability defense, the defendant should have played no role in causing or aggravating harm to the plaintiff.<sup>353</sup>

The Torts Law contains no definition of *force majeure*. The authoritative source is Article 153 of the 1986 Civil Code, where *force majeure* is defined as an objective circumstance that is unforeseeable, unavoidable and insurmountable.<sup>354</sup> This definition, however, is vague and invites much debate. For example, may incidents like war, riots, and strikes be construed as unforeseeable and insurmountable circumstances to assert *force majeure* as a defense?<sup>355</sup> Some believe that because the war, riot, or strike is a social force beyond the control of the will of the party, it should fall within *force majeure*.<sup>356</sup> Others, however, believe *force majeure* covers only natural forces, excluding social force. This rationale doubts that social force is unforeseeable and insurmountable.<sup>357</sup>

A more controversial issue is whether a defendant may assert the government's order or action as a defense under *force majeure*? Some argue that, given China's governmental authority, certain governmental actions or orders are unforeseeable, unavoidable and insurmountable to the defendant, and in these situations the defendant

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<sup>350</sup> See LIMING, *supra* note 6, at 276.

<sup>351</sup> See *id.*

<sup>352</sup> Tort Liability Law, *supra* note 4, at art. 29.

<sup>353</sup> See LIMING, *supra* note 6, at 282; see also LIXIN, *supra* note 21, at 124.

<sup>354</sup> See Civil Law, *supra* note 22, at art. 153.

<sup>355</sup> See LIMING, *supra* note 6, at 282.

<sup>356</sup> *Id.* at 282.

<sup>357</sup> See SHENGMING, *supra* note 40, at 148.

should have recourse to the *force majeure* defense.<sup>358</sup> Many, however, seem to be cautiously reluctant to broaden the coverage of *force majeure*.<sup>359</sup>

Self-defense, commonly called legitimate-defense in China, is a legal justification of the defendant's tortious conduct. Under Article 30 of the Torts Law, if the harm is caused by self-defense, no liability should be imposed.<sup>360</sup> Thus, when facing the imminent threat of harm inflicted by an aggressor, the defendant is privileged to take defensive actions that otherwise would be a tort. But such an action must not be excessive. If the self-defense exceeds the necessary limit, causing undue harm, the defendant shall bear proper civil liability.<sup>361</sup> Here, the proper liability means the additional damage caused by the excessive force.

Interestingly, self-defense is a criminal law concept and is analogically used here in civil defense. Taken from Article 20 of the Criminal Law (as amended in 2009),<sup>362</sup> civil self-defense is generally construed as a protective measure the defendant uses to defend and protect public interest, others' or his personal rights against ongoing unlawful conduct.<sup>363</sup>

Thus, self-defense in China involves the defense for three interests, namely public interest, self-interest, and the interest of other persons. Except for public interest defense, defense of self and other person's interests include both personal and property interests. Public interest defense is often problematic because of the ambiguity of what may form or become the public interest. In reality, public interest defense has never been clearly defined and is abused in many cases.<sup>364</sup>

Another problem is the indiscrimination between the harm to person and the harm to property, in the defense of self and defense of others. In the United States, the privilege of defense against personal harm is more limited than the defense against harm to property because the bodily integrity of human beings is considered more valuable

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<sup>358</sup> See *id.*

<sup>359</sup> See *id.*

<sup>360</sup> Tort Liability Law, *supra* note 4, at art. 30.

<sup>361</sup> See *id.*

<sup>362</sup> Criminal Law, *supra* note 307, at art. 20 (providing that no criminal responsibility is to be borne for an act of legitimate defense undertaken to stop present unlawful infringement of the state and public interest or the personal, property or other rights of the actor or of another person, causing harm to the unlawful infringer).

<sup>363</sup> See LIMING, *supra* note 6, at 284.

<sup>364</sup> See generally Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 361 (2008) (discussing the public interest issue).



than property.<sup>365</sup> In China, however, no such a difference is discernable, both in theory and in practice. On the contrary, it is encouraged to be brave in protecting the interests of others, particularly when the public interest is at stake. This dynamic has a direct impact on determining whether certain defensive force is excessive.

There is also a lack of authority as to whether the defendant remains privileged when he makes a mistake in judging the threat of harm or real danger while using the defensive force that causes harm to the alleged aggressor. Chinese torts law literature rarely discusses the defendant's reasonable belief in respect to the required elements for a legitimate self-defense. Nevertheless, one suggestion is that the mistaken judgment of the threat of harm or real danger should be deemed as a fault to which the general tort liability would apply.<sup>366</sup>

#### *E. Necessity – Rule of Emergency*

Another defense under the Torts Law is the necessity or action in emergency to avoid danger defense. But, the Torts Law does not tell what constitutes necessity. Instead, it only states what the consequences of the necessity defense. According to Article 31 of the Torts Law, when the harm is caused by a conduct of necessity, the person causing the occurrence of danger is liable. If the danger is the result of a natural cause, the person causing the harm for necessity is not liable or shall make proper compensation.<sup>367</sup>

What can be inferred from Article 31 is that necessity involves the danger not only from forces of nature but also from other causes. It is also clear that Article 31 does not entirely release the defendant's liability, even if the danger is caused by an act of nature. The purpose is to compensate under the fairness principle for the loss of the innocent plaintiff who sacrificed his interest for a good reason.<sup>368</sup> Moreover, under Article 31, if improper measures of necessity are taken or a necessity limit is exceeded, causing undue harm, the defendant shall bear proper liability.<sup>369</sup>

Similar to the concept of self-defense, Chinese criminal law addresses the concept of necessity as an action of urgent danger prevention that must be undertaken to avert the occurrence of present danger to the state or public interest, or to personal, property, or to other rights of the actor or of other people.<sup>370</sup> Borrowed from criminal law, the necessity defense, as applied to civil cases, remains un-

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<sup>365</sup> See PROSSER AND KEETON ON TORTS, *supra* note 93, at 132-33.

<sup>366</sup> See LIMING, *supra* note 6, at 287.

<sup>367</sup> Tort Liability Law, *supra* note 4, at art. 31.

<sup>368</sup> See LIMING, *supra* note 6, at 290-91.

<sup>369</sup> See Tort Liability Law, *supra* note 4, at art. 31.

<sup>370</sup> See Criminal Law, *supra* note 307, at art. 31.

changed in substance. The only procedural difference is that the state interest plays a lesser role in the civil case than in the criminal one.

In China, no emphasis is ever made on the clean-hand of the plaintiff to the danger for which the necessity measure is taken. In the United States, for example, it is required that necessity arises from some independent cause not connected with the plaintiff.<sup>371</sup> The decisive factor of necessity in China is whether there is a need for the protection of the public interest or the interest of the defendant or of some other person. Nevertheless, under Article 31 of the Torts Law, the person who causes harm for necessity must also pay for the associated costs.

## VI. MECHANISM OF REMEDIES AND DETERMINATION OF DAMAGES: UNFINISHED BUSINESS

The consequences of tort liability give rise to the remedies that are available as a matter of law. The purpose of legal redress is both to compensate the plaintiff and to prevent wrongdoing. In the common law system, the primary remedy in tort is compensation.<sup>372</sup> In civil law countries, in addition to compensation, monetary or in kind, another common remedy is restitution. The notion is that compensation repairs harm through delivery of an equivalent, while restitution restores a state of affairs that has been wrongfully altered.<sup>373</sup>

The redress for tort liability in China takes a more diverse approach. First, liabilities are provided separately from damages. The former is considered the legal consequence that the defendant may face while the latter deals with the compensation the plaintiff may obtain.<sup>374</sup> Second, the plaintiff is given different options, depending on the type of grievance, which comprise personal, property, mental, and other sufferings. This poly-folded way of redress helps tackle the complexity of tort liability development, and, more importantly offers certain more appropriate protections for, such rights as the right of personality and the intellectual property right.<sup>375</sup>

Some, however, challenge the approach of diversity and call for a return to the civil law tradition, namely compensation and restitution, with two major arguments. One argument is that it is illogical to make liabilities independent from damages because damages should not be narrowly understood to only mean the monetary compensation or property compensation. The other argument is that compensation

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<sup>371</sup> See KIONKA, *supra* note 32, at 194.

<sup>372</sup> See *id.* at 346.

<sup>373</sup> See Hans Stoll, *Consequences of Liability: Remedies*, in XI/2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS § 8-8, at 8 (1983).

<sup>374</sup> See LIXIN, *supra* note 21, at 73; see also LIMING, *supra* note 6, at 324.

<sup>375</sup> See SHENGMING, *supra* note 40, at 78.

and restitution actually cover different kinds of liability and particularly fit the very concept of the *obligatio* in that they both involve the right of one party to request the other party to fulfill particular obligations.<sup>376</sup>

These challenges, however persuasive, may not change anything. Modern China has developed a strong appetite politically, socially and economically for Chinese characteristics. Although the term Chinese characteristics may sound both illusory and mysterious, it generally means localization or distinction. The term has also become an ideology that dominates almost every piece of legislation in China. In the civil law arena, a long existing ambition is to create conceptions anew that belong to China, though many have warned that it is impossible.<sup>377</sup>

#### A. *Liability Forms and Remedies*

Under the Torts Law, when a tort is committed, the defendant may be required to take particular forms of liability based on the nature of the tortious conduct as a remedy to satisfy the plaintiff's claim. Article 15 of the Torts Law characterizes how the defendant may assume liability in one of eight different forms. These liability forms are: (a) cessation of infringement, (b) removal of obstruction, (c) elimination of danger, (d) return of property, (e) restoration of original status, (f) compensation for losses, (g) apology, and (h) elimination of ill effect and rehabilitation of reputation.<sup>378</sup>

The Torts Law did not invent these liability forms. These forms are provided in the 1986 Civil Code as methods for bearing civil liabilities in general. These liability methods apply equally to contract claims as well.<sup>379</sup> But the Torts Law does not follow the 1986 Civil Code to provide such civil penalties as admonitions, ordered pledges of repentance, confiscation of property used in carrying out illegal activities, and confiscation of income illegally obtained.<sup>380</sup> These civil penalties as provided in the 1986 Civil Code have been criticized for violating judicial justice in their application because of the lack of process of proper notice and hearing. Consequently, the demand to repeal of such penalties has increased.<sup>381</sup>

Indeed, the liability forms are the remedies the defendant may be required to make. But for the plaintiff, they are actually the dispos-

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<sup>376</sup> See LIMING, *supra* note 6, at 318-19.

<sup>377</sup> See 1 SU YONGXIN, *THE CIVIL LAW IN THE PAST SEVENTY YEARS: LOOKING BACK AND FORWARD* 48 (China Univ. of Political Sci. & Law Press 2002).

<sup>378</sup> Tort Liability Law, *supra* note 4, at art. 15.

<sup>379</sup> *Id.*; see Civil Law, *supra* note 22, at art. 134.

<sup>380</sup> *Id.*

<sup>381</sup> See LIMING, *supra* note 6, at 314-15.

able rights of claim. This means that the plaintiff may not ask for more than what he is entitled, but may voluntarily give up any of the rights to which he is entitled. The practical significance of the concept of disposability is that when a right holder waives such a right, the court should honor it and no decision *ex officio* should be made to enforce the right.

Despite the critique against the diverse approach of liability forms, each of these forms is viewed as having particular meaning and specific application. In fact, proponents claim that since the adoption of the 1986 Civil Code, these forms have proven to be effective and easily measurable in practice.<sup>382</sup> In their application, the liability forms are independent to each other, but not mutually exclusive. Under Article 15 of the Torts Law, the liability forms may be employed individually or concurrently.<sup>383</sup>

Topping the list of liability forms is the cessation of infringement. This applies to on-going infringing conduct. Upon a plaintiff's request, a court may order the defendant to stop infringing on the plaintiff's rights. The court order may be issued before or in the process of the case hearing, and it may also become part of the court judgment. The purpose of this remedy is to put a timely end to infringement to prevent further potential damages.<sup>384</sup>

Next on the list is the removal of obstruction. When the improper conduct of the defendant obstructs the plaintiff from normally exercising his right with regard to his person and property, the plaintiff may seek a court order to remove the obstruction. For example, the plaintiff may ask for the removal of a shed placed by the defendant that blocks the plaintiff's window. This removal may be made by the defendant or by the plaintiff at defendant's cost. But, for the plaintiff to have a valid claim, he must prove the defendant's legally unjustifiable conduct is unreasonably restricting the plaintiff's normal exercise of personal or property rights.

The third liability form is the elimination of danger. If the defendant's conduct or anything under the defendant's control constitutes a threat to the personal or property safety of the plaintiff, a danger is deemed to exist and the plaintiff has the right to request that the defendant takes necessary actions to eliminate that danger. The existence of the danger becomes actionable if the defendant refuses to do anything to dispel it upon the plaintiff's request.

A commonality present in the application of the foregoing three liability forms is that the defendant's conduct constitutes a threat to the safety of the plaintiff's person or property. Hence, under Article 21

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<sup>382</sup> See XINBAO, *supra* note 45, at 118.

<sup>383</sup> Tort Liability Law, *supra* note 4, at art. 15.

<sup>384</sup> See LIXIN, *supra* note 40, at 75.

of the Torts Law, when a tort endangers the personal or property safety of another person, the victim of the tort may request the tortfeasor to assume such tort liabilities as cessation of infringement, removal of obstruction, and elimination of danger.<sup>385</sup>

The return of property is the fourth liability form and takes place when the defendant unlawfully possesses the plaintiff's property. Unlawfulness, here, means without the right to possess. Agreement, or the operation of law, may create the right of possession. Therefore, a possession of another person's property by any means other than as recognized by law may incur a tort cause of action, and the possessor is liable for returning the property. The liability form of the return of property overlaps with Article 34 of the 2007 Property Law of China, which provides that if the real property or chattel is under unauthorized possession, the property's rightful holder is entitled to request a return of the original property.<sup>386</sup>

The overlapping reflects a trend in modern Chinese civil legislation that no clear distinction is made between property rights and creditor rights (*obligatio*),<sup>387</sup> especially in the protection of civil law rights. But, those who oppose the multiple liability forms and advocate going back to the tradition seriously doubt that obscuring the difference between the two rights is a good approach.<sup>388</sup> A general agreement, however, is that the return of property under the Torts Law is presupposed to the availability of the property possessed. Otherwise, monetary damages in lieu of the property are considered sufficient.<sup>389</sup>

The fifth liability form is the restoration of original status. The return of property and restoration of original status is basically restitution, because both are designed to help bring the plaintiff back to the position he would have been in if not for the defendant's improper action. In the context of the Torts Law, the restoration of original status is equivalent to reparation or repair, meaning to fix the damage. In making an order for restoration, courts normally need to consider (a) whether the damage is reparable and (b) whether the cost for the reparation is reasonable.<sup>390</sup>

Next is the compensation of loss, the most common liability form. Compensation is the monetary liability the defendant has to bear for the damage he caused to the plaintiff. It is a common form

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<sup>385</sup> Tort Liability Law, *supra* note 4, at art. 21.

<sup>386</sup> See Property Law, *supra* note 39, at 34.

<sup>387</sup> In civil law tradition, an *obligatio* implies two persons in principle, a creditor who has the right and a debtor who owes the duty. See SMITH'S DICTIONARY, *supra* note 10.

<sup>388</sup> See LIMING, *supra* note 6, at 317-18.

<sup>389</sup> See SHENGMING, *supra* note 40, at 80.

<sup>390</sup> See *id.* at 80-81.

because it may be applied to all kinds of damages, and is available to replace any other liability form that appears to be inapplicable (e.g. loss of property in a return of property case).<sup>391</sup> As it is discussed *infra*, the Torts Law contains several detailed provisions that deal with compensation issues.

The seventh liability form requires the defendant to extend an apology to the plaintiff, a sort of face-saving device to comfort the plaintiff. The Torts Law makes it a liability form because it is a social and cultural tradition in China that saving face, in certain cases, matters more than anything else. Often, the plaintiff is not satisfied without an apology from the defendant. The cases in which an apology is frequently sought are those that damage the right or interest of personality, i.e. the infringement of the right of honor, privacy, name or portrait of the plaintiff.<sup>392</sup>

A court-ordered apology may be, at the plaintiff's choice, oral, written, private, or public. A public apology may be published in an agreed upon or comparable newspaper, or by posting it in a designated area. The defendant bears any relevant costs.<sup>393</sup> The defendant's refusal to comply with an ordered apology may result in a more serious penalty.

The last liability form is the elimination of ill effect and rehabilitation of reputation. Similar to the apology, this liability form also concerns the plaintiff's personality and reputation. The difference is that the elimination of ill effect and rehabilitation of reputation applies mainly when the plaintiff's reputation is damaged, and therefore requires more than a mere apology from the defendant. Normally, at the plaintiff's request, the court will order the defendant to do certain things such as remove damaging materials, make a correction, or issue a public notice.<sup>394</sup>

### B. *Damages and Rules of Compensation*

The ultimate goal of compensation is to remedy damages. The Torts Law is not keen on the use of the jargons of pecuniary and non-pecuniary damages. Instead, it divides damages into three major categories: personal damages, property damages and mental damages. For each of these, the Torts Law provides the rules by which compensation is to be made.

The rules, which are intended to govern compensation against tortious conduct, are complicated by the need to balance the interests between private parties and between a private party and the general

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<sup>391</sup> See LIXIN, *supra* note 21, at 75.

<sup>392</sup> See SHENGMING, *supra* note 40, at 81.

<sup>393</sup> *Id.* at 82.

<sup>394</sup> *Id.*

public.<sup>395</sup> In China, the major issues in this regard, over which an incredible amount of debate was generated in drafting the Torts Law, involve the target, scope and standard of compensation.<sup>396</sup> In other words the issues concern who should be compensated, what compensation should be made, and how to make the compensation.

The Torts Law aims to deal with the compensation uniformly and extensively. That being said, certain compensation provisions in the Torts Law appear abstract and overly generalized. Some criticize this lack of detail and point to the consequence that these provisions may not work as well in practice as intended.<sup>397</sup> Some hope the Supreme People's Court will provide gap-fillers through its judicial interpretation function.

### 1. *Personal Damages*

The subject of personal damages is the most controversial area of the Torts Law because opinions are so divided over who is entitled to compensation and how much. By definition, it is generally agreed that personal damages are an infringement of the right or interests of the life or health of another person, causing injury, disability, or death.<sup>398</sup> But, the actual amount of compensation differs substantially depending on the particular type of personal damage, especially in cases concerning disability or death.

The Torts Law attempts to scale in equilibrium by adopting a three-level format of compensation for personal damages. Under Article 16 of the Torts Law, the first level compensates for personal damages in general. It includes reasonable costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nurse fees, travel expenses, and lost wages. The second level concerns the victim's disabilities, for which the costs of disability life assistance equipment and disability indemnity are paid in addition to first level compensation. The third level compensates for the victim's death, and includes funeral costs and death damages.<sup>399</sup>

This three-level format is clear about the types of compensation, but is not very helpful, in practice, because it lacks operational guidance. The compensation at the first level seems less controversial because most of the costs at this level are measurable. The issue that may generate disputes in particular cases is whether the costs are reasonable, and this is left to the court to decide. Normally, the court will rely on the costs or expenses that were actually incurred. Whoever

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<sup>395</sup> See Stoll, *supra* note 373, at 3-4.

<sup>396</sup> See SHENGMING, *supra* note 40, at 13-16.

<sup>397</sup> See LIXIN, *supra* note 21, at 23-24.

<sup>398</sup> See SHENGMING, *supra* note 40, at 8.

<sup>399</sup> Tort Liability Law, *supra* note 4, at art. 16.

challenges the reasonableness of costs or the need for certain treatment bears the burden of proof.<sup>400</sup>

Compensation for disability encounters certain difficulties. The cost for disability life assistance equipment may only be a matter of reasonableness, but disability indemnity is considerably knotty. First, what constitutes disability is still highly disputable. Second, what the disability indemnity should cover is also disputed. Third, the appropriate standard to determine the amount of disability indemnity remains questionable. One crucial issue is whether the same standard should apply to a city resident and a farmer, given the wide disparity of living conditions between the city and the countryside.

Scholars are also troubled about whether there should even be a standard. Some tend to treat the disability indemnity as a compensation for mental suffering as a result of being disabled. They argue that there is no need to set any standard, and that the actual amount of the indemnity shall be decided by the court on an individual basis. Others deem the disability indemnity as necessary to make up for the loss of anticipated future income, and believe that there should be a standard for the courts to follow.<sup>401</sup>

In the middle is the view that the disability indemnity is a compensation for both the loss of future income and for mental suffering. But, this view struggles with how to determine the appropriate amount of compensation. In practice, courts are inclined to apply the approach of “loss of ability to work” to ascertain the indemnity amount. Under this approach, the indemnity compensates the loss of ability to work because when the plaintiff is disabled, his ability to work is impaired. Thus, compensation is assessed on the degree of the impairment that the plaintiff has suffered, regardless of his loss of future income. Some, however, criticize this approach as being unfair on the ground that the approach is blind about such important factors as the plaintiff’s education, age, and salary level.<sup>402</sup>

Compensation for the victim’s death is one of the most debated topics within the Torts Law. All disputes in this regard are about death damages. Two fundamental issues exist. The first issue is who, the decedent or his survivors, is to be compensated? This issue asks about the nature of the death damages. One argument is that since death is a fatal injury to the decedent, damages that would be made to the decedent become an inheritance for the decedent’s survivors. The other argument holds that the decedent’s death is in fact the damage to the survivors because the civil actor status of the deceased does not

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<sup>400</sup> See SHENGMING, *supra* note 40, at 85.

<sup>401</sup> See *id.* at 87.

<sup>402</sup> See *id.* at 88.



survive death, and therefore the compensation can only be made to the survivors.<sup>403</sup>

Under the Torts Law, survivors, for the purpose of death damages, are the close relatives of the decedent. In China, the term “close relative” has a broad meaning and is used differently in different cases. In criminal cases, close relatives refer to the spouse, father, mother, sons, daughters, and siblings born of the same parents.<sup>404</sup> In civil cases, however, close relatives refer to spouses, sons and daughters, father and mother, brothers and sisters, grandparents, and grandchildren.<sup>405</sup> Grandparents and grandchildren include both the paternal and maternal sides.

The Torts Law does not address the nature of the death damages. Nevertheless, it grants the close relatives of the decedent the right to make a claim against the tortfeasor. According to Article 18, where a tort causes the victim’s death, the victim’s close relatives are entitled to require the tortfeasor to assume the tort liability. Article 18 also provides that in case of the victim’s death, those who have paid for the victim’s medical treatment, funeral services, and other reasonable expenses have the right to demand reimbursement from the tortfeasor.<sup>406</sup>

The second issue is how to determine the amount of the death damages. For many years, death damages in tort were calculated under a formula adopted by the Supreme People’s Court in 2003. Under that formula, the calculation for death damages in a personal injury case was based on the previous year’s average annual disposable income per capita in the city, or the previous year’s average net income per capita in the countryside in the locale of the forum. That figure was then multiplied by 20 years. For each year the decedent was 60 years or older, one year was subtracted from the 20 year maximum. If the decedent was over 75 years of age, the multiplier was reduced to 5 years.<sup>407</sup>

The Supreme People’s Court formula has faced intense criticism since its adoption. The formula bases death damages on residence, location, and age of the deceased, and is denounced as unjust because it results in “the same life but different prices.”<sup>408</sup> During the drafting of the Torts Law, some attempted to bring into place a de-

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<sup>403</sup> See XINBAO, *supra* note 45, at 386.

<sup>404</sup> Criminal Law, *supra* note 307, at art. 82.

<sup>405</sup> Opinions on the Issues of Implementation and Application of the General Principle of Civil Law of China (adopted by Judicial Comm. of Sup. People’s Ct., Jan. 26, 1988), art. 12.

<sup>406</sup> See Tort Liability Law, *supra* note 4, at art. 18.

<sup>407</sup> See Interpretations, *supra* note 239, at art. 29.

<sup>408</sup> See XINBAO, *supra* note 45, at 383.

tailed provision to replace the Supreme People's Court formula for the death damages.<sup>409</sup> But the attempt was ultimately abandoned due to an inability to reach any consensus, which left the determination of death damages highly uncertain.

The Torts Law, however, does clarify cases when the tortious conduct causes multiple deaths. Under Article 17 of the Torts Law, if the same tort causes the deaths of several persons, death damages may be determined on equal amount for each of the deaths.<sup>410</sup> Article 17's rationale is that, to be fair, no matter what standard is to be used to determine death damages, the amount of the damages each decedent's close relatives receives should be the same.

## 2. *Property Damages*

Compensation for property damages in torts mainly involves the value of the property damaged. Under Torts Law, there are two kinds of property damages: general property damages and personal right related property damages. General property damages are the damages to the property only. Personal right related property damages are the economic losses associated with the infringement upon the personal right and interest. An example is the loss of commercial income as a result of damage to the plaintiff's reputation.

In regards to general property damages, Article 19 of the Torts Law requires that the amount of loss be determined as per the market price at the time the loss occurred, or by other means.<sup>411</sup> These other means refer to situations when no market price is available, or when the market price is not fair given the victim's unique condition. In the former situation, damages may be assessed by expert appraisal or evaluation. In the latter situation, the court may determine the amount on the basis of fairness.<sup>412</sup>

It is commonly held that property damages include damages to both tangible and intangible property. Intangible property primarily consists of intellectual property rights.<sup>413</sup> Since the laws governing intellectual property rights have special provisions for damages, courts normally look for these provisions when making a judgment.<sup>414</sup> In addition, the infringement of the equity rights or interests of another person will also give rise to a tort liability for property damages.

One problem with property damages is whether the damages should include indirect damages, meaning the loss of future interest.

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<sup>409</sup> See SHENGMING, *supra* note 40, at 89-91.

<sup>410</sup> Tort Liability Law, *supra* note 4, at art. 17.

<sup>411</sup> *Id.* art. 19.

<sup>412</sup> See LIMING, *supra* note 6, at 334.

<sup>413</sup> See LIXIN, *supra* note 21, at 83.

<sup>414</sup> See SHENGMING, *supra* note 40, at 99-101.

Scholars disagree regarding what exactly is the future interest and how to compensate the future interest. To define the future interest, some suggest that it should be limited to one that is reasonably predictable and expected. Others, however, assert that this limitation is unnecessary because as soon as the future interest is retainable, it should all be compensated.<sup>415</sup> With regard to future interest compensation, one opinion supports complete compensation, while the other opinion stands for reasonable compensation.<sup>416</sup> The Torts Law takes no position as to how this problem should be resolved.

In certain cases, a tort victim is not a natural person. A commonly and collectively used synonym in China for a non-natural person is “unit,” referring to a legal person or other organization or entity. The Torts Law has a special rule for the unit, which applies to tort liability allocation in case of the unit’s structural change. Under Article 18 of the Torts Law, if the unit tort victim is split or merged, the new unit that succeeds the rights of the victim is entitled to require the tortfeasor to assume tort liability.<sup>417</sup>

Property damages related to personal right are compensated under three different rules. The first rule is the rule of actual damages. Article 20 provides that if a tort that causes harm to a personal right or interest of another gives rise to any loss to the tort victim’s property, then the tortfeasor shall compensate according to the victim’s loss.<sup>418</sup> Under this rule, compensation is made on the basis of the plaintiff’s actual loss.

The second rule is the tortfeasor’s benefit rule. This rule applies when there is difficulty in determining the tort victim’s actual loss. Under Article 20, if the victim’s loss is difficult to ascertain, but the tortfeasor obtains benefit from the tort, then the tortfeasor shall compensate corresponding to the benefit he obtained.<sup>419</sup> In this situation, the plaintiff’s compensation is determined according to the benefit the defendant received from his tortious conduct. The Supreme People Court first applied the tortfeasor’s benefit concept in 2001 to help determine a plaintiff’s mental damages.<sup>420</sup> The Torts Law escalates it to a rule that is applied when the actual loss rule is not practically applicable.

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<sup>415</sup> See *id.* at 97-98.

<sup>416</sup> See LIXIN, *supra* note 21, at 86.

<sup>417</sup> See Tort Liability Law, *supra* note 4, at art. 18.

<sup>418</sup> *Id.* art. 20.

<sup>419</sup> *Id.*

<sup>420</sup> See Explanations to Several Questions Concerning the Determination of the Amount of Compensation for Mental Damages Caused by the Civil Torts (adopted by Sup. People’s Ct., Mar. 8, 2001), art. 10, available at [http://www.law-lib.com/law/law\\_view.asp?id=589](http://www.law-lib.com/law/law_view.asp?id=589) [hereinafter Compensation for Mental Damages].

The third rule is the rule of adjudication. Pursuant to Article 20 of the Torts Law, if the benefit obtained by the tortfeasor is difficult to identify, and the tortfeasor consults but fails to reach an agreement with the victim regarding appropriate compensation, then the plaintiff may bring a court action. The court then determines appropriate compensation based on the circumstances of the case.<sup>421</sup> Evidently, the adjudication rule provides the victim with the last resort for a determination of compensation.

The tortfeasor will also be held liable for damages in one other situation. Under Article 23 of the Torts Law, when a person sustains harm as a result of preventing or stopping an infringement upon the civil law right or interest of another person, the tortfeasor bears liability for the harm. This provision aims to protect and encourage Good Samaritan activity. For that purpose, Article 23 also provides that if the tortfeasor flees or is unable to assume liability, the beneficiary shall make proper compensation upon the victim's request.<sup>422</sup>

### 3. *Mental Damages*

Compensation for mental damages in China is new in law, though it has been recognized in judicial practice for many years. For the first time in Chinese legislation, the Torts Law makes mental damages a major form of damages in tort. Under Article 22 of the Torts Law, when the harm inflicted upon the personal rights or interests of another person causes serious mental suffering, the tort victim may require compensation for mental damages.<sup>423</sup>

One inference from Article 22 is that mental damages are the monetary awards for the serious mental suffering caused by harm done to the personal rights or interests of another person. Article 22 also implies that three elements are required to award mental damages: (a) there must be mental suffering, (b) the mental suffering must result from the harm to personal right or interest, and (c) the mental suffering must be serious. Unfortunately, however, as the only provision in the Torts Law to deal with mental damages, Article 22 provides nothing more than a general rule that states a general cause of action for mental damages. The highly principled provision of Article 22 casts great doubt on the effectiveness of its application because several major issues that affect the determination of mental damages are not addressed. Perhaps for this reason, Article 22 is deemed considerably conservative.<sup>424</sup>

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<sup>421</sup> Tort Liability Law, *supra* note 4, at art. 20.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* art. 22.

<sup>424</sup> See LIXIN, *supra* note 21, at 88.

One issue is the scope of mental damages. Article 22 is too broad in referring to the mental suffering related to the harm to personal rights or interests. As a result, it is difficult to make a meaningful determination of the mental damages pertaining to the particular right or interest that is being damaged.<sup>425</sup> Practically, in an attempt to guide courts in their dealings with cases concerning mental damages caused by tortious conduct, the Supreme People's Court issued an opinion in 2001 on compensation for mental damages in torts.

The Supreme People's Court's 2001 opinion offers a detailed coverage of mental damages. In the meantime, it expands coverage to include emotional distress inflicted by illegal use of or harm to the body or remains of the deceased, and by the tortious conduct causing permanent loss of or damage to the unique memento of personally symbolic significance.<sup>426</sup> The opinion has met strong criticism because, at least in part, it is considered to have confused the harm to personal rights or interests with the damage to property with regard to mental suffering because the personal memento belongs to a property, not a personal, right.<sup>427</sup>

A logic implication from Article 22 is that mental damages include both the damages in conjunction with actual physical harm and the damages for emotional distress without physical contact. In fact, a significant number of mental damage cases under Article 22 are those in which there is no physical harm, mainly because the personal rights and interests are, to a great extent, concerned only with the right to name, reputation, honor, portrait, and privacy.

A related issue is whether the mental damages are to be awarded to the tort victim only, or whether they may be made to a third party. More precisely, the issue is whether a family member of the tort victim may claim mental damages. One practical example is the death of the victim. It is unclear if a husband who loses his wife, or *vice versa*, as a result of the tort may claim against the tortfeasor for mental damages on grounds of loss of consortium or companion. The other issue is the by-stander situation and whether the so-called "nervous shock" experienced by a by-stander from witnessing serious physical injury to a family member may be actionable for mental damages.<sup>428</sup> The Torts Law does not provide an answer.

Another issue is the seriousness of mental suffering or distress. The Torts Law and judicial interpretation contain no guidance on this matter. One scholarly suggestion is the "social tolerance" theory under

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<sup>425</sup> A question for an example is whether the right personality should be included as well. See LIXIN, *supra* note 21, at 90.

<sup>426</sup> Compensation for Mental Damages, *supra* note 420, at art. 3.

<sup>427</sup> See LIMING, *supra* note 6, at 347.

<sup>428</sup> See *id.*; see also LIXIN, *supra* note 40, at 91.

which the seriousness depends on whether the suffering or distress exceeds the minimum levels of societal tolerance.<sup>429</sup> Some propose an exclusion method, requiring that the serious mental suffering not extend to occasional pain or sadness.<sup>430</sup> Another view endorses a reasonable person standard by which the seriousness is to be judged under the degree of pain and suffering that a reasonable person could have endured in the same or similar situation.<sup>431</sup>

Since mental suffering or distress is largely immeasurable, determining appropriate compensation is always an issue. The Torts Law takes no initiative in this regard, making the issue a matter of court discretion. In practice, the Supreme People's Court has adopted a factor analysis approach that requires courts to consider several factors when determining compensation.<sup>432</sup> In addition, some provinces and major cities have imposed limitations on the total amount of compensation. The present cap ranges from RMB 50,000 to RMB 100,000.<sup>433</sup>

## VII. SPECIAL TORTS AND LIABILITIES: PARTICULAR TARGETS OF THE TORTS LAW

It is typical in China and in civil law countries in general that a statute normally consists of two major parts: general provisions and special provisions. The same is true for the Torts Law, which contains the rules that regulate the special torts, or the torts with particularities. Although structurally, the Torts Law does not exactly follow the "two major parts" pattern, the rules of special torts are in fact the special provisions of the Torts Law.<sup>434</sup> For some seven special torts, these particular rules are applied. Those special torts include product liability, liability for motor vehicle traffic accident, liability for medical malpractice, liability for environmental pollution, liability for ultra-hazardous activity, liability for harm caused by domestic animals, and liability for injury caused by an object.<sup>435</sup>

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<sup>429</sup> See LIMING, *supra* note 6, at 346.

<sup>430</sup> See SHENGMING, *supra* note 40, at 111.

<sup>431</sup> See WU GAOHENG & XING BAOJUM, EXPLANATIONS TO THE TORT LIABILITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 61 (China Univ. of Political Sci. & Law Press 2010).

<sup>432</sup> See Compensation for Mental Damages, *supra* note 420, at art. 10. The factors are (a) the degree of fault of the tortfeasor; (b) the means, place and method of the tort committed; (c) the consequences of the tortious conduct; (d) the benefit the tortfeasor obtained; (e) the financial ability of the tortfeasor to assume liability; and (f) the average living standard of the place of the court. *Id.*

<sup>433</sup> See *id.* at 112 (noting that the exchange rate between US dollar and Chinese RMB is 1:6.78).

<sup>434</sup> See LIMING, *supra* note 6, at 4.

<sup>435</sup> See Tort Liability Law, *supra* note 4, at art. 41-91.

It is naive to assume that the Torts Law governs only seven special types of torts. On the contrary, as noted, the Torts Law has an extensive coverage of tortious conducts and liabilities. The special torts are those that possess certain uniqueness. First, special torts either cause serious concern in the society or have a highly frequent occurrence.<sup>436</sup> Second, each special tort is subject to particular liability imputation rules.<sup>437</sup> Third, given a significant number of existing rules and regulations that govern the special torts, uniformity is being called for because many of the rules and regulations either overlap or contradict one another.<sup>438</sup> Lastly, a majority of the provisions dealing with the special torts reflect the recent development of the law of torts.<sup>439</sup>

For example, consider motor vehicle traffic accidents. Three decades ago, China was a country full of bicycles. Today, the city roads in China are jammed with cars.<sup>440</sup> The direct consequence of the fast growth of motor vehicles, especially private cars, is the increasing number of traffic accidents. In 2004, traffic related deaths peaked at 110,000. Since the Road Traffic Safety Law (RTS Law) took effect in May of 2004,<sup>441</sup> the death toll declined to 89,000 in 2006 and then to 73,000 in 2008.<sup>442</sup> But, traffic accident cases in recent years accounted for over one third of the total torts cases, and in some local courts, the number jumped to nearly fifty percent.<sup>443</sup>

Obviously, the 2004 RTS Law played a significant role in reducing motor vehicles fatalities, but the RTS Law is an administrative law of traffic safety, and thus does not directly regulate traffic-related civil liabilities. In addition, although the RTS Law makes the presumption of liability the basic principle for liability determination, it

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<sup>436</sup> See LIXIN, *supra* note 21, at 16-18; see also SHENGMING, *supra* note 40, at 469.

<sup>437</sup> See LIMING, *supra* note 6, at 4-5.

<sup>438</sup> See LIXIN, *supra* note 21, at 19-21.

<sup>439</sup> See LIMING, *supra* note 6, at 509; see also LIXIN, *supra* note 40, at 14-15.

<sup>440</sup> By the end of 2010, it is estimated that the number of vehicles in China will exceed 70 million. In 2003, the total of privately owned cars was 4.89 million, and by the end of 2009, it reached 26.05 million. See State Bureau of Statistics of the People's Republic of China, February 25, 2010, available at [http://www.yn.xinhua.net.com/auto/2010-02/26/content\\_19106084.htm](http://www.yn.xinhua.net.com/auto/2010-02/26/content_19106084.htm). In Beijing alone, as of February, 2010, there were a total of over 4.132 million vehicles, of which 3.291 million were private cars. See Beijing Report, available at <http://cppcc.people.com/cn/GB/11832680.html>.

<sup>441</sup> See Law on Road Traffic Safety of China (promulgated on Oct. 28, 2003, effective May 1, 2004) 8 P.R.C. LAWS & REGS, art. 91, available at <http://www.gov.cn/english/laws/2005-09/07content.29966.htm>.

<sup>442</sup> See SHENGMING, *supra* note 40, at 9.

<sup>443</sup> See *id.* at 246.

misses the particular type of liability arising from the harm caused by leased, borrowed, stolen, or illegally assembled vehicles.

Facing the ever pressing demand for a civil liability mechanism to deal with disputes over traffic accidents and compensation, the Torts Law singles out the motor vehicle traffic accidents as a special type of tort and intends to establish a compensation system under which claims for auto accident damages may be fairly handled. This system is expected to help both maintain traffic safety through a legal deterrence and reduce disputes by a fair allocation of liability between the parties involved and a reasonable compensation to the victim.

Among the seven special torts provided in the Torts Law, each faces challenges not only from the legislative point of view but also from a practical standpoint. One such challenge, which may be characteristic of all the special torts, is determining who is liable for what. A detailed analysis of all of the special torts will help in understanding the categorical function of the legal provisions for each of them and in appreciating how these legal provisions are to be applied. But, for the purpose of this discussion, the concentration is on such special torts as product liability, liability for medical malpractice and liability for environmental pollution. These three special torts are believed to have significant impact on the development of torts law in China.

#### A. *Product Liability*

Product quality has been a long-standing issue in China, and many heartbreaking stories, ranging from tainted baby formula to toys and toothpastes that contain dangerous chemicals, have astonishingly drawn international attention. These incidents outraged the public and generated overwhelming outcry for stronger government oversight and harsher punishments for wrongdoers.<sup>444</sup> Against this background, the Torts Law aims to establish more effective legal mechanisms through the means of special torts to cope with the harm caused by defective products, and to ensure liability for compensation.

Several provisions in the Torts Law govern product liability. Many of the provisions evolved from the 1993 Product Quality Law (PQL). The Torts Law provisions revise the PQL by adding new rules and appear to be more consumer-friendly.<sup>445</sup> With a focus on liability and legal recourse for compensation, the Torts Law is designed to provide extensive coverage of products liability, and to ensure a prompt

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<sup>444</sup> See Peter Neumann & Calvin Ding, *China's New Tort Law: Dawn of the Product Liability Era*, *CHINA BUS. REV.* (Mar./Apr. 2010), available at <http://www.china-businessreview.com/public/1003/neumann.html>.

<sup>445</sup> Product Quality Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., Feb. 22, 1993, effective Sept. 1, 1993) (China) [hereinafter Product Quality Law].



and just compensation for the victim. Likewise, the Torts Law provides manufacturers certain leeway so that their liability burden is not excessive.

### 1. *Non-Fault Liability*

Under Article 41 of the Torts Law, if a defective product causes harm to another person, the manufacturer shall assume tort liability. It is all but certain that Article 41 imposes a non-fault liability on the manufacturer. Therefore, in a products liability case, as long as the harm was caused by the defect of the product, the manufacturer is liable. Note that “the other person” in Article 41 could be anyone who suffers damages resulting from the product’s defect, and is not necessarily limited to the buyer.

The Torts Law does not define the term “defect.” It is generally agreed, however, that a reference should be made to Article 46 of the PQL when the product defect unreasonably endangers another person’s personal or property safety, or does not conform with available national or industry standards safeguarding health and personal or property safety.<sup>446</sup> Based on Article 46 of the PQL, the law employs two standards to determine product defects: a reasonable danger standard and a national or industry standard.<sup>447</sup> The former is called the “general standard” and the latter is deemed the professional standard.<sup>448</sup>

But confusion emerges about which standard should be applied in a given case.<sup>449</sup> In addition, unlike the national or industry standard that normally sets a benchmark to follow, reasonable danger has a loose meaning. Some then suggest that reasonable danger be judged from the following four aspects: (a) defect in design, (b) defect in manufacture, (c) defect in warning or specification, and (d) defect in management of distribution.<sup>450</sup>

Keep in mind, however, that the liability imposed on the manufacturer is not absolute. The Torts Law does not specify any exemp-

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<sup>446</sup> See *id.* art. 46.

<sup>447</sup> *Id.*

<sup>448</sup> See GAOHENG & BAOJUN, *supra* note 431, at 130.

<sup>449</sup> See SHENGMING, *supra* note 40, at 224.

<sup>450</sup> To be more specific, the defect in design involves existence of reasonable danger in the structure as well as contents of the product; defect in manufacture refers to the unreasonable danger in the process of production due to the errors made in raw materials, parts, technology and process; defect in warning or specification concerns the reasonable danger resulting from a failure to provide adequate warning and user instructions; defect in management of distribution relates to the reasonable danger caused by violation of the duty of care in transportation, storage or sales that adversely affects the quality and function of the product. See GAOHENG & BAOJUN, *supra* note 431, at 130-31; see also LIXIN, *supra* note 21, at 189-90.

tions for the manufacturer mainly because opinions are so widely divided. But, it is believed that the exemptions provided in the PQL remain applicable. Under Article 41 of the PQL, the manufacturer is not liable if it is proven that (a) the product is not placed into the stream of commerce, (b) the defect causing the damage did not exist at the time when the product was placed into the stream of commerce, or (c) the science and technology at the time when the product was placed into the stream of commerce was at a level incapable of detecting the defect.<sup>451</sup>

## 2. *Extended Liability*

In addition to manufacturer liability, the Torts Law extends liability to the seller (wholesaler or retailer), the carrier, and the warehouseman. The purpose is to ensure that in each segment during the product's production and circulation, someone remains responsible for damage caused by product defects. Here, the innocent consumer or end-user's protection is undoubtedly underscored.

The seller's liability is provided in Article 42 of the Torts Law. Under Article 42, if a product defect occurs due to the fault of a seller and causes damage to another person, the seller bears tort liability.<sup>452</sup> The seller's fault may be found in its action or omission. An example of a seller's action is that the seller alters the product or removes the product label without authorization. The seller's omission may be a failure to use proper caution to preserve product quality.

It is possible in product liability cases that the actual product manufacturer is unidentifiable. To avoid a situation where the plaintiff's claim might become frustrated because of the unidentifiable manufacturer, Article 42 further provides that if the seller can specify neither the manufacturer nor supplier of the defective product, it bears the tort liability.<sup>453</sup> In a product liability case therefore, if no one can be blamed, the seller is held accountable so that the victim's claim is not left in limbo.

If, however, the defect that causes damage to another person results from the fault of such third party as the transportation carrier or storage warehouseman, under Article 44 of the Torts Law, the manufacturer or seller is entitled to reimbursement from the third party after compensating the victim.<sup>454</sup> This provision actually grants the manufacturer or seller a right of recourse for indemnity from a third party if it is proved that the third party's fault attributed to the defect.

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<sup>451</sup> See Product Quality Law, *supra* note 445, at art. 41.

<sup>452</sup> Tort Liability Law, *supra* note 4, at art. 42.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* art. 44.

In terms of assumption of liability arising from a defective product, the major difference between the manufacturer and the seller or third party is the liability base. As noted, the law imposes non-fault liability for a manufacturer. However, with respect to the seller or third party, fault is required to impose liability. Although some scholars in China disagree, both Articles 42 and 44 are clear in this regard.<sup>455</sup> Therefore, when making a claim against a seller or a third party, the plaintiff bears the burden to prove that the defendant was at fault.

Despite the difference in liability imputation, Article 43 of the Torts Law allows the plaintiff to sue either the manufacturer or seller for damages.<sup>456</sup> As between the manufacturer and the seller, there is a matter of compensation under Article 43 depending on who causes the defect. But, no matter how the plaintiff wants to proceed, the burden of proof is different if a different defendant is sued. Inevitably, a more complicated situation is present if the plaintiff wants to sue both the manufacturer and the seller.

### 3. *Punitive Damages*

A significant change the Torts Law makes to the 1986 Civil Code is the provision of punitive damages. It is true that punitive damages were not new in China, but their application was previously limited to narrowly defined cases.<sup>457</sup> The Torts Law reinforces the legislative recognition of punitive damages and incorporates them into the tort system. Under Article 47 of the Torts Law, if a manufacturer or seller knowingly produces or sells a defective product that causes death or serious injury to another person, the victim is entitled to corresponding punitive damages.<sup>458</sup> The word “knowingly” means that the manufacturer or seller had knowledge about the defect of the product.

In China, punitive damages are considered to have a combined function of compensation, punishment, and deterrence. Because of its nature as punishment, the imposition of punitive damages must meet statutory requirements. In accordance with Article 47, the require-

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<sup>455</sup> One argument is that the seller’s liability is the same as that of the manufacturer. See LIMING, *supra* note 6, at 517.

<sup>456</sup> Tort Liability Law, *supra* note 4, at art. 43.

<sup>457</sup> Prior to the adoption of the Torts Law, there were few legal provisions allowing for punitive damages, including Article 49 of the 1994 Law of Protection of the Rights and Interests of the Consumers (fraudulent conduct in providing goods and services) and Article 96 of the 2009 Food Safety Law (production or sale of foods in violation of food safety standards). In 2003, the Supreme Court also applied punitive damages to a developer’s breach of residence real estate contract.

<sup>458</sup> Tort Liability Law, *supra* note 4, at art. 47.

ments for punitive damages in a product liability case are (a) the defendant's ill mind, (b) plaintiff's death or serious health problem caused by the defective product, and (c) causation.<sup>459</sup> Therefore, an injury caused by a defective product that is not deemed serious would not qualify for a punitive damages award.

A key issue left unsolved in the Torts Law is the amount of punitive damages to award in any given case. Currently, the punitive damages award is based on the contract or purchase price, which ranges from the lowest of one times the price (Consumer Protection Law) to the highest of 10 times the price (Food Safety Law).<sup>460</sup> In torts, however, there is no base price. Since the Torts Law requires that the punitive damages be "corresponding,"<sup>461</sup> one suggestion is to use a format of two to three times actual damages. The other suggestion advocates a factor-oriented formula on the ground that the punitive damages should be corresponding to the level of the defendant's ill mind and the degree of the plaintiff's injury.<sup>462</sup> But, at present, it is entirely at the court's discretion to assess the punitive damages.<sup>463</sup>

#### 4. *Mandatory Warning and Recall System*

It is mandated in Article 46 of the Torts Law that the manufacturer or seller take remedial measures, such as warning and recall, in a timely manner when, after the product is placed into the stream of commerce, a defect is discovered.<sup>464</sup> Prior to the adoption of the Torts Law, China's recall rule was scattered in administrative regulations and applied only to certain products. The significance of Article 46 is that it establishes a unified nationwide recall system for defective products in general. In addition, Article 46 imposes a duty of timely warning after the sale and upon the finding of the product defect.

Warning and recall apply when the product defect was not detected during the production and sale but was found after the product was put into circulation. The warning is actually an after-sales notice

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<sup>459</sup> *Id.*

<sup>460</sup> Law of The People's Republic of China on Protection of Consumer Rights and Interests (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), art. 44 (China), *available at* [http://www.nbaic.gov.cn/art/2008/10/20/art\\_865\\_8527.html](http://www.nbaic.gov.cn/art/2008/10/20/art_865_8527.html) (describing fraudulent conduct in providing goods or services); Food Safety Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., July 20, 2009, effective immediately), art. 96 (China), *available at* [http://www.chinaacc.com/new/63\\_73\\_/2009\\_3\\_4\\_wa8132639439002714.shtml](http://www.chinaacc.com/new/63_73_/2009_3_4_wa8132639439002714.shtml) (describing the production or sale of foods in violation of food safety standards).

<sup>461</sup> See Tort Liability Law, *supra* note 4, at art. 47.

<sup>462</sup> See LIMING, *supra* note 6, at 548.

<sup>463</sup> See SHENGMING, *supra* note 40, at 245.

<sup>464</sup> Tort Liability Law, *supra* note 4, at art. 46.

and serves a two-fold purpose. First, it informs the consumers of the potential danger the product may cause. Second, it equips consumers with the necessary knowledge to prevent danger and minimize risk in their normal product use.

Recall is a second step used to handle defective products. It is a process under which the defective product is replaced or returned at no cost to consumers. In China, the recall may be made by the manufacturer's product initiative or by the relevant administrative agency's order.<sup>465</sup> The Torts Law makes it imperative that the manufacturer or seller assumes the tort liability if he or she fails to take remedial measures in due course, or if the measures taken are insufficient and ineffective to prevent damage.<sup>466</sup>

An ambiguity in Article 46 is whether the Torts Law requires the manufacturer to enact a product tracking system to monitor possible defects. Some believe that the underlying notion of Article 46 is that the manufacturer is obligated to establish a scheme to enable it to timely track any defect that may appear in the product.<sup>467</sup> Others believe that Article 46 is all about remedial measures, to be taken when the defect is found after sale, and hence does not require the manufacturer to undertake an active tracking effort.<sup>468</sup>

##### 5. *Preventive Measures*

In addition to warning and recall, the Torts Law also requires that the manufacturer or seller take certain precautionary or preventive measures in particular product liability cases. Article 45 of the Torts Law provides that if a product defect endangers the personal or property safety of another person, that person is entitled to require the manufacturer or seller to bear such tort liability as to remove the defect and eliminate the danger.<sup>469</sup> The goal obviously is to prevent the defective product from inflicting harm or injury on consumers.

Article 47 of the Torts Law defines preventive measures as tort liabilities imposed on the manufacturer or seller. It is mandatory that the proper measures be put in place upon plaintiff's request when the product defect exists but has not yet caused harm. When making such requests, however, the plaintiff needs to prove the likelihood that the defect endangers his personal or property safety. This is because the existence of danger is the prerequisite for preventive measures in a product liability case.

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<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> See SHENGMING, *supra* note 40, at 241.

<sup>468</sup> See LIMING, *supra* note 6, at 537.

<sup>469</sup> Tort Liability Law, *supra* note 4, at art. 45.

## B. *Liability for Environmental Pollution*

China's growth has been rapid in the past few decades, with the unfortunate side effect of environmental pollution and ecological deterioration in the country. Although constantly denied by China, it has overtaken the U.S. in energy consumption and become the world's top energy consumer.<sup>470</sup> This raises serious concerns about China's impact on the environment as it is turning into the world's biggest source of climate-changing greenhouse gases.<sup>471</sup>

Within the country, the escalated environmental or ecological damages have also become a striking problem, which directly threaten the sustainability of the nation's development. From a legal perspective, since the promulgation of the Environmental Protection Law in 1989, there have been nearly thirty different laws and regulations related to the environment. But, given the complexity of the environmental issues and the often heated economic drive for development, environmental protection in China has not yet reached the level that it should. There have been several attempts to amend the 1989 Environmental Protection Law, which is widely considered obsolete in many respects, but each has failed due to the imbalance between economic and environmental interests, and between different government agencies fighting for control over particular matters.<sup>472</sup>

The Torts Law does not seem to be intended to solve the debates on environmental protection but rather to provide general rules governing civil liability for damages caused by environmental pollution. There are four articles in the Torts Law, and all of them are concerned with liability determination and allocation. Therefore, in the application of the Torts Law provisions on the liability for environmental pollution, a cross-reference is made to the relevant provisions in specific laws and regulations on the environment.

### 1. *Liability without Fault*

Like product liability, liability for environmental pollution requires no fault on the part of the tortfeasor. According to Article 65 of the Torts Law, when environmental pollution causes harm, the pol-

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<sup>470</sup> See Spencer Swartz & Shai Oster, *China Tops U.S. in Energy Use*, WALL ST. J. (July 18, 2010), <http://online.wsj.com/article/SB10001424052748703720504575376712353150310.html>.

<sup>471</sup> See Jenny Barchfield, *China Surpasses US as World's Top Energy Consumer*, WASH. TIMES (July 20, 2010), <http://www.washingtontimes.com/news/2010/jul/20/china-surpasses-us-top-energy-consumer/>.

<sup>472</sup> See Wang Hongru, *Debates over the Fate of the Environmental Protection Law*, CHINA ECON. WEEKLY (June 15, 2010), <http://news.sohu.com/20100615/n272809670.shtml>.

luter shall assume the tort liability.<sup>473</sup> The elements essential to impose tort liability on the polluter include (a) pollution, (b) damages, and (c) causation.<sup>474</sup> Here, the polluter's mental status is irrelevant. Liability may be exempted or reduced on certain statutory grounds.<sup>475</sup>

Article 65 is based on Article 124 of the 1986 Civil Code. The former, however, alters the latter by repealing the requirement that the polluter's conduct must be illegal. Under Article 124 of the 1986 Civil Code, any person who pollutes the environment and causes damages to others in violation of state provisions for environmental protection and the prevention of pollution bears civil liability in accordance with the law.<sup>476</sup> Pursuant to Article 65 of the Torts Law, pollution that causes damage, standing alone, will suffice to hold the polluter for tort liability.

Likewise, the term "environment" in the Torts Law has a broader meaning than that in the 1986 Civil Code. Under the Torts Law, the environment includes both the living environment and the ecological environment.<sup>477</sup> Article 2 of the Environmental Protection Law defines the environment to mean the total body of all natural elements and artificially transformed natural elements affecting human existence and development, which includes the atmosphere, water, seas, land, minerals, forests grasslands, wildlife, natural and human remains, nature reserves, historic sites and scenic spots, and urban and rural areas.<sup>478</sup> However, this definition apparently is not inclusive of the ecological environment or sustainable development since it does not include ecological balance or biodiversity.

## 2. *Reversed Burden of Proof*

The most difficult aspect of tort liability for environmental pollution is proving the connection between the harm and the pollution. In many cases, the harm is not readily seen or even discernable, because it may not be diagnosed until several years after exposure. On the other hand, to trace the source of the pollution that caused the harm often requires sophisticated devices and technology. Therefore, it would be too burdensome and unfair for the plaintiff to prove causation.

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<sup>473</sup> Tort Liability Law, *supra* note 4, at art. 65.

<sup>474</sup> *Id.*

<sup>475</sup> In environmental pollution cases the tort liability of the polluter may be exempted on the ground of force majeure or plaintiff's intentional fault, or may be reduced for the plaintiff's gross negligence.

<sup>476</sup> See General Principles, *supra* note 22, at art. 124.

<sup>477</sup> See LIXIN, *supra* note 21, at 254-55.

<sup>478</sup> Environmental Protection Law (adopted on Dec. 26, 1989), art. 2 (China), available at <http://www.china.org.cn/english/environment/34356.htm>.

In dealing with this issue, a common practice in China is to place the burden of proof on the defendant. Under Article 87 of the Water Pollution Prevention and Control Law, for example, in a water pollution damages case, the polluter has the burden of proof to show a lack of causation.<sup>479</sup> Similarly, the Supreme People's Court, in both the Evidence Rules and Opinions on the Implementation of the Civil Procedure Law, requires that the defendant bear the burden of proof in litigation involving environmental damage.<sup>480</sup>

The Torts Law imposes non-fault liability on the polluter and thus adopts, as a unified rule, a reverse burden of proof that applies to all environmental tort liability cases. According to Article 66 of the Torts Law, if a dispute arises over environmental pollution, a polluter shall bear the burden to prove that it should not be liable, its liability could be mitigated under certain circumstances as provided for by law, or there is no causation between its conduct and the harm.<sup>481</sup>

### 3. *Pollution Share Rule*

What likely happens in any given case is that two or more polluters cause the environmental damage. Thus, the polluters are a joint source of pollution. A practical question, then, is how to allocate liability among the polluters. Unquestionably, all the polluters involved are liable. The issue is, however, what liability each of the polluters should bear. Are the polluters jointly and severally liable for the damages or independently liable for their part of the damages?

Under Article 67 of the Torts Law, when two or more pollutants cause environmental pollution, the seriousness of each polluter's liability is determined according to the type of pollutant, the volume of emission, and other factors.<sup>482</sup> The Torts Law does not impose joint and several liability upon joint polluters, but instead, divides liability among the polluters according to the share each has in the pollution. Article 67 stands on the presumption that the polluters do not have joint intent and the pollution is caused by independent conduct. This suggests that if the polluters collaborated in causing the pollution,

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<sup>479</sup> Law of Prevention and Control of Water Pollution (adopted 1984, as amended 2008), art. 85 (China), available at <http://www.chinaenvironmentallaw.com/wp-content/uploads/2008/03/water-pollution-prevention-and-control-law.pdf>.

<sup>480</sup> Civil Evidence Rules, *supra* note 187, at art. 4(3); see also Supreme People's Court: Opinions on the Several Questions Concerning the Application of the Civil Procedure Law China (July 24, 1992), art. 4 (China), available at <http://www.dffy.com/faguixiazai/ssf/20031109201407.htm> (describing the burden of proof concerning environmental damages).

<sup>481</sup> Tort Liability Law, *supra* note 4, at art. 66.

<sup>482</sup> *Id.* art. 67.



they would be jointly and severally liable under the joint tortfeasors provision of the Torts Law.

Another presumption is that the seriousness of each polluter's liability is identifiable and determinable through various means. The reality is that in certain cases, the seriousness may not be determinable. In this situation, Article 67 is not helpful. One possible solution is that the polluters share liability equally. At any rate, for the plaintiff, the pollution share rule would mean it has to sue all polluters in order to achieve full compensation because the polluters are not jointly and severally liable as a matter of law.

#### 4. *Third Party's Action*

The liability of a third party in an environmental pollution case occurs when the third party's action is the "but for" intervening force that caused the pollution. Under Article 68 of the Torts Law, if the harm is caused by environmental pollution as the result of the fault of a third party, the victim may require compensation from either the polluter or the third party.<sup>483</sup> After paying compensation, the polluter is entitled to reimbursement from the third party.<sup>484</sup>

Thus, to hold the third party liable, in addition to his conduct attributive to the pollution, the third party must be at fault. The third party's liability may be taken in two different ways: directly compensate the victim, or reimburse the polluter for compensation paid to the victim. Once again, as between the polluter and the third party, the liability is not joint and several but independent.

#### C. *Liability for Medical Damages*

Medical damages are not well regulated in China. One reason is that medical malpractice is a relatively new type of civil liability.<sup>485</sup> In the past, medical accidents were generally addressed via administrative means.<sup>486</sup> In reality, however, the overly crowded hospitals and deficiency of professional ethics rendered the medical services so poor that patients were often left with no good care. Likewise, there was a lack of effective legal mechanisms to fairly handle the grievances of the victims. As a result, medical disputes frequently became violent, and in many cases, the disputes ultimately led to patients and

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<sup>483</sup> *Id.* art. 68.

<sup>484</sup> *Id.*

<sup>485</sup> Ren Rong-ming & Wan Man-tian, *On the Legal System of Medical Malpractice Management in China and Its Impact on Medical Ethics*, 12 INT'L J. OF THE COMPUTER, THE INTERNET & MGMT. 73, 74-77 (Sept.-Dec. 2004), available at [http://www.journal.au.edu/ijcim/2004/sep04/ijcimv3n1\\_article7.pdf](http://www.journal.au.edu/ijcim/2004/sep04/ijcimv3n1_article7.pdf).

<sup>486</sup> *Id.*

their families personally attacking doctors and other healthcare workers.<sup>487</sup>

The second reason is the drive for the balance between patient and hospital interests. For decades, under the planned economy, the government budget fully covered hospitals. The economic reform broke the “iron bowl” of all publicly owned entities, including hospitals. Suddenly, hospitals could not sit idle and had to generate enough revenue to pay salaries and operating expenses. The government then became concerned with how to protect patients’ rights through malpractice regulation without negatively affecting the legitimate interests of medical professionals and the development and improvement of medical research.<sup>488</sup>

Before adoption of the Torts Law, medical damage claims were governed mainly by the Regulation on the Handling of Medical Accidents issued by the State Council in 2002.<sup>489</sup> A year later, and in response to the application of the Regulation, the Supreme People’s Court issued a Notice on the Adjudication of the Civil Case Concerning Medical Damages Disputes. In that notice, the Supreme Court limited the application of the Regulation to medical accident cases and required that all non-medical accident cases be governed by the 1986 Civil Code.<sup>490</sup> In the same year, the Supreme People’s Court issued the damage award calculation formula for wrongful death, including for death from medical accidents.<sup>491</sup>

Some believed the State Council Regulation improperly protected the interests of medical service entities because it overly emphasized their specialty and particularity.<sup>492</sup> The Supreme People’s Court’s attention, however, was on the civil liability of medical accidents as well as other medical malpractice disputes. Consequently, the Regulation and the Supreme People’s Court opinions created a so-called two-track medical liability system. With regard to the cause of action, there were two different liabilities: medical accident liability

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<sup>487</sup> See Dean M. Harris & Chien-Chang Wu, *Medical Malpractice in the People’s Republic of China: the 2002 Regulation on the Handling of Medical Accidents*, J.L. MED. & ETHICS 463 (2005), available at <http://www.allbusiness.com/legal/3587269-1.html>.

<sup>488</sup> See SHENGMING, *supra* note 40, at 277.

<sup>489</sup> Regulation on the Handling of Medical Accidents (promulgated by the State Council, Apr. 4, 2002, effective Sept. 1, 2002) (China), available at [http://www.gov.cn/english/laws/2005-07/25/content\\_16885.htm](http://www.gov.cn/english/laws/2005-07/25/content_16885.htm) (last visited May 18, 2011).

<sup>490</sup> See Notice of the Supreme People’s Court on Adjudication of Civil Cases Concerning Medical Disputes with a Reference to the Regulation on the Handling of Medical Accidents (Jan. 6, 2003), LAWINFOCHINA, <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=45919>.

<sup>491</sup> See Compensation for Mental Damages, *supra* note 420.

<sup>492</sup> See LIXIN, *supra* note 21, at 226-27.

and non-medical accident liability. As far as the damage award is concerned, under the Regulation, the award for damages caused by the medical accident was much lower than the amount determined by the Supreme Court's formula for medical liability.

The more confusing and controversial practice under the two-track system is the appraisal of a medical accident. Experts selected by the National Association of Medical Science (NAMS), a semi-governmental organization, appraise the medical accident, while a judicial appraisal entity appraises any other medical liability. Thus, if a case involved both medical accident and other medical liability, the plaintiff would have to obtain two appraisals from different sources, and the two appraisals often conflicted. In many medical accident cases, plaintiffs instead asked for the medical accident's judicial appraisal as well because the NAMS' appraisal was considered biased in favor of the medical institution.<sup>493</sup>

The Torts Law was drafted in the midst of increasing demand for medical liability reform to clean up the mess resulting from the two-track scheme. One task for the Torts Law drafters was to form a single medical liability system to the extent that all medical treatment related disputes could be handled uniformly. The Torts Law now contains 11 articles under the title *Liability for Medical Damages*. But, many prefer to call it liability for medical malpractice since it mainly deals with the conduct of medical professionals. Hope remains that the Torts Law will help bring medical malpractice into a well-regulated mechanism.

### 1. *Medical Damages Categorization*

The Torts Law classifies medical damages into three categories: general medical damage, damage by conduct in violation of medical ethics, and damage resulting from defective medical products.<sup>494</sup> General medical damage is the harm a patient suffers during diagnosis and treatment.<sup>495</sup> It also includes the harm caused by the failure of medical staff members to fulfill their diagnosis and treatment obligations under the proper standard at the time of such diagnosis and treatments.<sup>496</sup>

Damage by a medical ethics violation refers primarily to the harm caused to a patient by disclosing his privacy or releasing his medical records without his consent.<sup>497</sup> Medical ethics violations also include the breach of the duty to inform the patient of his illness, con-

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<sup>493</sup> See SHENGMING, *supra* note 40, at 276.

<sup>494</sup> Tort Liability Law, *supra* note 4.

<sup>495</sup> *Id.* art. 54.

<sup>496</sup> *Id.* art. 57.

<sup>497</sup> *Id.* art. 62.

dition, and relevant medical measures, as well as of possible medical risks if an operation, special examination, or special treatment is needed.<sup>498</sup> There is, however, an exception. In an emergency situation, upon approval by the medical person in charge, certain medical measures may be taken without obtaining consent from the patient or his close relatives.<sup>499</sup>

Damage resulting from defective medical products is the injury a patient suffers from the defect of a drug, medical disinfectant, medical instrument, or by a substandard blood transfusion.<sup>500</sup> In recent years, the number of cases involving harm caused by substandard blood transfusions has dramatically increased, especially in rural areas. The Torts Law aims to limit risky transfusions by imposing stringent tort liability on medical institutions. Its effectiveness is unknown.

## 2. *Multiple Liability Basis*

Under the Torts Law, tort liability imputes differently in respect to different categories of medical damages. The general liability rule for medical malpractice is fault-based liability. As provided in Article 54, when a patient sustains harm during diagnosis and treatment, the medical institution is liable for compensation if the institution or any of its medical staff is at fault.<sup>501</sup> This fault liability equally applies to medical damages caused by ethical violations.

However, in accordance with Article 58 of the Torts Law, fault will be presumed for the harm caused to a patient if a medical institution (a) violates a law, administrative regulation or rule, or any other provision on the procedures and standards for diagnosis and treatment, (b) conceals or refuses to provide the medical records related to the dispute, or (c) forges, tampers or destroys any medical record or data.<sup>502</sup> Hence, under any of the aforementioned circumstances, the medical institution must prove it was not at fault.

With regard to medical damages caused by defective medical products or by contaminated blood, the Torts Law turns away from liability but permits the patient to request compensation from the manufacturer or entity providing the blood, or from the medical institution.<sup>503</sup> The Torts Law also provides that if the medical institution pays compensation upon the patient's request, it is entitled to reimbursement by the liable manufacturer or blood-providing entity.<sup>504</sup>

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<sup>498</sup> *Id.* art. 55

<sup>499</sup> *Id.* art. 56.

<sup>500</sup> Tort Liability Law, *supra* note 4, at art. 59.

<sup>501</sup> *Id.* art. 54.

<sup>502</sup> *Id.* art. 58.

<sup>503</sup> *Id.* art. 59.

<sup>504</sup> *Id.*

Nevertheless, many believe that the implied liability base in the case of defective medical products is non-fault liability because liability for defective medical products is analogous to product liability.<sup>505</sup>

### 3. *Special Grounds for Liability Exemption*

As noted above, a number of defenses are available to the defendant under the Torts Law. Medical institutions may also employ these defenses, if applicable, in a medical damages lawsuit. Given the distinctive nature of medical damages, however, medical institutions may be exempt under certain special provisions in the Torts Law.

Pursuant to Article 60 of the Torts Law, a medical institution shall not be held liable for compensating the harm caused to a patient under any of the following circumstances: (a) the patient or his close relative did not cooperate with the medical institution in the diagnosis, and the treatment met the required procedures and standards, (b) the medical staff fulfilled the duty of reasonable diagnosis and treatment in an emergency such as the rescue of a patient in critical condition, or (c) diagnosis and treatment of the patient were difficult due to the medical limits at the time.<sup>506</sup>

When a patient refuses to cooperate, the tort liability of a medical institution may not be fully exempted if the medical institution or any of its medical staff is found to be at fault as well. In this situation, Article 60 requires the medical institution to assume liability to compensate the patient involved, in accordance with its fault.<sup>507</sup>

### 4. *Legal Restraint on Patients*

As an echo to China's frequent medical treatment related violence, the Torts Law has a provision intended to discipline patients. Article 64 of the Torts Law emphasizes that the legitimate rights and interests of a medical institution, and its member staff, are protected by law.<sup>508</sup> It mandates that anyone who interrupts the order of the medical system or obstructs the work or life of the medical staff will be subject to legal liability.<sup>509</sup>

The Torts Law requires the medical institution to keep and maintain its medical records including admission logs, medical treatment order slips, test reports, operation and anesthesia records, pathology records, nurse care records, medical expenses sheets, and

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<sup>505</sup> See LIXIN, *supra* note 21, at 238-39; see also SHENGMING, *supra* note 40, at 291-98.

<sup>506</sup> Tort Liability Law, *supra* note 4, at art. 60.

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* art. 64.

<sup>509</sup> *Id.*

other medical data.<sup>510</sup> The medical institution is also required to give patients an opportunity to review or obtain copies of medical records.<sup>511</sup>

Additionally, the Torts Law prohibits a medical institution and its staff from conducting unnecessary examinations in violation of the procedures and standards for diagnosis and treatment.<sup>512</sup> This prohibition aims to avoid over or unreasonable charges to patients. What examination is and is not necessary may, however, become highly questionable. The Torts Law suggests that an examination is necessary as long as it meets the procedures and standards for diagnosis and treatment.

### VIII. CONCLUSION

Adoption of the Torts Law is a significant step toward building a civil law infrastructure in China. As a hybrid of civil law tradition, common law concepts, and Chinese reality, the Torts Law establishes a legal framework under which civil wrongs are addressed and civil damages are compensated. In this regard, the Torts Law represents China's effort to develop the rule of law and to establish a sound legal mechanism to resolve civil disputes.

It is fair to say that the Torts Law is an ambitious piece of legislation. It is equally fair to conclude that the Torts Law is an incomplete statute to regulate torts because it leaves many important questions unanswered. For example, it is unclear if the Torts Law should govern administrative torts, state agency torts, or government personnel torts committed in connection with the exercise of official duty. Additionally, the broad coverage of the Torts Law, in terms of rights and interests, creates many ambiguities that require more legislative interpretations or judicial explanations, especially when determining damages and calculating damage awards.

A more practical issue concerns reconciliation of the differences between the Torts Law and the 1986 Civil Code. It is unclear which law controls if there is a conflict between the two. Theoretically, the rule of "later in time" or the rule of "special law superior to general law" may play a role, but there are many hidden conflicts that cause confusion. The same issue arises with regard to the relationship between the Torts Law and other tort related regulations and rules.

The biggest challenge facing the Torts Law is how to effectively and strictly enforce the law. This remains an issue straining the Chinese legal system. The real test to Chinese courts is how to handle civil damages fairly when the damage award would particularly affect vari-

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<sup>510</sup> *Id.* art. 61.

<sup>511</sup> *Id.*

<sup>512</sup> Tort Liability Law, *supra* note 4, at art. 63.

ous local, economic, and business interests. In short, the critical issue is how to transform the Torts Law from “law on the paper” into “law in action.”<sup>513</sup>

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<sup>513</sup> See LIMING, *supra* note 6, at 7.





**MISUSE AND ABUSE OF LEGAL ARGUMENT BY  
ANALOGY IN TRANSJUDICIAL  
COMMUNICATION: THE CASE OF  
ZAHEERUDDIN V. STATE**

*Amjad Mahmood Khan*<sup>1</sup>

ABSTRACT

This article explores the risks and limits of transjudicial communication. In particular, I critique the scholarly contention that transjudicial communication can be built upon commonly accepted methods of legal reasoning. I argue that transnational courts do not uniformly understand or apply commonly accepted methods of legal reasoning, especially legal argument by analogy. As a result, transnational courts that utilize transjudicial communication can and do render specious, even destructive, judicial opinions. I analyze the case of *Zaheeruddin v. State*—a controversial decision by the Supreme Court of Pakistan that upheld the constitutionality of Pakistan’s anti-blasphemy ordinances. The Supreme Court of Pakistan poorly analogized to numerous U.S. Supreme Court authorities to bolster and legitimize its deeply flawed decision.

INTRODUCTION

In his 2009 majority opinion in *Graham v. Florida*, U.S. Supreme Court Justice Anthony Kennedy cited to foreign law as persuasive authority to hold that life-without-parole sentences for juveniles convicted of non-homicide crimes were unconstitutional.<sup>2</sup> In his 2003 majority opinion in *Lawrence v. Texas*, Justice Kennedy cited a decision by the European Court of Human Rights as persuasive authority to hold that a Texas statute criminalizing acts of sodomy was unconstitutional.<sup>3</sup> The recent and rising trend of U.S. courts to rely on foreign

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<sup>2</sup> See *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

<sup>3</sup> See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

law for constitutional adjudication, particularly for contentious issues, illustrates more generally the globalization of modern constitutionalism. Indeed, as legal problems become more common across more common law systems in the world, courts increasingly rely on the legal opinions of outside jurisdictions as a powerful source of persuasive authority.

Professor Anne-Marie Slaughter describes such cross-court citation and deliberation on common legal problems as “transjudicial communication.”<sup>4</sup> Her typology suggests the relative merits of this communication and even describes its increasing trend as an emergence of a new and promising “global community of courts.”<sup>5</sup> Transjudicial communication, argues Slaughter, fosters cross-fertilization of legal ideas and becomes a “pillar of a compelling vision of global legal relations” where “national differences would be recognized, but would not obscure common legal problems nor block the adoption of foreign solutions.”<sup>6</sup> For Slaughter, what helps develop this cross-fertilization of legal ideas is a common judicial identity and legal methodology, including among other tools, common methods of legal reasoning across legal systems.<sup>7</sup>

This article explores some of the risks and limits of transjudicial communication. I call into question Slaughter’s contention that common methods of legal reasoning necessarily advance cross-fertilization of ideas between courts of competing systems. I argue that transnational courts do not uniformly understand methods of legal reasoning. To this end, I focus my critique on one particular method of legal reasoning that Slaughter would deem to be “common” to transjudicial communication: legal argument by analogy. Proper legal argument by analogy is a less common, or a less consistently applied, judicial methodological tool to work with. To encourage transjudicial communication through legal argument by analogy is problematic not only because the mode of analogy itself is more rigorous than it appears, but also because legal argument by analogy carries special risks in the transjudicial setting.

Part I details Slaughter’s typology of transjudicial communication. Part II introduces the basic principles and methodology underlying legal argument by analogy. Here, I contrast the views of two prominent scholars of jurisprudence—Professor Cass Sunstein and

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<sup>4</sup> Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994).

<sup>5</sup> Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192-93 (2003); see also Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430-32 (2003).

<sup>6</sup> Slaughter, *supra* note 4, at 132.

<sup>7</sup> *Id.* at 125.

Professor Scott Brewer—concerning the rational force of legal argument by analogy. I also outline the basic problems associated with legal argument by analogy and highlight what Sunstein refers to as the “distinctive illogic of bad analogical reasoning.”<sup>8</sup> Finally, Part III illustrates the troubling consequences of poor analogical reasoning in the transjudicial context by way of an analysis of *Zaheeruddin v. State*<sup>9</sup>—a controversial and extant 1993 decision by the Supreme Court of Pakistan that relies principally on U.S. constitutional and trademark law as persuasive authority.

## PART I: SLAUGHTER’S TYPOLOGY OF TRANSJUDICIAL COMMUNICATION

### A. *Horizontal and Vertical Communications*

Slaughter’s typology of transjudicial communication succinctly summarizes the characteristics and relative merits of certain courts citing and deferring to courts outside their national jurisdiction. She outlines two major types of transjudicial communication: horizontal and vertical. She defines horizontal communication as communication between courts of the same authority and stature across national and regional borders (e.g., the U.S. Supreme Court referencing decisions of the Supreme Court of Zimbabwe, or vice versa).<sup>10</sup> Horizontal communication consists of a court’s tacit emulation of a court of another jurisdiction by way of cross-citation of decisions.<sup>11</sup> Horizontal communication usually operates as a “monologue” where neither the originating nor the sharing court has any direct and formal links, nor do they directly converse with one another.<sup>12</sup> The originating court is wholly unaware that its views have a foreign audience; the listening court manufactures the foreign audience.

Slaughter defines vertical communication as communication between courts of different statures across national and regional borders (e.g., the U.S. Supreme Court referencing decisions by the Inter-

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<sup>8</sup> CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 74 (1996).

<sup>9</sup> *Zaheeruddin v. State*, (1993) 26 SCMR (SC) 1718, 1753–54 (Pak.). The Supreme Court of Pakistan voted four to one in favor of declaring Ordinance XX, two of Pakistan’s anti-blasphemy laws, to be constitutional. Justice Abdul Qadeer Chaudhry wrote the majority opinion. Justices Muhammad Afzal Lone, Saleem Akhtar and Wali Muhammad Khan joined the majority. Justice Saleem Akhtar wrote a concurring opinion. Justice Shafiqur Rahman, the Court’s Senior Justice, dissented from the majority opinion.

<sup>10</sup> Slaughter, *supra* note 4, at 103.

<sup>11</sup> *Id.* at 104.

<sup>12</sup> *Id.* at 113.

American Court, or vice versa).<sup>13</sup> Like horizontal communication, vertical communication consists of cross-citation between courts, but usually involves more formal deference on the part of a court of narrow jurisdiction towards a court of wider jurisdiction. Vertical communication can operate as a “dialogue” where both the originating and sharing courts recognize and acknowledge each other’s cross-citations.<sup>14</sup>

### *B. Functionality and Purpose*

Slaughter highlights two generally desirable functions of transjudicial communication: cross-fertilization of legal ideas and increased legitimacy of individual judicial decisions. With respect to the first function—cross-fertilization of legal ideas—Slaughter points out how an originating court’s particular decision can often be “cast [into] transnational winds” in no predetermined direction.<sup>15</sup> A listening court adopts the originating court’s decision either expressly as a means to bolster its own like-minded decision (i.e., actual citation of the originating court’s decision) or implicitly by adopting a parallel line of reasoning (i.e., incorporation without express citation).<sup>16</sup> Functionally speaking, transjudicial communication allows a listening court to resolve particularly difficult legal issues through express or implied affirmation of legal arguments made by courts of foreign jurisdictions. In this way, transnational legal arguments cross-fertilize.

With respect to the second function—increased legitimacy of individual judicial decisions—Slaughter points out how transjudicial communication, whether horizontal or vertical, with express or implied citation, legitimizes a listening court’s decision.<sup>17</sup> A listening court may intend to arrive at a correct statement of the law (assuming such a statement exists) or to persuade the court’s audience of lawyers, litigants and citizens (assuming a general indeterminacy in the law).<sup>18</sup> Regardless, transjudicial communication confers authority upon what others might perceive as an irrational and illegitimate decision.

### *C. Communicating Through What is Common*

What sets up and perpetuates transjudicial communication? By virtue of their common institutional mission to apply and interpret the law, common law courts are uniquely positioned to engage in transjudicial communication. What makes such communication more

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<sup>13</sup> Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> Slaughter, *supra* note 4, at 118.

<sup>16</sup> *Id.* at 119.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

or less frequent or elaborate depends on how transnational courts build upon common methods of legal reasoning.<sup>19</sup> Specifically, Slaughter refers to the use and invocation of clear legal rules and case precedence.<sup>20</sup> The common enterprise of “balancing rights and duties, individual and community interests, and the protection of individual expectations,” argues Slaughter, “transcends any cultural or ideological differences between different common law systems.”<sup>21</sup> Once the common enterprise begins, a global community of courts might develop whereby courts further acknowledge a common set of principles that define their own mutual relations.<sup>22</sup> The prerequisite to such a development, however, is the pursuit of transjudicial communication through common methods of legal reasoning.

## PART II: ONE (NOT SO) COMMON METHOD OF LEGAL REASONING: LEGAL ARGUMENT BY ANALOGY

### A. *Assessing What is Common*

Slaughter’s typology assumes that transnational courts might benefit from cross-citation and cross-fertilization of legal ideas because they share common ways to arrive at judicial decisions. Thus, if Court B of Country B cites prior precedence from its own jurisdiction, formulates and applies legal rules, and articulates coherently its reasoning and conclusion, it would be permissible, indeed even desirable, for it to cite to case law of Court A of Country A as persuasive authority, assuming that Court A shares the same methods of legal reasoning. But even if Courts A and B share the same judicial methodology, they may not consistently utilize the methodology in the same manner.<sup>23</sup> Indeed, transjudicial communication cannot readily be built upon inconsistently applied methods of legal reasoning.

To help illustrate this point, consider one method of legal reasoning courts frequently use in their decisions: legal argument by analogy.<sup>24</sup> The use of legal argument by analogy by courts of different jurisdictions or countries may ostensibly appear to be common. Upon further scrutiny, however, legal argument by analogy is not commonly

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<sup>19</sup> *Id.* at 125.

<sup>20</sup> *Id.* at 126.

<sup>21</sup> *Id.* at 127.

<sup>22</sup> Slaughter, *supra* note 5, at 194. See also ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 69 (Princeton Univ. Press 2004).

<sup>23</sup> Note here that my point applies no less to courts within the same country and jurisdiction (e.g., Courts A1 and A2).

<sup>24</sup> What Slaughter describes rather vaguely as “the ability to formulate a rule of general applicability and to generate coherent distinctions between the outcome in the case at hand and divergent outcomes in apparently similar cases.” Slaughter, *supra* note 4, at 126.

utilized in the same manner and is in fact poorly understood and applied.

*B. Legal Argument by Analogy: Purpose and Methodology*

Judges render legal arguments by analogy when they make claims or derive conclusions about uncertain factual issues by comparing the relevant similarities and differences between those issues and the issues of another distinct case or concept.<sup>25</sup> More generally, legal argument by analogy is “the use of examples in the process of moving from premises to conclusions in an argument.”<sup>26</sup> In common law systems, the “examples” used by judges are legal precedents or prior cases; more precisely, common law judges reason from precedential analogies, particularly in constitutional cases.<sup>27</sup> In order to resolve their doubts and disputes about factual issues, judges run through examples to discern who or what might be similarly or dissimilarly situated.<sup>28</sup>

Professor Sunstein summarizes the structure of legal argument by analogy in four steps:

- (1) Some fact pattern *A* has a certain characteristic *X*, or characteristics *X*, *Y*, and *Z*; (2) Fact pattern *B* differs from *A* in some respects but shares characteristics *X*, or characteristics *X*, *Y*, and *Z*; (3) The law treats *A* in a certain way; (4) Because *B* shares certain characteristics with *A*, the law should treat *B* the same way.<sup>29</sup>

Two cases may be different from each other in innumerable ways; what renders them *analogous* is when there are no *relevant* differences between them—that is, any differences between the two cases do not themselves make a difference with respect to the actual precedents attached to them.<sup>30</sup> Precedents are narrow conclusions of law that judges make based on their choice of distinctive facts in a fact pattern. For example, Jehovah’s Witnesses and Muslims have significant differences in their beliefs and practices, but for purposes of protecting the free exercise of their religion in the United States, both groups may be analogously situated. If in one case a court upholds a regulation that permits a Jehovah’s Witness to distribute literature in a

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<sup>25</sup> See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 87 (1988).

<sup>26</sup> Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 934 (1996).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 937.

<sup>29</sup> SUNSTEIN, *supra* note 8, at 65.

<sup>30</sup> *Id.* at 67.

town entirely owned by a private company,<sup>31</sup> in a subsequent case a court should uphold a regulation that permits a Muslim to do the same, notwithstanding the numerous differences in the beliefs and practices of Jehovah's Witnesses and Muslims. The judge in the second case—the case of the Muslim—would deem such differences irrelevant in arriving at her decision. In this manner, the first and second cases would be analogous.

If legal argument by analogy requires two cases to be relevantly similar with no relevant differences between them, and a judge must decide when differences prove relevant based on her own convictions, then the method itself can be characterized as subjective. Sunstein identifies this subjectivity as an inherent limitation to legal argument by analogy. He argues that legal argument by analogy “operates without anything like a deep or comprehensive theory that would account for the particular outcomes it yields. . . the judgments that underlie convictions about the relevant case are incompletely theorized.”<sup>32</sup> By incompletely theorized agreements, Sunstein means that judges suggest general principles that capture their convictions and render cases analogous, but they do not test those principles against specific examples outside the universe of the facts of the case at hand.<sup>33</sup> A judge's generally articulated principle may fail when held up against such examples, but so long as the general principle explains the case and analogy at hand, a judge can—and indeed should—invoke it. For Sunstein, the principal virtue of legal argument by analogy is that judges who disagree at the level of comprehensive theory may nevertheless be able to agree on low-level analogies among cases.<sup>34</sup> Society benefits when judges reach practical agreement against a background of moral controversy through legal argument by analogy.<sup>35</sup>

If Sunstein's depiction of the inherent limitations of legal argument by analogy is accurate—that legal arguments by analogy are based on incompletely theorized agreements that have low formal effi-

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<sup>31</sup> See *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that the managers of a company-owned town could not curtail the religious liberty of a Jehovah's Witness distributing religious literature).

<sup>32</sup> SUNSTEIN, *supra* note 8, at 68.

<sup>33</sup> *Id.* at 36. See also Cass R. Sunstein, *Commentary: Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

<sup>34</sup> Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1181 (1999) (arguing that “the practice of reasoning by analogy from prior decisions has advantages, both epistemic and institutional, that exceed its rational force.”).

<sup>35</sup> *Id.* See also SUNSTEIN, *supra* note 8, at 36. Sunstein argues that incompletely theorized agreements allow for greater collaboration in the face of disagreements and are practically significant in terms of generating relevant laws.

cacy but that are nonetheless socially useful—then legal argument by analogy can well be used as a common method of legal reasoning for transjudicial communication. So long as courts adhere to the generally understood structure of legal argument by analogy of the kind Sunstein sets forth, common law judges should be free to analogize to foreign cases in their domestic jurisprudence regardless of the depth of the general principles they articulate. Thus, it is essential to determine whether legal argument by analogy has more rational force than what Sunstein concedes.

### C. *Intellectual Honesty in Legal Argument by Analogy*

Sunstein is not wholly skeptical about the rational force of legal argument by analogy. He identifies what he deems to be inherent limitations to the method while also recognizing the method to be the best that judges and lawyers have to work with. Professor Brewer identifies scholars such as Sunstein who stake faith in legal argument by analogy by foregoing the need to rationally articulate and justify judges' use of relevancy in their analogical arguments as "mystics."<sup>36</sup> In the name of practicality and utility, mystics blindly accept what they deem to be an inherent subjectivity in legal argument by analogy.

Brewer points out that a mystical belief in legal argument by analogy neglects to consider the actual rational force behind the method. Specifically, he argues that the general principles through which judges analogize cases are not necessarily based on incompletely theorized agreements, as Sunstein would contend, but rather on a clearly defined scheme of argument that is formally cognizable and that can be evaluated and critiqued. Brewer reconstructs the conventional structure of legal argument by analogy with three distinct components.

The first component is what he characterizes as "abduction in the context of doubt."<sup>37</sup> A judge who is equipped with a set of legal propositions based on fact patterns from prior cases, but who has before her a new competing fact pattern that might potentially cast doubt on the scope of those propositions, might seek to make consistent her set of propositions with the new competing fact pattern by discovering a rule that encapsulates both the prior and present fact patterns. If given this rule (R), then the set of propositions (P) could logically apply to the new competing fact pattern (F). The judge, thereby, first discovers and then tentatively accepts R to be an inference to the best legal explanation of how to apply P to F (i.e., the judge abduces R).<sup>38</sup> Having derived R, the judge next applies R to examples

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<sup>36</sup> Brewer, *supra* note 26, at 951.

<sup>37</sup> *Id.* at 962.

<sup>38</sup> *Id.*



outside the context of the case at hand to test its validity. In so doing, the judge implicitly provides some justification (J) for why she chose R (the judge's justification could reflect her convictions, the standards of her community, etc.). Brewer identifies this process of confirming or disconfirming R as the second component of legal argument by analogy. Finally, once the judge confirms the validity of R (to the extent she can), she applies R to trigger the application of P to F and thus completes her analogy. Brewer refers to R as the "analogy-warranting rule" and to J as the "analogy-warranting rationale."<sup>39</sup>

Put differently, if a judge analogizes two items, be they cases or judgments, then she should show how the relevant shared similarities between the items logically relate to some other inferred similarity between the items. When she articulates this relation, she is said to be using an analogy-warranting rule. A judge does not arbitrarily make an analogy; some reason motivates her analogical choice. The reason is the analogy-warranting rationale. Brewer introduces the following formal scheme to explain his logical form of legal argument by analogy:

Where  $x, y, z$  are individuals and  $F, G, H$  are predicates of individuals:

Step 1:  $z$  has characteristics  $F, G, \dots$

Step 2:  $x, y, \dots$  have characteristics  $F, G, \dots$

Step 3:  $x, y, \dots$  also have characteristic  $H$ .

Step 4: The presence in an individual of characteristics  $F, G, \dots$  provides sufficient warrant for inferring that  $H$  is also present in that individual.

Step 5: Therefore, there is sufficient warrant to conclude that  $H$  is present in  $z$ .<sup>40</sup>

The analogy-warranting rules and rationales that undergird legal argument by analogy for Brewer undercut Sunstein's formulation of incompletely theorized agreements. Brewer formalizes the nexus between a judge's unexpressed convictions and her analogical choice. By virtue of analogy warranting rules and rationales, a judge can formally construct the general principles that drive her particular analogical choice. In so doing, a judge's analogical choice may be critically evaluated. Sunstein's formulation of incompletely theorized agreements takes for granted a judge's convictions and provides no basis or mechanism to assess the validity of her analogical choice. With Brewer's formulation, beyond the utility of its craft and convenience, legal argument by analogy may actually be subject to rational scrutiny.

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<sup>39</sup> *Id.* at 965.

<sup>40</sup> *Id.* at 966.

Intellectual honesty cautions a judge from venturing down a path of analogical decision-making that might not be able to withstand rational scrutiny. Such honesty tempers the use of an otherwise convenient tool of legal reasoning and makes it more difficult for judges to employ valid analogical arguments in judicial opinions. While judges in common law systems might consistently apply legal argument by analogy—that is, while the invocation of the method might be common, as Slaughter suggests, and the structure of analogical argument itself “invariant,”<sup>41</sup> as Brewer suggests—the successful *application* of legal argument by analogy is not very common.

#### *D. Poor Analogical Reasoning*

Notwithstanding their contrasting formulations of the rational force behind legal argument by analogy, both Sunstein and Brewer would agree with the basic characteristics that underlie poor analogical reasoning. Two main problems often emerge when judges employ legal argument by analogy. First, judges often simply announce that a particular case or fact pattern is analogous to the case or fact pattern at hand without concretely describing the relationship between the two cases or fact patterns.<sup>42</sup> That is, they invoke the nominal force of legal argument by analogy without parsing through the precise relationships between the source and target cases or fact patterns. Any argument for the analogical relationship is left unexpressed. Sunstein refers to this as a problem of “bad formalism.”<sup>43</sup> Second, judges do not adequately defend judgments about relevant similarities and differences.<sup>44</sup> More frequently, judges gloss over the relevant differences between the source and target cases or fact patterns and overlay their similarities.

### PART III: LEGAL ARGUMENT BY ANALOGY AND *ZAHHEERUDDIN V. STATE*

So far, I have defined Slaughter’s typology for transjudicial communication and have questioned her assumption that common methods of legal reasoning may encourage cross-fertilization of legal ideas. I have shown that legal argument by analogy is ill-perceived as a loose, convenient tool for judges. Rather, legal argument by analogy is formally structured, rigorous, and, in its most robust form, subject to rational scrutiny. While commonly invoked by common law courts, legal argument by analogy is less commonly applied to intellectually honest ends. Transjudicial communication, therefore, should not be

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<sup>41</sup> *Id.* at 965.

<sup>42</sup> SUNSTEIN, *supra* note 8, at 77.

<sup>43</sup> *Id.* at 73.

<sup>44</sup> *Id.*

encouraged on the basis of a method of legal reasoning that is uncommonly understood and applied.

To help support these contentions, I analyze a seminal constitutional decision by the Supreme Court of Pakistan: *Zaheeruddin v. State*. The controversial 1993 majority opinion illustrates the significant risks and consequences of employing legal argument by analogy in the transjudicial context.

#### A. *Zaheeruddin v. State: Background*

On July 3, 1993, the Supreme Court of Pakistan dismissed eight appeals brought by members of the Ahmadiyya Muslim Community<sup>45</sup> who were arrested under Ordinance XX and Pakistan Penal

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<sup>45</sup> The Ahmadiyya Muslim Community is a contemporary messianic movement founded in 1889 by Mirza Ghulam Ahmad (1839–1908), who was born in the small village of Qadian in Punjab, India. See THE COLUMBIA ENCYCLOPEDIA (2003), available at <http://www.encyclopedia.com/doc/1E1-Ahmadiyy.html> (last visited June 30, 2011). In 1889, Ahmad announced that he had received divine revelation authorizing him to accept the *baya* or allegiance of the faithful. See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*, available at <http://alislam.org/introduction> (last visited June 30, 2011). In 1891, he claimed to be the expected *mahdi* or reformer of the latter days, the Awaited One of the world community of religions, and the messiah foretold by the Prophet Muhammad in the seventh century. See THE COLUMBIA ENCYCLOPEDIA (2003). Ahmad's teachings, incorporating Indian, Sufi, Islamic, and Western elements, attempted to revitalize Islam in the face of the British raj, Protestant Christianity, and resurgent Hinduism. See *id.* Thus, Ahmad introduced the Ahmadiyya Muslim Community as a revivalist movement within Islam and not as a new religion.

Members of the Ahmadiyya Muslim Community (“Ahmadis”) profess to be Muslims. They contend that Ahmad meant to revive the true spirit and message of Islam that the Prophet Muhammad introduced and preached; he meant to relieve Islam from all misconstrued or superstitious teachings that had tainted it for fourteen centuries. See M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. 275, 279 (1995). Orthodox Muslims, particularly Sunnis, believe that Ahmad had proclaimed himself as a prophet, thereby rejecting a fundamental tenet of Islam: *Khatme Nabuwat* (literally to orthodox Muslims, a belief in the “finality of prophethood”). See YVONNE Y. HADDAD & JANE I. SMITH, MISSION TO AMERICA: FIVE ISLAMIC SECTARIAN COMMUNITIES IN NORTH AMERICA 52 (1993). Ahmadis respond that Mirza Ghulam Ahmad was a non law-bearing prophet subordinate in status to Prophet Muhammad; he came to illuminate Islam in its pristine beauty and to reform its tainted image, as predicted by Prophet Muhammad. See Siddiq, *supra*, at 280. For Ahmad and his followers, the Arabic *Khatme Nabuwat* does not refer to the finality of prophethood in a literal sense—that is, to prophethood's chronological cessation—but rather to its culmination and exemplification in Prophet Muhammad (*i.e.*, *Khatme Nabuwat* signifies the “seal of prophethood”). See *id.* According to Ahmadis, the belief that the Prophet Muhammad is the last prophet in chronology does not exalt his spiritual status, as does

Code (PPC) Sections 295 and 298—the so-called “anti-blasphemy laws.”<sup>46</sup> The collective complaint in the case, *Zaheeruddin v. State*,

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the belief that the Prophet Muhammad is the seal of prophets and the “last word” on prophets. M.G. Farid, ed. *THE HOLY QUR’AN* n.2359 (1981) (quoting commentary written by Mirza Bashiruddin Mahmud Ahmad, the Ahmadiyya Community’s Second Caliph and son of Mirza Ghulam Ahmad). According to his followers, contrary to accusations leveled against him, Ahmad came to crystallize the teachings of Islam and thereby elevate the status of Prophet Muhammad. *Id.*

According to Ahmadi sources, the Ahmadiyya Muslim Community currently has branches in over 195 countries and a worldwide membership exceeding tens of millions, with large concentrations of Ahmadis in India, Pakistan, Ghana, Burkina Faso, and The Gambia. See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*. There are roughly four million Ahmadis living in Pakistan. See Siddiq at 283.

<sup>46</sup> See PAK. PENAL CODE §§ 298B, 298C [hereinafter ORDINANCE XX].

According to § 298B:

- (1) Any person of the Quadiani group or the Lahori group (who call themselves ‘Ahmadis’ or any other name) who by words, either spoken or written, or by visible representation
  - a. refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (*peace be upon him*), as ‘Ameer-ul-Mumineen,’ ‘Khalifat-ul-Mumineen,’ ‘Kilafat-ul-Muslimeen’ ‘Sahaabi’ or ‘Razi Allah Anaho’;
  - b. refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (*Peace be upon him*), as ‘Ummul-Mumineen’;
  - c. refers to, or addresses, any person, other than a member of the family (‘Ahle-bait’) of the Holy Prophet Muhammad (*peace be upon him*), as ‘Ahle-bait’; or
  - d. refers to, or names, or calls, his place of worship as ‘Masjid’;
 shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

- (2) Any person of the Quadiani group or Lahori group (who call themselves as ‘Ahmadis’ or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as ‘Azan’ or recites Azan as used by Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

According to § 298C:

Any person of the Quadiani group or Lahori group (who call themselves ‘Ahmadis’ or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of

was that Pakistan's anti-blasphemy laws violated the constitutional rights of religious minorities. The court dismissed the complaint on two main grounds. First, the court held that Ahmadi religious practice, however peaceful, angered and offended the Sunni majority in Pakistan; to maintain law and order, Pakistan would, therefore, need to control Ahmadi religious practice. Second, Ahmadis, as non-Muslims, could not use Islamic epithets in public without violating company and trademark laws. Pakistan, the court reasoned, had the right to protect the sanctity of religious terms under these laws and the right to prevent their usage by non-Muslims.

In his majority opinion, Justice Abdul Qadeer Chaudhry relied almost exclusively on U.S. constitutional and trademark law to arrive at his decision to uphold the constitutionality of Pakistan's anti-blasphemy laws. Justice Chaudhry's legal arguments by analogy demonstrate the court's striking inattention to the relevant distinctiveness of U.S. constitutional and trademark law.

### B. Trademark Analogy

Pakistan's anti-blasphemy laws subject those who "indirectly or directly pose as a Muslim" through "[written or verbal] words" or "verbal representation" to fine, imprisonment, or capital punishment. In his majority opinion, Justice Chaudhry identified the legal significance of protecting the sacredness of Islamic terms through Pakistan's anti-blasphemy laws. He relied on the company laws of Britain, India, and Pakistan as well as U.S. trademark law to justify prohibiting Ahmadis from using Islamic epithets or practices to exercise their faith. In arriving at this conclusion, he analogizes to U.S. trademark law thus:

[intentionally] using trade names, trade marks, property marks or descriptions of others in order to make [third parties believe] that they belong to the user thereof amounts to an offence, and not only the perpetrator can be imprisoned and fined but damages can be recovered and [an] injunction to restrain him issued. This is true of

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either description for a term which may extend to three years and shall also be liable to fine.

*See also* PAK. PENAL CODE § 295C (part of the Criminal Law Amendment Act of 1986, which amended the punishments enumerated in §§ 298B and 298C to include death).

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (*peace be upon him*) shall be punished with death, or imprisonment for life, and shall be also liable to fine.

goods of even very small value. For example, the Coca Cola Company will not permit anyone to sell, even a few ounces of his own product in his own bottles or other receptacles, marked Coca Cola, even though its price may be a few cents. . . The principles involved are: do not deceive and do not violate the property rights of others. . . The [Ahmadis] who are non-Muslims want to pass off their faith as Islam? . . . [a] [Muslim] believer. . . will not tolerate a Government which is not prepared to save him of such deceptions or forgeries. . .<sup>47</sup>

Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan has exclusive right to protect the sacredness of Islamic words, names, and epithets (i.e., it has exclusive right over its product).
- (2) Coca Cola, too, has exclusive right over its product.
- (3) Coca Cola will not permit any user to sell its product or to deceive others into thinking Coca Cola's product belongs to the user.
- (4) Pakistan should also not permit anyone to use Islamic words, names, and epithets or to deceive others into thinking such Islamic words, names, and epithets belong to that person.
- (5) Ahmadis use Islamic words, names, and epithets even though they are non-Muslims.
- (6) Therefore, Pakistan should prohibit Ahmadis from using Islamic words, names, and epithets.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if commercially valuable property can be protected under company and trademark law, then religion can be protected under company and trademark law. Justice Chaudhry makes his analogy-warranting rationale for this rule clear: both commercially valuable property and religion should be free from deceptive use.

Justice Chaudhry's analogy-warranting rule is fallacious on several fronts. First, no foreign jurisdiction cited in *Zaheeruddin*—British, Canada, or the U.S.—treats restrictions on commercial speech in the same way as restrictions on religious freedom.<sup>48</sup> In fact, in the U.S. context, federal trademark law makes clear that religious prayers and names cannot be trademarked.<sup>49</sup> Second, Islam, unlike Coca Cola,

<sup>47</sup> *Zaheeruddin*, (1993) 26 SCMR at 1753–54 (Pak.).

<sup>48</sup> Siddiq, *supra* note 45, at 296 n.99 (citing KAREN PARKER, RELIGIOUS PERSECUTION IN PAKISTAN: THE AHMADI CASE AT THE SUPREME COURT 10 (1993)).

<sup>49</sup> *Id.* at 296–97.

is not a registered company, and religion itself is not commercially valuable property because religious terms are used generically.<sup>50</sup> Third, company and trademark law protect a company's rights to a unique product; that Islamic terminology is somehow unique to Islam is an inaccurate assumption since many Islamic terms have emanated from other monotheistic religious traditions, such as Christianity and Judaism.<sup>51</sup> This last point begs the question whether Pakistan itself has violated company and trademark law under its own Supreme Court's standard.

### C. *Public Order and Safety Analogies*

#### i. *Cantwell v. Connecticut*<sup>52</sup>

The *Zaheeruddin* court's main holding was that Pakistan's anti-blasphemy laws can constitutionally restrict Ahmadi religious practice in order to maintain public order and safety and to safeguard the religious sentiments of Pakistan's majority Sunni population. In arriving at this holding, Justice Chaudhry again invoked U.S. federal law. The Court cited *Cantwell v. Connecticut* to argue that the freedom to profess one's religion may be legally restricted. Justice Chaudhry analogizes thus:

The fundamental right. . . is the 'freedom to profess religion' but it has been made 'subject to law, public order and morality.' The court [in *Cantwell*] [has] held that this right embraces two concepts: freedom to believe and freedom to act. . . The latter cannot be absolute. . . and remains subject to regulation for the protection of

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<sup>50</sup> See K.M. Sharma, *What's in a Name? Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 188 (1997-1998) ("Religion as an abstract sentiment or idea is manifestly unpatentable. References to trademarks and company law are, thus, totally inappropriate in that religion is not a commercial property, nor is Islam a registered corporate entity.").

<sup>51</sup> Siddiq, *supra* note 45, at 299.

<sup>52</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1939). In *Cantwell*, defendant Jehovah's Witnesses were arrested and later convicted after they distributed religious materials in a New Haven neighborhood. Defendants claimed their activities, which included the distribution of books and pamphlets, did not fall within Connecticut General Statute § 6294, which prohibits "[any] person from soliciting money, services, subscriptions or any valuable thing for any alleged religion, charitable, or philanthropic cause from [someone] other than a member of the organization for whose benefit such person is soliciting. . . [without approval by] the secretary of the public welfare council. . ." The Court held that § 6294 deprived defendants of their liberty without due process of law in contravention of the First and Fourteenth Amendments. *Id.* at 303. In so holding, the Court in dicta commented that religious conduct might be subject to regulation for the protection of society so long as the regulation does not violate protected freedoms. *Id.* at 304.

society. . .The phrase ‘subject to law’. . .does neither invest the legislature with unlimited power to unduly restrict [nor] take away the Fundamental Rights guaranteed in the Constitution, nor can they be completely ignored or by-passed as non-existent. A balance has thus to be struck between the two, by resorting to a reasonable interpretation, keeping in view the peculiar circumstances of each case.<sup>53</sup>

Justice Chaudhry’s analogical argument may be formally represented as follows:

- (1) Pakistan has a free exercise clause in its Constitution.
- (2) The U.S., too, has a free exercise in its Constitution.
- (3) The U.S. Supreme Court in *Cantwell* indicated that the U.S. legislature could restrict the freedom to act insofar as it is for the purpose of protecting society and does not take away one’s fundamental rights.
- (4) The Pakistani legislature could also restrict the freedom to act insofar as it is for the purpose of protecting society and does not take away one’s fundamental rights.
- (5) Pakistan’s anti-blasphemy laws are designed for the protection of society and do not take away one’s fundamental rights.
- (6) Pakistan’s anti-blasphemy laws, therefore, could restrict Ahmadi religious practice to protect Pakistani society.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a legislature can restrict religious practice in the name of public order and safety through a neutral licensing statute,<sup>54</sup> then it can also regulate religious practice in the name of public order and safety through non-neutral anti-blasphemy laws. The analogy-warranting rationale here appears to be that legislatures should be allowed to determine for themselves when it is reasonable to restrict religious practice to protect society.

Justice Chaudhry’s analogy-warranting rule is problematic insofar as it ignores the broad protection for religious freedom given in *Cantwell*. In considering the constitutional challenge to the Connecticut licensing statute before it, the U.S. Supreme Court held that a state statute that prohibits the solicitation of funds for religious, chari-

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<sup>53</sup> *Zaheeruddin*, (1993) 26 SCMR at 1758 (Pak.).

<sup>54</sup> This was not the case in *Cantwell*. The Court struck down the Connecticut statute as unconstitutional because it was not neutral.



table and philanthropic purposes without a license is unconstitutional.<sup>55</sup> A state may impose a time, place, and manner restriction on religious practice, but only through a general (non-neutral) and non-discriminatory piece of legislation.<sup>56</sup> Insofar as the grant of a license to solicit money for a religious cause was left to the discretion of a Connecticut state official, the Connecticut licensing statute was discriminatory, “burdened the exercise of [religious] liberty,” and thus unconstitutional.<sup>57</sup> The court in *Cantwell* clearly did not intend to allow legislatures to restrict religious freedom through non-neutral ordinances. The Supreme Court of Pakistan nevertheless analogized to *Cantwell* to legitimize its decision to uphold the constitutionality of Pakistan’s anti-blasphemy laws. The *Cantwell* analogy provides a telling illustration of how legal argument by analogy can be misused and abused in the transjudicial context.

ii. *Reynolds v. United States*<sup>58</sup>

Justice Chaudhry analogizes to *Reynolds v. United States* to further bolster his contention that non-neutral ordinances may restrict religious liberty. He writes thus:

The Supreme Court of America in the case of Reynolds Vs. United States [sic] held that ‘Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . .Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.’ After taking the above view, the Supreme Court felt justified to ban polygamy, as it was being practiced by Mormons sect on the ground that it was a duty imposed on them by their religion and was not a religious belief or opinion. It must be noted that the observations in the last part of the above [quote] are peculiar to America where the people and not Allah are the sovereign.<sup>59</sup>

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<sup>55</sup> See *Cantwell*, 310 U.S. at 306-07.

<sup>56</sup> *Id.* at 304.

<sup>57</sup> *Id.* at 307.

<sup>58</sup> *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, a member of the Mormon Church, according to the dictates of his faith, practiced bigamy and was charged and arrested pursuant to U.S. Revised Statutes Section 5352, which outlawed bigamy. The Court affirmed the conviction arguing that a federal statute may interfere with religious practice so as not “to permit every citizen to become a law unto himself.” *Id.* at 167.

<sup>59</sup> *Zaheeruddin*, (1993) 26 SCMR at 1758 (Pak.).

Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan accords its legislature the power to reach actions subversive of good order.
- (2) The U.S., too, accords its legislature the power to reach actions subversive of good order.
- (3) The U.S. Supreme Court in *Reynolds* indicated that state statutes can interfere with religious practices.
- (4) Pakistan's anti-blasphemy laws can also interfere with religious practices.
- (5) Pakistan's anti-blasphemy laws, therefore, can interfere with Ahmadi practices.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a court can uphold the constitutionality of statutes of general applicability that restrict polygamous acts already deemed to be criminal and odious under domestic law, then the court can also uphold the constitutionality of non-neutral ordinances that restrict religious practices not deemed to be criminal or odious under domestic law, but that are nonetheless criminal or odious in the eyes of a majority population. The analogy-warranting rationale is embedded in the final line of the extended quote above—namely that a sovereign nation should be allowed to restrict the activities of a religious group that offend the sentiments of a nation's majority people.

Once again, Justice Chaudhry's analogy-warranting rule fails to withstand rational scrutiny. The statutes banning polygamy predated the religious practices at issue in *Reynolds*.<sup>60</sup> They were of general application and did not target any particular group.<sup>61</sup> The practice of polygamy had already been criminalized in the United States.<sup>62</sup> The *Reynolds* court held that certain religious groups were not exempt from generally applicable laws that restricted practices that had already been criminalized in the United States. The situation at issue in *Zaheeruddin* was entirely different. Pakistan's anti-blasphemy laws explicitly criminalized the activities of Ahmadis in Pakistan. These practices, which include calling an Ahmadi place of worship a '*masjid*' or mosque, reciting the '*Adhan*' or call for prayer and reciting the Arabic greeting '*Assalamo Alaikum*' ("peace be upon you"), were never previously made to be illegal.<sup>63</sup> Indeed, practicing the basic tenets of

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<sup>60</sup> Siddiq, *supra* note 45, at 303.

<sup>61</sup> *Reynolds*, 98 U.S. at 146, 164.

<sup>62</sup> *Id.*

<sup>63</sup> See Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217, 220-29 (2003).

Islam in Pakistan can hardly be said to be subversive of public order or to be odious. What the Supreme Court of Pakistan found to be subversive in *Zaheeruddin* was the transformation of basic Islamic practice into blasphemy. But blasphemy had never previously been made to be illegal in Pakistan prior to the passage of the very laws at issue in the case.<sup>64</sup> Thus, Pakistan's anti-blasphemy laws are not generally applicable laws.<sup>65</sup> As such, *Reynolds* is simply inapposite authority.

iii. *Hamilton v. Regents of the University of California*<sup>66</sup>

Having established that Pakistan's anti-blasphemy laws may legally restrict Ahmadi religious practice, Justice Chaudhry proceeds to offer a more expansive argument for restricting religious freedom in the name of public safety by citing to *Hamilton v. Regents*. He quotes *Hamilton* and analogizes thus:

In *Hamilton Vs. Board of Regents of University of California* [sic], where students appealed to the Supreme Court that the act of the university to make a regulation for compulsory military training was contrary to their religious belief, the court rejected that contention, holding that the 'Government owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and assure the enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend the Government against all enemies.' [This] go[es] to show that freedom of religion would not be allowed to interfere with the law and order or public peace and tranquility. . . No one can be allowed to insult, damage or defile the religion of any other class or outrage their feel-

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<sup>64</sup> *Id.*

<sup>65</sup> For the Supreme Court of Pakistan itself to make this determination is problematic, especially considering that in a case that expressly overruled *Reynolds*, *Patrick v. Le Fevre*, the Second Circuit acknowledged the "judiciary's incapacity to judge the religious nature of an adherent's belief." *Patrick v. Le Fevre*, 745 F.2d 153, 157 (2d Cir. 1984).

<sup>66</sup> *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). In *Hamilton*, defendant university regents made a course in military science compulsory for all University of California school students. The university regents suspended a few Christian students who refused to take the prescribed course because of their religious and conscientious objections to war. The Court held that the regents' order requiring compulsory military training did not violate the Due Process Clause of the Fourteenth Amendment. To maintain peace and order, the government could compel citizens against their will to take their place in the ranks of the army of their country and risk the chance of being shot down in its defense. *See id.* at 262-63.

ings. . .Whenever or wherever the state has reasons to believe that the peace and order will be disturbed or the religious feelings of others may be injured, so as to create law and order situation, it may take such minimum preventive measures as will ensure law and order.<sup>67</sup>

Justice Chaudhry's analogical argument might be formally represented as follows:

- (1) The Pakistani government owes a duty to protect its people and maintain law and order, and Pakistani citizens in turn owe a reciprocal duty to defend the government against enemies.
- (2) The U.S government, too, owes a duty to protect its people and maintain law and order, and U.S. citizens in turn owe a reciprocal duty to defend the government against enemies.
- (3) The U.S. Supreme Court in *Hamilton* indicated that religious freedom can yield to a compelling government need.
- (4) In Pakistan, too, religious freedom can yield to a compelling government need.
- (5) The Pakistani government had a compelling need to ensure that the religious feelings of others are not injured.
- (6) The religious liberty of Ahmadis, therefore, can yield to the Pakistani government's compelling need to ensure that the feelings of others are not injured.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a sovereign nation can maintain peace and order by curtailing the religious freedom of students through compulsory military training, then it can also do the same by curtailing the religious freedom of religious minorities through anti-blasphemy laws. Again, Justice Chaudhry makes his analogy-warranting rationale explicit in the *Zaheeruddin* opinion itself: "no one can be allowed to insult, damage or defile the religion of any other class or outrage their feelings."

Justice Chaudhry's analogy-warranting rule is deeply flawed. The U.S. Supreme Court upheld the compulsory military training requirement by the University of California school system because the requirement applied to *all* students of a particular age attending the University who had not yet completed certain levels of education. The requirement was a *neutral* university regulation and not a non-neutral state or federal statute. In refusing to take a compulsory military sci-

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<sup>67</sup> *Zaheeruddin*, (1993) SCMR at 1764 (Pak.).

ence class at the University of California, the students could not assert a liberty interest under the Fourteenth Amendment because the purpose of the university regulation was to effectuate the state's authority to train its citizens to serve in the United States army.<sup>68</sup> The regulation was never intended to restrict the free exercise of religion.<sup>69</sup> Justice Chaudhry misconstrues *Hamilton* as restricting religious liberty in the name of military security. More strikingly, he draws parallels between a neutral university regulation and non-neutral federal anti-blasphemy laws. He curiously equates Pakistan's concerns about not injuring the feelings of its majority Sunni population with the U.S.'s concerns about having adequately trained military soldiers to defend the country.

*iv. Cox v. New Hampshire*<sup>70</sup>

To complete his argument for upholding the constitutionality of Pakistan's anti-blasphemy laws in the name of public safety and order, Justice Chaudhry analogizes to *Cox v. New Hampshire* thus:

Justice Hughes in *Willis Cox v. New Hampshire* also enlightened the same subject [of restricting the free exercise of religion in the name if public order] to say: 'A statute requiring persons using the public streets for a parade or procession to procure a special license therefore from the local authorities does not constitute an unconstitutional interference with religious worship or the practice of religion, as applied to a group marching along a sidewalk in single file carrying signs and placards advertising their religious beliefs.'<sup>71</sup>

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<sup>68</sup> *Hamilton*, 293 U.S. at 260.

<sup>69</sup> *See id.* at 266 (Cardozo, J., concurring) ("Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion. . .").

<sup>70</sup> *Cox v. New Hampshire*, 312 U.S. 569 (1941). Justice Chaudhry also briefly analogizes to *Jones v. Opelika*, 316 U.S. 584 (1942), to underscore the same propositions he gleans from *Cox*. In *Cox*, defendant Jehovah's Witnesses were arrested for marching near city hall carrying religious literature and signs with religious messages without having obtained a license to do so. They claimed that New Hampshire Public Law Chapter 145 § 2, which prohibited a "parade or procession" upon a public street without a special license, was invalid under the Fourteenth Amendment. The Court affirmed the lower court judgment, holding that the regulation of the streets for parades and processions was a traditional exercise of control by the state. The Court also found that the New Hampshire statute was not aimed at any religious or free speech restraint. *Cox*, 312 U.S. at 573-74.

<sup>71</sup> *Zaheeruddin*, (1993) SCMR at 1764 (Pak.).

Remarkably, the passage cited does not appear anywhere in the *Cox* opinion. Nevertheless, taking the fictitious quote as truth for a moment, Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan allows for the free exercise of religion.
- (2) The U.S., too, allows for the free exercise of religion.
- (3) The U.S. Supreme Court in *Cox* [allegedly] upheld statutory restrictions upon religious activities conducted in public streets, in a parade or procession, without a special license.
- (4) Pakistan, too, can promulgate statutory restrictions upon the religious activities of those publicly manifesting their faith without a special license.
- (5) Pakistan's anti-blasphemy laws restrict the religious activities of Ahmadis in the name of public order.
- (6) Pakistan's anti-blasphemy laws, therefore, do not unconstitutionally interfere with Ahmadi religious practice.

Justice Chaudhry's analogy here is particularly problematic since he does not concede that Ahmadis may practice their faith publicly if they secure a special license (the missing logical inference from step (4) to step (5)). Notwithstanding this omission, for Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a court can uphold the constitutionality of a neutral statute that impliedly restricts the free exercise of religion only for a specific time, place, and manner, then a court can also uphold non-neutral anti-blasphemy ordinances that expressly restrict the free exercise of religion for however long the religious practice in question disrupts public order. The analogy-warranting rationale is that a legislature should have statutory authority to regulate public disturbances owing to religion.

Justice Chaudhry's analogy-warranting rule to *Cox* is questionable. The *Cox* court never legitimates interference with religious worship or practice as the *Zaheeruddin* court suggests. The New Hampshire statute sets forth a time, place, and manner regulation and not a prohibition of religious practice.<sup>72</sup> Judge Hughes states clearly that the regulation of street parades must be applied "without unfair discrimination," and that appellants taking part in the parade at issue were "not prosecuted. . .for maintaining or expressing religious beliefs."<sup>73</sup> Far from restricting religious practice, the statutory requirement of obtaining a special license for a parade or procession was "to prevent confusion by overlapping parades or processions, to secure

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<sup>72</sup> *Cox*, 316 U.S. at 576.

<sup>73</sup> *Id.*

convenient use of the streets by other travelers, and to minimize the risk of disorder.”<sup>74</sup> Pakistan’s anti-blasphemy laws are not intended to restrict public practice of religion when such practice interferes with public order and safety. Rather, they are intended to criminalize the entire range of activities of the Ahmadiyya Muslim Community (and other minority religious groups) in Pakistan.

*D. The Implications of Legal Argument by Analogy in Zaheeruddin*  
*i. Persuasive Authority as Controlling Authority*

One possible response to my critique of Justice Chaudhry’s legal arguments by analogy in *Zaheeruddin* may be that the Supreme Court of Pakistan relied on U.S. judicial precedent only as persuasive authority, not controlling authority, to uphold the constitutionality of Pakistan’s anti-blasphemy laws. Because domestic parties cannot invoke foreign cases as controlling authority, the practical effect of poor analogical reasoning in Pakistan may not be as pronounced or significant.

This response may be well taken had the Supreme Court of Pakistan cited at least *some* domestic authority as controlling in *Zaheeruddin* to support its central holdings. But, incredibly, Justice Chaudhry did not invoke a single Pakistani case to hold that Pakistan could restrict Ahmadi religious practice in order to maintain public order and safety and that Pakistan had the right to protect the sanctity of religious terms under company and trademark law. Instead, he relied exclusively on foreign judicial precedent, particularly U.S. constitutional and trademark law. Justice Chaudhry, therefore, effectively used foreign judicial precedent as controlling authority in Pakistan. When a court gives controlling significance to target cases of a foreign jurisdiction, the success or failure of legal argument by analogy becomes that much more critical. Domestic parties may find it difficult to distinguish foreign case law in subsequent litigation; indeed, they must trust judges to rationally articulate the methodology and reasoning behind adopting foreign legal pronouncements.

*ii. Analogizing to U.S. Law in a Shari’a-Based Common Law Regime*

Pakistan is one of a handful of Muslim countries to use a common law system. But the features of Pakistan’s common law system are as peculiar as the analogical mode of reasoning Pakistani judges often utilize. English is one of Pakistan’s official languages (the other, Urdu). Pakistan’s Constitution is written in English and all court documentation and litigation are recorded and conducted in English.

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<sup>74</sup> *Id.* at 575-76.

Many of Pakistan's guiding constitutional principles, however, emanate from Islamic law (*shari'a*), based largely in part on the *ulema's* (class of Muslim clerics) Quranic textual interpretations in Arabic and Urdu.<sup>75</sup> Pakistan's judicial system has several court systems with overlapping and sometimes competing jurisdictions. Pakistan has separate civil and criminal systems with special courts for banking, antinarcotics, and antiterrorist cases, as well as the Federal Shariat Court for certain Hudood offenses (i.e., Islamic laws for serious crimes).<sup>76</sup> The appeals process in the civil system progresses from Civil Court, District Court, High Court, and the Supreme Court. In the criminal system, the progression is Magistrate, Sessions court, High Court, and the Supreme Court. Decisions by the Federal Shariat Court may be appealed directly to the Supreme Court, which has a separate Shariat Appellate Branch consisting of three Muslim judges and two members of the *ulema*.<sup>77</sup>

Because Pakistan's Constitution incorporates elements of Islamic law,<sup>78</sup> common law decisions emanating from Pakistan's civil and criminal systems, apart from the Federal Shariat Court, often also invoke *shari'a*. In *Zaheeruddin*, for example, Justice Chaudhry compared in detail Ahmadi ideology vis-à-vis traditional Sunni Muslim ideology to illustrate how Ahmadi practice is inimical to Islam. To help legitimize his decision, Justice Chaudhry made several references to Pakistan's *shari'a* and even formally adopted a decision rendered by the Federal Shariat Court.<sup>79</sup> Thus, the *Zaheeruddin* opinion, like many federal constitutional decisions in Pakistan, is an admixture of common law and *shari'a* principles.<sup>80</sup> Given this context, Justice

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<sup>75</sup> See Siddiq, *supra* note 45, at 295.

<sup>76</sup> Bernard J. Hibbits, *Pakistan: Courts and Judgment*, JURIST LEGAL INTELLIGENCE (2003).

<sup>77</sup> PAKISTAN CONST., art. VII, § 3A, cl. 203(F).

<sup>78</sup> For example, the repugnancy clause states: "No law shall be repugnant to the teachings and requirements of Islam as set out in the Qur'an and Sunnah [actions of the Holy Prophet], and all existing laws shall be brought into conformity therewith." See PAKISTAN CONST., art. IX, § 227(1). In addition, the Objectives Resolution of 1949, made part of Pakistan's Constitution in 1985, states: "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah." See PAKISTAN CONST., art. I, § 2(a), *amended* by Presidential Order No. 14 (1985).

<sup>79</sup> *Zaheeruddin*, (1993) SCMR at 1752 (Pak.).

<sup>80</sup> Interpreting a constitution in a manner consistent with principles of faith is characteristic of even the American legal system. Sanford Levison has described two dominant faith-based positions regarding constitutional interpretation in the U.S.: Protestant and Catholic. The Protestant position treats the text of the U.S. Constitution alone as the source of all constitutional doctrines and the individual citizen as the text's ultimate interpreter. The Catholic position treats the U.S.



Chaudhry's deference to U.S. federal constitutional law proves deceptive insofar as many of the salient features of the U.S. constitution, such as the Establishment and Due Process Clauses, are simply alien to *shari'a* as understood and applied in Pakistan.<sup>81</sup>

*E. The Deleterious Effects of Zaheeruddin*

As my various critiques illustrate, Justice Chaudhry ignored the relevant dissimilarities between U.S. and Pakistani constitutionalism, made poor analogical choices, and drew illogical inferences by analogy. From a purely legal perspective, the decision is intellectually dishonest and dubious. Unfortunately, however, the consequences of *Zaheeruddin* cut much deeper on a human level.

Pakistani governmental and law enforcement officials have used *Zaheeruddin* to justify nearly two decades of institutionalized, state-supported persecution of religious minorities. In particular, Pakistan's anti-blasphemy laws criminalize the existence of the Ahmadiyya Muslim Community. By upholding the laws' constitutionality, *Zaheeruddin* legitimized and further entrenched Pakistan's anti-blasphemy regime. While the decision purported to combat threats to public safety, the opposite effect has been true. Ahmadis have fallen victim to patent discrimination and sectarian violence.<sup>82</sup> In 1994, within only a year after *Zaheeruddin* was decided, seventeen blasphemy cases, resulting in one conviction, were registered against Ahmadis.<sup>83</sup> Since 1994, blasphemy cases registered against Ahmadis now number in the hundreds. In 2010 alone, 45 Ahmadis have been formally charged in criminal cases (including blasphemy) for profess-

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Constitution and unwritten tradition as the source of all constitutional doctrines and the U.S. Supreme Court as the text's ultimate interpreter. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (Princeton Univ. Press 1988). When a judge reasons by analogy using a source case with one faith-based interpretive bias and a target case with another, she may be necessarily constrained in her selection of relevant shared characteristics between cases. This inhibition becomes especially problematic in the transjudicial context when a court like the Supreme Court of Pakistan analogizes to source cases with *both* Protestant and Catholic interpretive biases even as it uses its own *shari'a*-based interpretive bias. Given this complexity, it is not surprising to note Justice Chaudhry's misconceived analogical choices in *Zaheeruddin*.

<sup>81</sup> A.K. BROHI, *FUNDAMENTAL LAW OF PAKISTAN* 342 (1958).

<sup>82</sup> For example, on May 28, 2010, armed gunmen from the Tehrik-e-Taliban Pakistan massacred 86 Ahmadis while they offered Friday prayers at their mosques in Lahore. See Zahid Hussain & Rehmat Mehsud, *Militants Attack Tiny Pakistani Sect*, WALL ST. J., May 29, 2011.

<sup>83</sup> 1995 BUREAU OF DEMOCRACY, HUMAN RTS. AND LABOR ANN. REP. ON HUMAN RTS. ABUSES: PAKISTAN.

ing their religion.<sup>84</sup> As of December 2010, three Ahmadis languish in prison having been convicted and sentenced to death for committing blasphemy.<sup>85</sup> The offenses charged in Ahmadi cases have included wearing an Islamic slogan on a shirt, planning to build an Ahmadi mosque in Lahore, and distributing Ahmadi literature in a public square.<sup>86</sup>

Among the many benefits Slaughter cites in her typology for transjudicial communication is the potential for greater compliance with international human rights norms. She writes:

Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to increasingly visible international consensus on various issues. . . To the extent that pockets of global jurisprudence are emerging, they are most likely to involve issues of basic human rights. Courts may well feel a particular common bond with one another in adjudicating human rights cases. . . because such cases engage a core judicial function in many countries of the world. They ask courts to protect individuals against abuse of state power. . .<sup>87</sup>

*Zaheeruddin* seriously undermines Slaughter's contention. Not only did Justice Chaudhry seek to limit the free exercise of religion in Pakistan by upholding the constitutionality of Pakistan's anti-blasphemy laws, he disingenuously invoked U.S. constitutional and trademark law to justify his holding. In fact, he employed transjudicial communi-

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<sup>84</sup> 2011 BUREAU OF DEMOCRACY, HUMAN RTS. AND LABOR ANN. REP. ON INT'L RELIGIOUS FREEDOM: PAKISTAN (2010)

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* The persecution of Ahmadis is part of the widespread mistreatment of religious minorities in Pakistan under its anti-blasphemy ordinances. Christians, for example, are also subject to severe religious persecution. *See* Hearing on Pakistan's Anti-Blasphemy Laws Before Tom Lantos Human Rights Comm'n, 111th Cong. (2009) (testimony of Amjad Mahmood Khan), *available at* <http://www.mkausa.org/View-document/1219-Congress-Testimony-Amjad-Khan-10-08-09>. A telling case concerns Ayub Masih, a Christian jailed for making favorable comments about Salman Rushdie, the author of the controversial *Satanic Verses*. A Pakistani court sentenced him to death on April 27, 1998, a year after he survived an attempt on his life during trial. The case was on appeal to the Lahore High Court when Masih's chief defender, Roman Catholic Bishop John Joseph, committed suicide outside the courtroom to protest Masih's death sentence. His act sent shockwaves through the minority Christian community across Pakistan, which protested violently against the anti-blasphemy ordinances immediately thereafter. *See* Dexter Filkins, *Pakistan's Blasphemy Law Under Heightened Scrutiny*, L.A. TIMES, May 9, 1998, at A1.

<sup>87</sup> Slaughter, *supra* note 22, at 78-79.

cation to insulate the Supreme Court of Pakistan from possible foreign criticism of his decision. *Zaheeruddin* is a glaring example of Pakistan's failure to abide by the provisions of her own Constitution and her legal commitments under Article 18 of the Universal Declaration of Human Rights ("UDHR"), Articles 18, 19, 20 and 27 of the International Covenant on Civil and Political Rights ("ICCPR") and other binding peremptory norms related to freedom of religion.<sup>88</sup> This notorious decision is a quintessential example of the very "abuse of state power" Slaughter incorrectly assumes transnational courts would uniformly seek to protect through transjudicial communication.

## CONCLUSION

In his majority opinion in *Printz v. United States*, Justice Antonin Scalia remarked: "Comparative analysis [is] inappropriate to the task of interpreting a constitution."<sup>89</sup> One factor that makes comparative analysis inappropriate is the inherent difficulty for judges to properly employ legal argument by analogy. I have demonstrated that legal argument by analogy is inconsistently understood and applied, and when used transjudicially, can lead to destructive outcomes, particularly with contentious and weighty constitutional cases like *Zaheeruddin* in Pakistan. Legal argument by analogy in the transjudicial context prompts judges to affirm their own country's legislative or public mandate more than it prompts them to tether to international norms. In short, legal argument by analogy is an ill-perceived instrument to further judicial globalization.

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<sup>88</sup> Khan, *supra* note 63, at 230.

<sup>89</sup> *Printz v. United States*, 521 U.S. 898, 921 (1997).



**THE NORTH AMERICAN FREE TRADE  
AGREEMENT: LOOKING AT THE BINATIONAL  
PANEL SYSTEM THROUGH THE LENS OF  
*FREE ENTERPRISE FUND***

*By John J. Garman<sup>1</sup> and Matthew K. Bell<sup>2</sup>*

INTRODUCTION

This paper examines the constitutionality of the binational panels of the North American Free Trade Agreement (“NAFTA”) under the United States Constitution. Part I provides an overview of the binational panel process. Part II outlines the process for challenging the constitutionality of binational panels and the obstacles that must be overcome. Part III discusses possible violations of the Due Process Clause. Part IV analyzes the constitutionality of binational panels under Article II of the United States Constitution. Part V examines the constitutional implications of Article III with respect to the absence of judicial review. Part VI is a case-by-case analysis of previous attempts to challenge the constitutionality of binational panels. The conclusion illustrates how binational panels may violate Article II, Article III, and the Due Process Clause of the 5th Amendment.

Chapter 19 of the NAFTA allows each party to reserve “the right to apply its antidumping . . . and countervailing duty law to goods imported from the territory of the other Party.”<sup>3</sup> Antidumping laws prevent companies from selling products in other countries at unreasonably low prices. Countervailing duty laws are a means to the same end, but are in place to offset government subsidies. In the United States, a domestic firm can ask the Commerce Department to investigate a potential violation of either antidumping or countervailing duty actions.<sup>4</sup> The Commerce Department and the Interna-

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<sup>3</sup> North American Free Trade Agreement, U.S.-Can.-Mex., art. 1902(1), Dec. 17, 1992. 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>4</sup> 19 U.S.C. § 1673(1) (1930).

tional Trade Commission then make a preliminary determination.<sup>5</sup> If both agencies make affirmative findings, they then make final determinations.<sup>6</sup> Prior to the NAFTA, these determinations were appealable to the Court of International Trade,<sup>7</sup> and then the United States Court of Appeals for the Federal Circuit.<sup>8</sup> Mexico and Canada were both dissatisfied with this process due to fear of domestic political bias. Participating countries originally reached a compromise in the U.S.-Canada Free Trade Agreement of 1988,<sup>9</sup> which was later implemented nearly verbatim into the NAFTA. This compromise stripped the Court of International Trade and the Federal Circuit's review power, and placed jurisdiction exclusively in a binational panel.<sup>10</sup>

The case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>11</sup> looms large while analyzing the Appointments and Removal Clause of Article II of the Constitution. In that case, the Supreme Court provided further guidance on how officers are classified and, in addition, struck down the manner in which officers were removed. As this case plays a pivotal role in comparing the Appointments and Removal Clause to the binational panels of the NAFTA, a full review is necessary.

Appellants,<sup>12</sup> Free Enterprise Fund ("the Fund"), received a critical report by Appellees, Public Company Accounting Oversight Board ("the Board"), regarding the Fund's auditing practices.<sup>13</sup> The critical report triggered a deeper investigation by the Board into the Fund's practices.<sup>14</sup> With the investigation and looming possibility of severe penalties, the Fund brought a declaratory judgment action claiming that the Board is unconstitutional, and sought an injunction

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<sup>5</sup> 19 U.S.C. § 1673(2).

<sup>6</sup> 19 U.S.C. § 1673(e).

<sup>7</sup> 19 U.S.C. § 1516(a)(1)(D) (1988) ("[A]n interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint . . . contesting any factual findings or legal conclusion upon which the determination is based.")

<sup>8</sup> 28 U.S.C. § 1295(a)(5) (1988) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of International Trade.")

<sup>9</sup> MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 6 (2000).

<sup>10</sup> NAFTA ch.19 (1993).

<sup>11</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bo.*, 130 S.Ct. 3138 (2010).

<sup>12</sup> "The Fund" is actually a mix of two different groups: Beckstead and Watts, LLP (an accounting firm that received the critical report from the Board) and the Free Enterprise Fund, an organization of which Beckstead and Watts is a member. *Id.* at 3149.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

to prevent the Board from exercising its investigative powers.<sup>15</sup> A look into how the Board operates is necessary to understand the Fund's argument.

The Sarbanes-Oxley Act created the Board to help reign in the wildly volatile financial sector in the aftermath of Enron and other questionable financial practices.<sup>16</sup> The reach of the Board is broad: all accounting firms, domestic and foreign, that wanted to be a part of the American financial industry were required to register with the Board.<sup>17</sup> In doing so, those that were registered were subject to the Board's rules.<sup>18</sup> Additionally, all firms paid a fee directly to the Board.<sup>19</sup>

The five individual board members<sup>20</sup> serve five-year staggered terms<sup>21</sup> and are appointed by commissioners of the Securities and Exchange Commission ("SEC").<sup>22</sup> Together, the commissioners enforce the rules in the Sarbanes-Oxley Act, the rules the SEC promulgates, the rules the Board itself imposes, and professional accounting and auditing standards.<sup>23</sup> In addition to enforcing the above rules, the Board promulgates its own auditing and ethical standards and performs routine inspections of the registered firms.<sup>24</sup> If one of the registered firms fails to abide by any of the rules, the Board can hand down a steep penalty. A willful violation of a Board rule is considered a willful violation of an SEC rule, and is therefore a felony punishable by 20 years in prison or \$25 million dollars in fines.<sup>25</sup> Lastly, and arguably most importantly, only the SEC can remove Board members, and only for good cause.<sup>26</sup>

The heart of the case, and the Fund's key argument, rested with the way the Board members and the SEC commissioners were appointed and removed. Ultimately, the Court latched onto the way the Board members were removed.<sup>27</sup> Because the Board members are only removable by SEC commissioners for good cause, and SEC commissioners are removable by the President only under a *Humphrey's*

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<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. § 7211(a) (2010).

<sup>17</sup> *Free Enter. Fund*, 130 S. Ct. at 3147

<sup>18</sup> *Id.* at 3147-48.

<sup>19</sup> *Id.* at 3147.

<sup>20</sup> 15 U.S.C. § 7211(e)(1).

<sup>21</sup> *Id.* § 7211(e)(5).

<sup>22</sup> *Id.* § 7211(e)(4).

<sup>23</sup> *Id.* §§ 7215(b)(1), (c)(4).

<sup>24</sup> *Id.* §§ 7213-14.

<sup>25</sup> *Free Enter. Fund*, 130 S. Ct. at 3148.

<sup>26</sup> 15 U.S.C. § 7211(e)(6).

<sup>27</sup> *Free Enter. Fund*, 130 S. Ct. at 3148-49.

*Executor*<sup>28</sup> standard, a dual-level removal cloud exists.<sup>29</sup> The existence of both standards means neither the President nor the SEC commissioners have direct control over the Board members.<sup>30</sup> Because the SEC cannot remove a Board member at will, the President cannot hold the Commission accountable for the Board's behavior.<sup>31</sup> The President can only act when he so disagrees with the Commissioners' determination of good cause that its unreasonableness reaches the *Humphrey's* standard.<sup>32</sup>

Therefore the Court concluded that the Board operates under a dual-level of good cause removal, which directly conflicts with the constitution's separation of powers.<sup>33</sup> Although in dicta, the Court stated, "While we need not decide the question here, a removal standard appropriate for limiting government control over private bodies may be inappropriate for officers wielding the executive power of the United States."<sup>34</sup>

Although the Fund raised an additional challenge to the Board using the Appointments clause, the Court found it without merit.<sup>35</sup> The main challenge under the Appointments clause was that the Board members were principal officers and therefore the President was required to seek the advice and consent of the Senate prior to appointing the members.<sup>36</sup> While the Court rejected the Fund's argument and determined that the Board Members were not principal officers, they did so only after stating that the SEC Commissioners, because of the opinion, possessed the ability to remove Board Members at will in order to avoid violating the Constitution.<sup>37</sup> Therefore, the Court left open the possibility that had there existed only a single level of removal for Board Members - a higher one than an at-will standard - the Board Members would be considered principal officers. As such they would have been subject to Presidential appointment with the advice and consent of the Senate.<sup>38</sup> Nevertheless, the holding of the case was limited to the removal procedures only.<sup>39</sup>

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<sup>28</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935) (citing 15 U.S.C. § 1) (finding that a Commissioner may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office).

<sup>29</sup> *Free Enter. Fund*, 130 S. Ct. at 3151.

<sup>30</sup> *Id.* at 3154.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3151.

<sup>34</sup> *Id.* at 3158.

<sup>35</sup> U.S. CONST. art. II, § 2, cl. 2; *id.* at 3162.

<sup>36</sup> U.S. CONST. art. II, § 2, cl. 2; *id.* at 3162.

<sup>37</sup> *Free Enter. Fund*, 130 S. Ct. at 3162.

<sup>38</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>39</sup> *Free Enter. Fund*, 130 S. Ct. at 3164.



The impact of this decision has the potential to reach the binational panels of NAFTA. As discussed below, the way panel members are selected and removed may follow the Court's reasoning in *Free Enterprise Fund* and therefore could be unconstitutional.

## I. BINATIONAL PANEL SYSTEM

Binational panels decide whether an administrative determination was correct under the laws of the country that rendered it.<sup>40</sup> The panel may remand for further proceedings consistent with its decision.<sup>41</sup> The panel's decision is generally binding and non-reviewable, with one exception for an "extraordinary challenge."<sup>42</sup> These qualities are judicial in nature, and the non-reviewability factor essentially makes the binational panel the court of last resort.<sup>43</sup>

Binational panels are made up of five members selected from a 75-person roster.<sup>44</sup> Similar to arbitration, the parties themselves develop the roster with each selecting two panelists subject to challenge by the opposing party. The parties then agree on a fifth panelist together, or, if an agreement is not possible, they select the fifth panelist by lot.<sup>45</sup> The chairperson and a majority of the panel must be lawyers, but there is no requirement that all panelists be lawyers.<sup>46</sup> The NAFTA encourages the use of judges, or former judges, to the extent practicable.<sup>47</sup> It should be noted that panel review is not mandatory.<sup>48</sup> In fact, if a party does not request a panel review, the determination may proceed through the judicial review procedures that apply. Due to the generally high dollar amounts at stake and perceived bias in domestic judicial review processes, failure to request a review panel is unlikely. When review panels are requested, they should apply the same substantive law that the agency has applied.

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<sup>40</sup> See NAFTA arts. 1902(1), 1904, 1911.

<sup>41</sup> 19 U.S.C. § 1516a(g)(7)(A) (1994).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> NAFTA Annex 1901.2(1-3).

<sup>45</sup> NAFTA Annex 1901.2(3).

<sup>46</sup> NAFTA Annex 1901.2(2).

<sup>47</sup> NAFTA Annex 1901.2(1).

<sup>48</sup> NAFTA art. 1903(3); see generally *Ontario Forest Industries Assoc. v. United States*, 444 F. Supp.2d 1309, 1313 (Ct. Int'l Trade 2006).

## II. CHALLENGING BINATIONAL PANELS

No court in the U.S. will review any decision made by either a binational panel or an extraordinary panel.<sup>49</sup> The only challenge that is justifiable is a constitutional challenge to the binational panel itself. Such a challenge must be filed in the United States Court of Appeals for the District of Columbia within thirty days of the panel's decision.<sup>50</sup> A decision by the D.C. Circuit may be appealed to the United States Supreme Court within ten days of issuance.<sup>51</sup> This procedure has only been used twice since the implementation of binational panels under the U.S.-Canada Free Trade Agreement of 1988.<sup>52</sup> The lack of challenges to the binational panel, and the fact that the two aforementioned cases never reached a decision on the merits, are likely due to the multiple hurdles that have been placed in the path of a potential challenger. Numerous obstacles negate any motivation for a party seeking to challenge the constitutionality of this quasi-judicial procedure.

The first obstacle is a financial one. Constitutional disputes are pricey in general, but prospective challengers might hesitate before requesting review of a binational panel's decision when faced with the possibility of paying the opposing party's fees as well as their own. The NAFTA requires the petitioning party to pay their opponent's litigation costs if the challenge fails.<sup>53</sup> While the court has discretion as to whether to utilize this provision, the very existence of such a possibility is likely to discourage many companies from pursuing a challenge. The second obstacle is a dual-threat hurdle from the executive and legislative branches. In 1989, President Ronald Reagan

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<sup>49</sup> *Ontario Forest Industries Assoc.*, 444 F. Supp.2d at 1313 (Ct. Int'l Trade 2006) (citing NAFTA arts. 1904(11), (13); 19 U.S.C. § 1516a(g)(2)); *see also* NAFTA annex 1904.13.

<sup>50</sup> 19 U.S.C. § 1516a(g)(4)(C) (“[W]ithin 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action . . . by filing an action in accordance with the rules of the [District of Columbia Circuit] court.”).

<sup>51</sup> 19 U.S.C. § 1516a(g)(4)(H) (“[A]ny final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the United States . . . within 10 days after such order is entered.”).

<sup>52</sup> United States-Canada Free-Trade Agreement, Jan. 21, 1988, Can.-U.S., 27 I.L.M. 281.

<sup>53</sup> 19 U.S.C. § 1516a(g)(4)(F)(ii) (1994) (“[i]f a court upholds the constitutionality of the determination in question in such action, the court shall award to a prevailing party fees and expenses, in addition to any costs incurred by that party, unless the court finds that the position of the other party was substantially justified or that special circumstances make an award unjust.”).

issued an executive order providing that the President accepts “as a whole, all decisions of binational panels and extraordinary challenge committees.”<sup>54</sup> The President may also direct the Commerce Department to take action consistent with the panel decision, even if the binational panels are held unconstitutional.<sup>55</sup>

This combination of congressional and executive action essentially make a constitutional challenge, even if successful, useless to the parties involved in the case. The only reason for such a challenge would be to put an end to or to amend the binational panel process in future disputes because the result in the underlying case would not change. When the financial and practical obstacles are combined, it becomes apparent that constitutional challenges will be rare. These factors were likely central considerations to the settlements that prevented the only two challenges thus far from reaching a decision on the merits. Regardless of the practicality of a constitutional challenge, there are many questions that should be answered regarding binational panels. The next three sections will discuss possible constitutional violations in detail.

### III. DUE PROCESS

“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”<sup>56</sup> As interpreted, this phrase forbids the deprivation of a property interest by government action without the opportunity to be heard by a neutral and detached decision-maker.<sup>57</sup> In 1970, the Supreme Court of the United States outlined a four-prong analysis for due process challenges.<sup>58</sup> First, the challenger must establish that the action was performed under the direction or control of the government. Second, the challenger must prove that a life, liberty, or property interest is affected. Third, the challenger must establish what process is due. Finally, the challenger must prove that the government, or its instrumentality, has not provided such process.<sup>59</sup> Under this test, it is likely that the NAFTA’s binational panel system violates due process.

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<sup>54</sup> Exec. Order No. 12,662, 54 Fed. Reg. 785 (Jan. 9, 1989).

<sup>55</sup> 19 U.S.C. § 1516a(g)(7)(B). Prior to Executive Order, Congress implemented the NAFTA which provided for the President to accept binational decisions, even if they are held unconstitutional.

<sup>56</sup> U.S. CONST. amend. V.

<sup>57</sup> *Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976) (regarding termination of Social Security benefits).

<sup>58</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (involving the question of whether welfare recipient’s interest in continued receipt of welfare was a property interest requiring due process before termination).

<sup>59</sup> *Id.*

Binational panels perform a judicial function typically reserved for the federal judiciary under Article III.<sup>60</sup> Binational panels “are endowed by the State” through 19 U.S.C. § 1516a(g), thus their “functions [are] governmental in nature, they [have] become [an] agenc[y] or instrumentalit[y] of the State and subject to its constitutional limitations.”<sup>61</sup> Likewise, a “sufficiently close nexus” exists between the United States Government and the binational panel system, such that the actions of binational panels are government actions for due process purposes.<sup>62</sup> The nexus is the finality and binding nature that panel decisions have on the executive branch of the U.S. Government. In essence, binational panels are interpreting law, a judicial function, and enforcing law, an executive function. For these reasons, the first prong of the due process analysis is met, and an action by a binational panel should be considered government action. Next, it must be determined whether a property interest is affected.

“Property interests . . . are not created by the Constitution, [but] are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . that secure certain benefits and that support claims of entitlement to those benefits.”<sup>63</sup> The independent source of law in this situation is the statutes for the antidumping and countervailing duties laws. Where a statute creates a property interest, the Due Process clause requires that constitutionally adequate procedures must be followed to alter or end that property interest.<sup>64</sup> In fact, on multiple occasions, the Court of International Trade has recognized that domestic companies threatened with material injury from dumped or subsidized imports have a property interest in the enforcement of laws and are, therefore, entitled to procedural due process.<sup>65</sup> Because the government has created a property right, Congress lacks the constitutional authority to mandate the use of a process that strips a company of that right without complying with due process. This analysis must determine what process a challenger is entitled to and whether the binational panel system affords such a process.

The process that is due to a challenger is an opportunity to be heard by impartial and unbiased decision-makers. In certain instances, the possibility of bias may render adjudication unconstitu-

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<sup>60</sup> See 19 U.S.C. § 1516a(g)(2).

<sup>61</sup> *Evans v. Newton*, 382 U.S. 296, 299 (1966).

<sup>62</sup> See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

<sup>63</sup> *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

<sup>64</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

<sup>65</sup> See, e.g., *Koyo Seiko Co. v. United States*, 796 F. Supp. 517 (Ct. Int'l Trade 1992); *PPG Indus., Inc. v. United States*, 708 F. Supp. 1327 (Ct. Int'l Trade 1989).

tional as a denial of due process.<sup>66</sup> The test for bias rendering adjudication violating due process is a situation “which would offer a *possible* temptation to the average man as judge . . . which might lead him not to hold the balance nice, clear, and true between the [parties].”<sup>67</sup> The Supreme Court has emphasized the need for impartial and unbiased review, even if that means that a judge with no actual bias will be barred from hearing a case.<sup>68</sup> The Court derives its position from the maxim that “justice must satisfy the appearance of justice.”<sup>69</sup> In *Matthews v. Eldridge*, the Supreme Court laid out balance to this stringent rule.<sup>70</sup> In *Matthews*, the Court applied a balancing test weighing the affected private interest with the government’s interest.<sup>71</sup> The apparent government interest at play in instituting the binational panel system is a political interest to satisfy the governments of Canada and Mexico. The Supreme Court has rarely found a governmental interest sufficient to outweigh private due process rights. In 2004, the Court held that even national security interests cannot outweigh the right to an impartial adjudicator.<sup>72</sup> If national security does not weigh enough to tip the scales, then it is doubtful that political and pecuniary interests would weigh more. Now that the initial three elements have been satisfied, it must be determined whether the binational panel system provides the process due.

Binational panels do not provide due process because the process itself creates the possibility of bias. Many argue that if binational panels are unconstitutional for this reason, then all arbitrations would suffer the same fate. However, the compulsory nature of binational panels noticeably distinguishes them from private arbitrations. In private arbitrations, both sides agree to submit to such a system in exchange for cost savings and to promote efficiency. However, in the binational panel arena, if either party demands a binational panel review then both parties are required to submit to this process.<sup>73</sup> The possibility of bias and lack of mutual assent renders the binational panel system unconstitutional.

In 1993, the Supreme Court heard a case that had similar concerns to the binational panel system. In *Concrete Pipe and Products of California, Inc. v. Construction Laborers*, the Court noted disfavor for any process by which the adjudicators chosen, even by private parties,

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<sup>66</sup> *In re Murchison*, 349 U.S. 133, 136 (1955) (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>67</sup> *Tumey*, 273 U.S. at 532 (emphasis added).

<sup>68</sup> *Murchison*, 349 U.S. at 136.

<sup>69</sup> *Id.* (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

<sup>70</sup> *Matthews*, 424 U.S. at 319 (1976).

<sup>71</sup> *Id.* at 335.

<sup>72</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>73</sup> NAFTA § 1904.

had an incentive to be biased.<sup>74</sup> The Court stressed that justice must appear just, and that this requirement is not relaxed when a private party has adjudicative authority by statute.<sup>75</sup> Binational panelists have a dual role that cannot be separated sufficiently to satisfy due process. On one hand, they may be biased towards the party that appointed and pays them. Likewise, the panelists are also usually from the country of the appointing party. On the other hand, they have been asked to serve in a quasi-judicial, unbiased role with little to no training in U.S. law or administrative procedure. This inherent conflict of interest creates at least a possibility of bias. Therefore, some argue that this probability of bias makes binational panels in violation of the Constitution's Due Process Clause.

In addition to the generalized bias of nationality and affinity for the appointing party, binational panelists can have both a professional and pecuniary interest in the outcome of the cases. Professional bias may arise because many of the panelists are trade lawyers and consultants who currently practice before the Commerce Department and International Trade Commission. Thus, panelists are placed in a position to review decisions of the agencies before which they practice. Panelists may feel inclined to take one position because of the possible assistance the decision could lend to their own cases or controversies. In addition, panelists also have a personal financial interest in ensuring repetitive selection by ruling in favor of the party who appointed them in order to continue collecting fees. If a party perceives that one panelist seems to side with them on a regular basis, they are more likely to choose that panelist for future disputes. While panels are unlikely to be filled with biased members, the Supreme Court held that a single biased member taints the entire panel, and thus denies the party's due process rights.<sup>76</sup>

A sufficient process to remove potentially biased members and guard against bias would cure this deficiency. Unfortunately, no such process exists under the NAFTA. A panel member may only be removed if both party-countries consent.<sup>77</sup> The possibility that one party could present evidence of bias and be unable to effectuate removal unilaterally deprives the aggrieved party of their due process right to a neutral and detached decision-maker. Even if the panel is completely unbiased, the process may still violate due process by failing to provide

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<sup>74</sup> *Concrete Pipe & Products of California, Inc. v. Construction Laborers*, 508 U.S. 602, 617 (1993).

<sup>75</sup> *Id.* at 618.

<sup>76</sup> *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260, 264 (D.C. Cir. 1962) (quoting *Berkshire Employees Ass'n v. N.L.R.B.*, 121 F.2d 235, 238-39 (3d Cir. 1941)).

<sup>77</sup> *See* NAFTA Annex 1901.2(6).

a panel that is competent to interpret and apply the United States laws and standards of review.<sup>78</sup>

In considering the use of untrained adjudicators, the Supreme Court upheld a Medicare review system that allowed non-lawyers to serve as decision-makers because the Act specifically required hearing officers to have a *thorough* knowledge of the Medicare program.<sup>79</sup> No such requirement exists under chapter 19 of the NAFTA. In addition, the binational panel system suffers from some other serious practical complications. Under the current system, Canadian lawyers are expected to interpret and apply U.S. law, and Mexican lawyers, who come from a civil law background, are expected to act in a common law system that is foreign to their training. As is human nature, a panelist who is not trained in U.S. law or its standards may focus on the outcome and work backwards from there. This concern has played out before.

In at least two panel opinions, a dissenting member noted that the majority of the panel ignored the standard of review or applicable case law. In *In re Grey Portland Cement & Clinker From Mexico*, panelist Endsley noted that he feared the other panel members ignored the standard of review and utilized a “wholesale dismissal of the applicable case law.”<sup>80</sup> In *In re Certain Softwood Lumber Products from Canada*, panelist Wilkey noted that the Canadian members did not have a familiarity with the standards of judicial review and instead proceeded to “reevaluate the evidence, [and] re-determine the technical issues” that were before the agency.<sup>81</sup> The possibility of ignorance of applicable law creates a process that is diametrically opposed to the concept of due process. The most elementary expectations for an adjudicator are that they have knowledge and understanding of the law or rules to be applied. For these reasons, the binational panel system violates due process.

#### IV. ARTICLE II

Article II of the United States Constitution provides, in relevant part, that the President “shall nominate . . . with the Advice and Consent of the Senate . . . Officers of the United States, whose Appointments are not herein otherwise provided for.”<sup>82</sup> It also provides that the Congress may “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or

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<sup>78</sup> See *Gordon v. Justice Court for Yuba Judicial Dist.*, 525 P.2d 72, 75 (Cal. 1974) (striking practice of non-law-trained judges presiding over criminal trials).

<sup>79</sup> *Schweiker v. McClure*, 456 U.S. 188, 199-200 (1982).

<sup>80</sup> No. US-97-1904-1, 1999 FTAPD Lexis 4 at \*325 (June 18, 1999).

<sup>81</sup> 1994 WL 405928 at \*63-64 (August 3, 1994).

<sup>82</sup> U.S. CONST. art. II.

in the Heads of Departments.”<sup>83</sup> The Supreme Court has defined “Officer of the United States” as an appointee exercising significant authority pursuant to the law of the United States.<sup>84</sup> The following paragraphs demonstrate that binational panelists exercise such authority, and that whether regarded as an “Officer” or an “inferior Officer,” their appointments contravene Article II of the United States Constitution.

Binational panelists exercise significant authority pursuant to the law of the United States. They review antidumping and countervailing duty determinations of other principal Officers of the United States. The President, with advice and consent of the Senate, appoints the Secretary of Commerce and Commissioner of the International Trade Commission. The panelists, however, derive their power directly from the implementing legislation of the NAFTA.<sup>85</sup> The Supreme Court has never determined whether such panelists are “Officers.”<sup>86</sup> But, in an analogous situation, the Court determined that the Election Commission, created to enforce compliance with certain laws, were Officers for the purpose of Article II appointments.<sup>87</sup> The Court noted that the commissioners’ powers encroached upon the President’s ability to faithfully execute the law.<sup>88</sup> Also, the Court has become highly skeptical of officers, whether principal or inferior, who are insulated from the President.<sup>89</sup> When such officers are handling some form of executive business without presidential oversight, their authority and actions contravene constitutional authority.<sup>90</sup> Similarly, binational a panelist’s authority to review the determinations of administrative agencies encroaches upon the executive authority to make such determinations, and possibly the judiciary’s authority to review such determinations. It is unreasonable that an officer should be subject to the binding review of a non-officer. Another major problem is the lack of control or direction by any of the three constitutional branches.<sup>91</sup> As discussed, this problem was at issue in *Free Enterprise Fund*, where Board Members, only controllable by the President through a dual-layer of good-cause removal, had the ability to dole out fines, force registration with the payment of a fee, and enforce specific procedures and protocol for an entire sector.<sup>92</sup> The Court held that the

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<sup>83</sup> *Id.*

<sup>84</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

<sup>85</sup> *See* 19 U.S.C. § 1516a(g)(7)(A).

<sup>86</sup> *Buckley*, 424 U.S. at 141.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See Free Enter. Fund*, 130 S. Ct. at 3151.

<sup>90</sup> *Id.*

<sup>91</sup> *Buckley*, 424 U.S. at 126.

<sup>92</sup> *See Free Enter. Fund*, 130 S. Ct. at 3151.



amount of power the Board Members wielded coupled with the level of insulation they enjoyed was unconstitutional.<sup>93</sup>

Binational panelists are required to apply the laws of the United States, utilizing standards of review developed by the American judiciary whose decisions have binding authority over administrative agencies. Because the panelists exercise their authority pursuant to United States law, they are “Officers” of the United States. The fact that panelists are only selected for a single case at a time does not remove them from the purview of the Appointments Clause. While duration is a factor to be considered, no single factor is determinative.<sup>94</sup> Authority exists for “Officers” who are only appointed for a single case. The Supreme Court has held that Independent Counsels, appointed for a single case, are subject to the requirements of the Appointments Clause.<sup>95</sup> While Independent Counsels were determined to be inferior officers, the following paragraphs explain why the current process for the selection of binational panelists violates the Appointments Clause, regardless of whether they are considered principal or inferior Officers.

The President selects Principal Officers with the advice and consent of the Senate; while inferior Officers, if Congress allows, may be appointed by the President alone, by the head of a department, or by the Judiciary.<sup>96</sup> Recently, the Supreme Court expanded the scope of those that may appoint inferior officers.<sup>97</sup> Now, the term, “head of a department” can be considered to include an entire commission of people, so long as they generally share responsibilities with each other.<sup>98</sup> Specifically, the Court stated, “As a constitutional matter, we see no reason why a multi-member body may not be the ‘Hea[d]’ of a ‘Departmen[t]’ that it governs.”<sup>99</sup> Here, however, a single entity does not select binational panelists. In fact, the governments of Canada or Mexico select some of the panelists, while the United States Trade Representative appoints the rest.<sup>100</sup> Obviously, the panelists are not appointed by the President and confirmed by the Senate. If panelists are determined to be principal Officers, then this deficiency would make their appointment unconstitutional. If it is assumed that panelists are more accurately characterized as inferior Officers, then they

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<sup>93</sup> *Id.*

<sup>94</sup> *See* *United States v. Germaine*, 99 U.S. 508 (1878).

<sup>95</sup> *See* *Morrison v. Olson*, 487 U.S. 654, 672 (1988).

<sup>96</sup> *Id.* at 670.

<sup>97</sup> Even recently, the Supreme Court has expanded the scope of those who may appoint officers. *See* *Freytag v. Comm’r*, 501 U.S. 868, 918 (1991).

<sup>98</sup> *Free Enter. Fund*, 130 S. Ct. at 3162.

<sup>99</sup> *Id.* at 3163.

<sup>100</sup> *North American Free Trade Agreement Implementation Act*, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

still fail to pass constitutional muster. The United States Trade Representative is not the President, a head of a department, or the Judiciary.<sup>101</sup> The appointment of panelists by foreign governments is in no way reconcilable with the mandates of the Appointments Clause. As Justice Scalia noted in a 1994 case, “violations of the Appointments Clause occurs . . . when Congress . . . effectively lodges appointment power in any person other than those whom the Constitution specifies.”<sup>102</sup>

Congress granted panelists the authority to make binding decisions regarding administrative determinations. The Founding Fathers established the Appointments Clause to prevent this type of delegation.<sup>103</sup> If panelists are principal Officers, the President, with the advice and consent of the Senate, should have the sole power to appoint.<sup>104</sup> If panelists are inferior Officers, the President, the head of a department, or the Judiciary should appoint them.<sup>105</sup> The Constitution, in no way, gives foreign powers the authority to appoint panelists. For these reasons, the current selection process for binational panelists violates the Appointments Clause.

In addition, should it be determined that panelists exercise executive rather than judicial powers, the panels violate the requirement of a unitary executive branch. Article II requires that the President personally, and through officers accountable to him, ensure that the laws be faithfully executed.<sup>106</sup> Executive authority may be delegated, but must ultimately be delegated to Officers or agencies that are still subject to the President’s control.<sup>107</sup> In *Printz v. United States*, the Court held that the President was not allowed to force local law enforcement officers to perform background checks on handgun purchasers because the act unconstitutionally delegated executive power beyond the President’s control.<sup>108</sup> Under the binational panel system, private citizens are selected to exercise, arguably, executive powers outside the control of the President. Similarly, the Supreme Court

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<sup>101</sup> See 5 U.S.C. § 101 (2000) (stipulating that departments of the United States are identified by statute, and the applicable statute does not include the Office of the U.S. Trade Representative).

<sup>102</sup> *Weiss v. United States*, 510 U.S. 163, 196 (1994) (Scalia, J., concurring).

<sup>103</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>104</sup> If panelists are determined to be principal Officers, this deficiency would make their appointment unconstitutional. If it is assumed that panelists are more accurately characterized as inferior Officers, they still fail to pass constitutional muster. See *Freytag*, 501 U.S. at 919.

<sup>105</sup> If it is assumed that panelists are more accurately characterized as inferior Officers, they still fail to pass constitutional muster. *Id.*

<sup>106</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>107</sup> See *Printz v. United States*, 521 U.S. 898, 922 (1997).

<sup>108</sup> *Id.* at 922-23.

struck down legislation giving the force of law to regulatory codes developed by industry associations.<sup>109</sup> The Court noted that the delegation to industry associations “is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be, and often are, adverse to the interest of others in the same business.”<sup>110</sup> As previously noted, the panelists’ private interests may be adverse to the parties involved in the case before them. Thus, the inability of the executive branch to control or review binational panel decisions violates the mandate for a unitary executive.<sup>111</sup> In *Free Enterprise Fund*, it was the President’s inability to directly control the Board Members that led to its unconstitutionality.<sup>112</sup> The court stated, “Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”<sup>113</sup> Executive control over officers is unquestionably inherent in the Constitution.

The NAFTA implementing legislation delegates power to decide matters pursuant to United States law to panels unaccountable to the executive branch and the American people. This delegation is inconsistent with both the Constitution and American democracy.<sup>114</sup> While the binational panel system does not include accountability to the United States government as required by the Constitution, it does include accountability to foreign countries at some level.<sup>115</sup> If the decisions are not attributable to the United States government because of the constitutional shortcomings, then they are analogous to a foreign judgment. The Supreme Court has determined that foreign judgments are not controlling in United States with respect to the Supreme Court’s interpretation and application of the 8th Amendment.<sup>116</sup> It appears that the binational panel system violates both the Appointments Clause and the requirement of a unitary executive under Article II of the United States Constitution.

In addition to the Appointments Clause, the NAFTA binational panels violate the Removal Clause as illustrated by *Free Enterprise*

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<sup>109</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>110</sup> *Id.* at 311.

<sup>111</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding that the President’s retention of the power to decide whether to give binding legal effect to trade, state, or council determinations was not enough to validate the delegation of such power under the National Industrial Recovery Act).

<sup>112</sup> *Free Enter. Fund*, 130 S. Ct. at 3164.

<sup>113</sup> *Id.*

<sup>114</sup> *Schechter Poultry*, 295 U.S. at 537.

<sup>115</sup> NAFTA arts. 1902.1, 1904, 1911.

<sup>116</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

*Fund*.<sup>117</sup> The Constitution has charged the President with the duty to “Take care that the laws be faithfully executed.”<sup>118</sup> To do so, the President is vested with the power to remove the officers that help him carry out the duties he has been charged with.<sup>119</sup> And, while there have been limits placed on this presidential power,<sup>120</sup> these limits, with respect to the binational panels of the NAFTA, contravene the Constitution.

As noted above, the panelists serving on binational panels are appointed from different countries. The analysis above demonstrates that the appointment of those panelists is unconstitutional. However, just as the President lacks the power to appoint, he also lacks the power to remove the panelists, making their existence unconstitutional, again. Well-stated constitutional law affirms that the President holds the authority to remove officers working for the executive department.<sup>121</sup> And, while the Court stated in *Humphrey’s Executor* that Congress may restrict the President’s removal power by requiring him to show “for-cause”, it only mattered when the officer was considered a hybrid, meaning he possessed some form of multiple branch characteristics, rather than purely executive.<sup>122</sup>

When it comes to the binational panels of the NAFTA, the President lacks the constitutionally protected power of removing officers. If the panelists are considered purely executive officers, the President should have the ability to remove for whatever reason. Even if the panelists are considered quasi-branch officers, as those illustrated in *Humphrey’s Executor*, the President may be restricted to a for-cause standard.<sup>123</sup> The panelists, however, irrespective of status (quasi or pure) or nationality (American, Canadian, or Mexican), are not removable by the President.<sup>124</sup> This means that the President has no authority – whether for-cause or not – to fulfill his constitutional duty and ensure the laws of the United States are followed and executed. In essence, a panelist from a different nation may contribute to a ruling that binds a party from the United States without that panelist being accountable to any government agent in the United States of America.

In *Free Enterprise Fund*, an analogous situation regarding the President’s removal powers of inferior officers was at issue.<sup>125</sup> The of-

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<sup>117</sup> *Free Enter. Fund*, 130 S.Ct. at 3151.

<sup>118</sup> U.S. CONST. art. II, § 3.

<sup>119</sup> *Myers v. United States*, 272 U.S. 57 (1926).

<sup>120</sup> See *Humphrey’s Ex’r*, 295 U.S. at 602; *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>121</sup> *Id.*

<sup>122</sup> *Humphrey’s Ex’r*, 295 U.S. at 602.

<sup>123</sup> *Id.*

<sup>124</sup> NAFTA arts. 1901.2, 2011.

<sup>125</sup> *Free Enter. Fund*, 130 S. Ct. at 3151.

ficers in *Free Enterprise Fund* were protected by a dual for-cause removal standard, meaning they could only be removed for-cause by their superiors, SEC Commissioners, who, in turn, were also only removable by the President for-cause.<sup>126</sup> While Congress has been able to insulate officers to a degree, the Court held, creating a dual for-cause protection crossed the constitutionally allowed threshold.<sup>127</sup> The double level of insulation took control away from the President, even in the decision of whether good cause existed or not.<sup>128</sup> The Court noted that one level of for-cause protection has been upheld in the past, but that double protection constructed a denial of the ability to hold any of the SEC Commissioners accountable. Even the SEC lacked the ability to remove the Board Members at-will.<sup>129</sup> Therefore, nobody, including the President, could be held accountable for the actions of the Board Members.<sup>130</sup> The lack of accountability, a constitutional staple for the Executive Branch, was being contravened.

The same lack of accountability in *Free Enterprise Fund* is present in the NAFTA binational panels. As outlined above, the President is charged with the duty of executing the laws of the United States.<sup>131</sup> Because of this, he is accountable and responsible to the people he governs. Therefore, the President needs the ability to run the Executive Branch as he sees fit and this includes removing officers if he desires. However, the NAFTA binational panels eviscerate the President's ability to execute this responsibility. If the President disagrees with a panelist's ruling, he lacks the requisite power to remove the panelist, even if the panelist hails from a foreign nation.

Furthermore, the people affected by a decision handed down from the binational panels have no one to hold accountable for the positioning of the panelists. They cannot blame a member of Congress, a department head, or the President. Instead, the panelists enjoy an independent source of protection because no superior officer can remove them, either at will or for cause.<sup>132</sup> Therefore, the binational panelists lack any removal procedure typical for officers of the United States. In *Free Enterprise Fund* the Court struck down a dual-level of protection.<sup>133</sup> When it comes to the binational panels of the NAFTA, multiple levels of protection exist, leading to an utter lack of accountability. The President's inability to remove these officers directly conflicts with the Constitution.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 3151.

<sup>128</sup> *Id.* at 3153.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> U.S. CONST. art. II, § 3.

<sup>132</sup> NAFTA art. 1902(1).

<sup>133</sup> See *Free Enter. Fund*, 130 S. Ct. at 3151.

## V. ARTICLE III

The total divestiture and preclusion of review by Article III courts makes the binational panel system inherently unconstitutional. Prior to the invention of the binational panel system, antidumping and countervailing duty determinations of the Commerce Department were subject to review by the Court of International Trade, the Court of Appeals for the Federal Circuit, and possibly the Supreme Court of the United States.<sup>134</sup> After the implementation of the binational panel system, however, the panels have the authority to interpret United States law and direct the actions of administrative agencies without any meaningful oversight.<sup>135</sup> This lack of oversight, or even a modicum of judicial review, should render the process unconstitutional. Whatever power Congress has to parse out adjudicatory duties, allowing possibly biased non-governmental panels to interpret and apply United States law, without any judicial oversight, falls outside the province of its authority.

The Supreme Court has recognized that the decisions of binational panels are "binding, and domestic judicial review of panel determinations is prohibited."<sup>136</sup> A jurisprudential examination of the history of Congressional delegations of adjudicatory powers reveals that while review may be limited, it may not be wholly abandoned. For example, in a 1982 plurality opinion, the Supreme Court allowed Congress to delegate authority over bankruptcy litigation from Article III district courts to the newly formed bankruptcy courts.<sup>137</sup> It is noteworthy that the Court reached this decision partially because the litigant has an appeal as of right to an Article III court.<sup>138</sup> The *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* decision created an exception for matters considered functions of the executive or legislative departments.<sup>139</sup> While this appeared to be a bright line rule, it was short lived.

In 1985, the Supreme Court refused to follow any bright line rules and instead, upheld Congress's attempt to transfer adjudicatory power from the Environmental Protection Agency to a body of arbitrators.<sup>140</sup> The Court approved use of a balancing test to comply with the mandates of Article III.<sup>141</sup> When applying the balancing test, the

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<sup>134</sup> *Id.*

<sup>135</sup> 19 U.S.C. § 1516a(g)(7).

<sup>136</sup> *American Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 763 (D.C. Cir. 1997).

<sup>137</sup> *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>138</sup> *Id.* at 55.

<sup>139</sup> *Id.* at 63-68.

<sup>140</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985).

<sup>141</sup> *See id.* at 587.

Court pointed out the significance of some judicial review, to review arbitrators' decisions for fraud, misconduct or misrepresentation.<sup>142</sup> Specifically, the Court noted that such review protects against "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."<sup>143</sup> The binational panel system's failure to provide even this modicum of protection for litigants possibly renders the system unconstitutional.

The Supreme Court further refined the balancing test in 1986 when the Court upheld Congress's delegation of adjudicatory power to the Commodity Futures Trading Commission ("CFTC").<sup>144</sup> In *Commodity Futures Trading Commission v. Schor*, the Court noted that the plaintiff waived his right to Article III review by *voluntarily* submitting his claim to the CFTC.<sup>145</sup> In contrast, the NAFTA binational panel system is not voluntary.<sup>146</sup> If either party wishes to remove the claim from traditional Article III review, the case is transferred to the binational panel.<sup>147</sup> Thus, an opposing party's request for binational review overrides the plaintiff's choice to submit his claim to a court.

The Supreme Court noted in dicta that removing all review would be unconstitutional.<sup>148</sup> In addition, several circuit courts have acknowledged some form of judicial review is fundamental to an Article III analysis.<sup>149</sup> By contrast, the binational panel system provides no judicial review.<sup>150</sup> Neither the international concerns at play, nor the nature of the law in dispute, should allow Congress to summarily preclude all judicial review because such preclusion violates Article III.<sup>151</sup> It is also worth noting that *Union Carbide* involved the transfer of power from one non-Article III institution to another, while still preserving judicial review by an Article III court.<sup>152</sup> However, the implementation of the binational panel system transferred authority from

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<sup>142</sup> *Id.* at 592.

<sup>143</sup> *Id.*

<sup>144</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986).

<sup>145</sup> *Id.* at 849.

<sup>146</sup> NAFTA § 1904(1).

<sup>147</sup> NAFTA § 1904(5).

<sup>148</sup> *Northern Pipeline*, 458 U.S. at 70 n.23 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 n.13 (1977)).

<sup>149</sup> See *Chemical Bank v. Togut (In re Axona Int'l Credit)*, 924 F.2d 31, 35 (2d Cir. 1991); *Parklane Hosiery Co. v. Parklane/Atlanta Venture (In re Parklane/Atlanta Joint Venture)*, 927 F.2d 532, 538 (11th Cir. 1991); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989); *Marozsan v. United States*, 852 F.2d 1469, 1472 (7th Cir. 1988).

<sup>150</sup> 19 U.S.C. § 1516a(g)(7)(A).

<sup>151</sup> See *U.S. Dep't of Treasury v. Fed. Labor Relations Auth.*, 43 F.3d 682, 689-90 (D.C. Cir. 1994).

<sup>152</sup> *Union Carbide*, 473 U.S. at 571.

an Article III court, the Court of International Trade, to arbitrators in a non-Article III institution without any oversight by the government whose laws they are to interpret and apply.<sup>153</sup> Because *Schor* is still the applicable law in an Article III analysis, it is necessary to examine the factors the Court considered in their balancing test.

The factors for consideration are:

(1) the extent to which the essential attributes of judicial power are reserved to Article III courts; (2) the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in the Article III courts; (3) the origins and importance of the right to be adjudicated; and (4) the concerns that drove Congress to depart from the requirements of Article III.<sup>154</sup>

Although no individual factor is determinative, many courts view the first factor as dominant in their analysis.<sup>155</sup> This dominant factor, however, is non-existent in the binational panel system, further tilting the balancing scales toward unconstitutionality.

The second factor, the extent to which the non-Article III forum exercises traditional Article III functions, likewise contributes to the constitutional demise of the binational panel system. As Chief Justice John Marshall noted, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>156</sup> Congress did not adhere to this precedent when it gave binational panels’ unfettered authority to interpret, apply, and render decisions regarding the laws of the United States without the possibility of judicial oversight. Panel members also engage in judicial activities, such as entertaining motions, reviewing legal memoranda, and hearing oral arguments.<sup>157</sup> It appears that binational panelists are serving in a judicial role that is clearly within the province of Article III, and thus, the second factor also weighs against the constitutionality of the binational panel system.

Third, the process does not invoke the public rights exception. Antidumping and countervailing duty questions do not involve the government as a party, but two private companies.<sup>158</sup> While govern-

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<sup>153</sup> 19 U.S.C. § 1516a(g)(7)(A).

<sup>154</sup> *Schor*, 478 U.S. at 851.

<sup>155</sup> See *Spierer v. Federated Dep’t Stores, Inc. (In re Federated Dep’t Stores)*, 328 F.3d 829, 835-36 (6th Cir. 2003); *Public Citizen v. Burke*, 843 F.2d 1473, 1479 n.8 (D.C. Cir. 1988); *United States v. Garcia*, 848 F.2d 1324, 1331 (2d Cir. 1988).

<sup>156</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>157</sup> See NAFTA arts. 1904(7), (14).

<sup>158</sup> Leon E. Trakman, Address before the 25th Australian International Trade Law Conference 2003 Resolving Trade Disputes: Learning from the NAFTA 4–5 n.15 (1997), [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(1E76C1DSD1A3](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1DSD1A3)



mental presence is not mandatory, it is a nearly dispositive factor.<sup>159</sup> Even if the right were somehow styled as a 'public right', the nature of the right is not dispositive in an Article III analysis.<sup>160</sup> Even if it is conceded that this factor weighs in favor of the binational panel system, the other factors still substantially outweigh it.

Finally, Congress has historically departed from the mandates of Article III to reduce the burdens on their dockets, and created Article I courts with specialized areas of expertise.<sup>161</sup> Prior to the implementation of the binational panel system, the reverse had occurred because the cases were decided by a specialized Article III court that was well versed in United States trade law, and was one of the most efficient Federal courts in the country.<sup>162</sup> After a consideration of the factors, it is clear that the binational panel system not only fails the balancing test, but also struggles to provide any constitutional weight in favor of the system. Therefore, the binational panel system violates Article III of the Constitution of the United States. As discussed in the next section, there are only two instances in which this procedure has been formally challenged on a constitutional basis. Although neither case reached a decision on the merits, their presentation and posture are instructive in our consideration of this subject.

## VI. CASES

The first case to challenge the constitutionality of the binational panel system of the NAFTA was filed in 1997.<sup>163</sup> The American Coalition of Competitive Trade ("ACCT"), a non-profit organization, brought suit claiming injury through its respective members who lost their jobs due to adverse binational panel decisions.<sup>164</sup> ACCT contended that the binational panel system infringed upon United States sovereignty by violating the Appointments Clause, Article III, and the Due Process Clause of the United States Constitution.<sup>165</sup> Unfortunately, the court refused to address the merits of the case and dismissed the action due to lack of Article III standing.<sup>166</sup> The ACCT's

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<sup>159</sup> See *Union Carbide*, 473 U.S. at 586.

<sup>160</sup> *Schor*, 478 U.S. at 853.

<sup>161</sup> See *Peretz v. United States*, 501 U.S. 923, 936–37 (1991); *Palmore v. United States*, 411 U.S. 389, 398 (1973).

<sup>162</sup> Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX & BUS. LAW. 101, 113–14 (1996).

<sup>163</sup> See *American Coal. for Competitive Trade*, 128 F. 3d at 761.

<sup>164</sup> *Id.* at 763.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 765–67.

failure to exhaust administrative remedies as required by the NAFTA also served as the basis for the adverse finding.<sup>167</sup>

It took nearly ten years for the next constitutional challenge to occur. In 2006, the Coalition for Fair Lumber Imports challenged the constitutionality of the binational panel systems contained in both the U.S.-Canada Free Trade Agreement and the NAFTA.<sup>168</sup> Once again, the system was challenged for violation of Article II, Article III, and the Due Process Clause of the United States Constitution.<sup>169</sup> The parties settled their dispute, however, after oral argument and deprived the court of jurisdiction the opportunity to decide the case.<sup>170</sup> The exact reasons for the settlement have never been disclosed, although it may have been to avoid unraveling the NAFTA, to avoid further litigation costs if the decision was later appealed to the Supreme Court of the United States, or because the Coalition received favorable terms for settlement. What is clear is that the settlement has once again raised constitutional suspicion of the binational panel system without the satisfaction of a definitive answer.

## CONCLUSION

Binational panels, comprised of members untrained in United States law, are ill equipped to interpret and enforce the laws of the United States. While similar to private arbitration, the process is flawed because it requires private companies to waive their right to judicial determination without due process. The financial and practical hurdles that potential challengers face clearly exist to discourage opposition to an institution that direly needs exactly that. At the very least, every adjudicator should be expected to know and understand the applicable laws and rules. The possibility, or probability, that members cannot adequately apply United States law demonstrates the reality that the binational panel system violates the Due Process Clause of the United States Constitution. Regardless of whether the panel members are determined to be principal or inferior officers, the current process violates the Appointments and Removal Clause. If panel members wield executive powers, then the current process violates the requirement of a unitary executive. Considering the *Schor* factors, it is apparent that the binational panel system not only fails the balancing test, but also struggles to provide any constitutional weight in favor of the system, violating Article III as well. For these

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<sup>167</sup> *Id.* at 766–67.

<sup>168</sup> *See* Coal. for Fair Labor Imps. Exec. Comm. v. United States, 471 F. 3d 1329, 1330 (D.C. Cir. 2006).

<sup>169</sup> Brief of Petitioner at 46, 53, Coal. for Fair Lumber Imps. Exec. Comm. v. United States, No. 05-1366 (D.C. Cir. Jan. 17, 2006).

<sup>170</sup> *Id.* at 1332-33.

reasons, the next challenger of the binational system should possess the required standing, the perseverance to attain a decision on the merits, and the financial resources to promote the greater good, because he will not receive any immediate benefit.



# FROM RUSSIA WITH LOVE: THE EU, RUSSIA, AND SPECIAL RELATIONSHIPS

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## ABSTRACT:

This paper compares the institutions and goals of the USSR, the EU, and the CIS to understand the differing origins and competing tendencies of these alternative models of transnational governance. It then projects those models through history to examine the current relationships of the former Soviet Republics to the EU and the United States. Understanding the historical sources and development of transnational relations in Eastern Europe will enable better international relations among the EU, the Russian Federation, and the other former Soviet Republics. This comparison will also help the Russian Federation and other former Soviet Republics to take up EU models of governance where appropriate (most often the case) in order to help restructure Eastern Europe, and to safeguard peace by increasing economic prosperity and interdependence.

## Keywords:

EU, USSR, Russia, CIS, Commonwealth of Independent States, EurAsEC, Eurasian Economic Community, WTO, US, NATO, eastern partnership, northern dimension, common spaces, ECHR, European Court of Human Rights, Rule of Law, Human Rights, Democracy, Legitimation, Partnership and Cooperation Agreement, PCA.

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## I. INTRODUCTION

The European Union builds peace through interdependence and prosperity by transferring elements of state sovereignty to inter-governmental and supranational bodies. An unparalleled success, the EU presents a model for transnational governance. The EU is the world's most advanced and successful example of a pragmatic mixture of supra-national and intergovernmental governance. It is thus a key vector of globalization.<sup>2</sup> Other regions of the world, such as Eastern Europe, can emulate its rules and institutions.

This paper compares the institutions and objectives of the USSR, the EU, and the CIS to understand the differing origins and competing tendencies of these alternative models of transnational governance. Understanding the systemic differences and commonalities of those models enables the contextualizing of past history, and thus im-

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<sup>2</sup> See generally Eric Engle, *Europe Deciphered: Ideas, Institutions and Laws*, 33 FLETCHER F. WORLD AFF. 63, 63-81 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336490](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336490) (describing transnational governance within the EU).

proves our understanding of current relationships of the former Soviet Republics to the EU. Hopefully, understanding the historical sources and development of transnational relations in Eastern Europe will, in turn, enable better international relations between the EU, the Russian Federation, and other former Soviet Republics and the United States.

## II. COMPARING TELEOLOGIES OF TRANSNATIONAL GOVERNANCE: GOALS AND STRUCTURES

Understanding the past helps us appreciate the present and form the future. First, we compare the goals and structures of the USSR, the EU, and the CIS. By disaggregating the differing origins and competing tendencies of these distinct transnational governance models, we can see their commonalities and the historical breakdowns in order to foster improved relations by understanding shared goals and methods used to attain these goals.

### A. *The Structure and Teleology of the USSR*

The USSR was a one-party system. It was a workers' and peasants' dictatorship in name,<sup>3</sup> directed and led by the Communist Party of the Soviet Union (CPSU). The CPSU regarded itself as a vanguard party, the most advanced elements (intelligentsia) of the most advanced class (the proletariat), subject to democratic centralism (open debate within the party upon the issues, followed by a vote, and then decisive unanimous action to implement the voted decision with no further discussion or dissent), and exercising a dictatorship on behalf of the proletariat (workers and peasants). The party elite of the CPSU (the "nomenklatura") claimed to govern on behalf of and for the benefit of the workers and peasants, i.e. the peoples of the Soviet Union.<sup>4</sup> In western terms, the CPSU was a centralized, hierarchical party of elites directing a centrally planned economy via dictatorship. The dictatorship was justified as necessary to work revolutionary changes on the behalf of the workers and peasants, and, indeed, the initial performance of the USSR was breathtaking. The USSR eradicated illiteracy, literally doubled average life expectancy,<sup>5</sup> and ended the chronic

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<sup>3</sup> KONSTITUTSIIA SSSR (1936) [KONST. SSSR][USSR CONSTITUTION] art. 1, *translated in 1936 Constitution of the USSR*, BUCKNELL UNIVERSITY (Sept. 7, 2011), <http://www.departments.bucknell.edu/russian/const/36cons01.html> (stating "[t]he Union of Soviet Socialist Republics is a socialist state of workers and peasants.") [hereinafter USSR CONSTITUTION].

<sup>4</sup> A. Nove, *Is There a Ruling Class in the USSR?*, 27 *SOVIET STUDIES* 615, 615-16 (Oct. 1975).

<sup>5</sup> STEPHEN WHITE, *RUSSIA GOES DRY: ALCOHOL, STATE AND SOCIETY* 43 (Cambridge Univ. Press 1996).

famines endemic of Tsarist Russia. Leninism also instituted sex equality.<sup>6</sup> In these real human terms, Leninism was unquestionably progress as compared to Tsarism.

<i>Population</i>		1879	1920	1926	1939	1959	1970	1979
<i>Rural</i>	<i>M</i>	35.5	52.4	67.3	91.6	99.1	99.6	99.6
	<i>F</i>	12.5	25.2	35.4	76.8	97.5	99.4	99.5
	<i>All</i>	23.8	37.8	50.6	84.0	98.2	99.5	99.6
<i>Urban</i>	<i>M</i>	66.1	80.7	88.0	97.1	99.5	99.9	99.9
	<i>F</i>	45.7	66.7	73.9	90.7	98.1	99.8	99.9
	<i>All</i>	57.0	73.5	80.9	93.8	98.7	99.8	99.9
<i>Total</i>	<i>M</i>	40.3	57.6	71.5	93.5	99.3	99.8	99.8
	<i>F</i>	16.6	32.3	42.7	81.6	97.8	99.7	99.8
	<i>All</i>	28.4	44.1	56.6	87.4	98.5	99.7	99.8

Source: Narodnoe obrazovanie, nauka i kul'tura v SSSR: Statisticheskii shornik (Moscow, 1977, 9; SSSR: zarubezhnye strany, 1987: Statisticheskii sbornik (Moscow, 1988), 83.

The CPSU justified its dictatorship as the best way to obtain the well-being of the workers and peasants,<sup>7</sup> and also as necessary to help prevent or win any future world war.<sup>8</sup> Over time, however, the Soviet system degenerated, and worked increasingly for the benefit of the party establishment (the “nomenklatura”)<sup>9</sup> at the expense of the broad masses of workers and peasants. Meanwhile, the threat of invasion diminished. From this perspective, which I call dual delegitimation, we can better understand the sudden, unexpected, and relatively bloodless restoration of capitalism<sup>10</sup> in Russia. The system, *in its own*

<sup>6</sup> See, e.g., GAIL WARSHOFSKY LAPIDUS, WOMEN IN SOVIET SOCIETY: EQUALITY, DEVELOPMENT, AND SOCIAL CHANGE 136 (Univ. of Cal. Press 1978).

<sup>7</sup> USSR CONSTITUTION, *supra* note 3 (“The Union of Soviet Socialist Republics is a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia, the working people of all the nations and nationalities of the country.”).

<sup>8</sup> *Id.* art. 28.

<sup>9</sup> See generally MICHAEL VOSLENSKY, NOMENKLATURA: THE SOVIET RULING CLASS (Eric Mosbacher trans., Doubleday 1984).

<sup>10</sup> Capitalism is a system of economic production predicated on the private ownership of capital. It is distinct from state capitalism wherein the state or public-private partnerships hold capital. Many define capitalism as an industrial rather than a feudal mode of production. The Tsarist economy was semi-feudal and industrializing. Further, many of its economic projects involved heavy state participation (state capitalism). However, the ownership of capital in the hands of the financial elite distinguishes Tsarist semi-feudal (state) capitalism from the Soviet planned economy. Of course, strong state participation in the economy, directly and indirectly, remains a mark of the Russian economy. However, the post-Soviet era definitively restored private ownership of capital and the role of the Orthodox



*terms*, lost legitimacy as being no longer necessary for defense against a war that never came. Likewise, the system lost legitimacy because consumer well-being was simply higher in the west and the nightmare of Tsarist famine, illiteracy, and inequality was long past. These systemic facts help explain the near bloodless dissolution of the Soviet system.

Soviet foreign policy was less aggressive than what the U.S. foreign policy elites, particularly the military, perceived at the time. Rather than relentlessly seeking to inflame global revolution at every turn in a zero-sum struggle against the West, the USSR first sought to build socialism in one country,<sup>11</sup> and then in its own sphere of influence, to construct a stable autarchic system. The Soviets sought autarchy as the means to self-defense.

Geopolitically, the Soviet system was a series of concentric rings. The USSR was at the center, then Eastern Europe,<sup>12</sup> then Third World Marxist states, and, finally, Third World non-Marxist allies. The closer a country was geographically to the Soviet center, the greater the level of integration into the autarchic economy. Western efforts to “roll back” Marxism were generally unsuccessful,<sup>13</sup> perhaps because the Soviet system *was* autarchic. The failure of “roll back” ultimately led to the “Brezhnev doctrine,” wherein the USSR declared the attainment of “socialism” (i.e. single party state capitalism with worker safeguards) in any country as irreversible.<sup>14</sup>

To attain autarchic economic development, the USSR implemented an import substitution industrialization (“ISI”) model for economic development. ISI had already been used in the West for the industrialization of the United States and Japan.<sup>15</sup> However, the So-

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Church as the spiritual guides of the nation. Thus, I refer to this process as “capitalist restoration” rather than “capitalist instauration”. See, e.g., STEVEN ROSEFELDE, *COMPARATIVE ECONOMIC SYSTEMS: CULTURE, WEALTH, AND POWER IN THE 21ST CENTURY* 183 (Blackwell Publishers 2002).

<sup>11</sup> Josef Stalin, *The October Revolution and the Tactics of the Russian Communists*, Preface to JOSEF V. STALIN, *PROBLEMS OF LENINISM* 117 (Charles Farrell trans., Foreign Languages Press, Peking 1976), available at <http://www.marxists.org/reference/archive/stalin/works/1924/12.htm>.

<sup>12</sup> JOSEPH G. WHELAN & MICHAEL J. DIXON, *THE SOVIET UNION IN THE THIRD WORLD: THREAT TO WORLD PEACE?* 8 (Pergamom-Brassey’s Int’l Def. Publishers 1986).

<sup>13</sup> See, e.g., PETER GROSE, *OPERATION ROLLBACK: AMERICA’S SECRET WAR BEHIND THE IRON CURTAIN* 210 (2000).

<sup>14</sup> This policy was known as “The Brezhnev Doctrine.” See generally MATTHEW J. OUMET, *THE RISE AND FALL OF THE BREZHNEV DOCTRINE IN SOVIET FOREIGN POLICY* (The Univ. of N.C. Press 2003) (explaining the doctrine).

<sup>15</sup> See generally DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (Cambridge Univ. Press 2006)

viet system's rationales were the opposite of those of the United States. The USSR justified its version of ISI through rationales of substantive equality and solidarity, and contrasted those with the merely formal freedoms conditioned by economic inequality that justified western democracies<sup>16</sup> some of which were social. Social democracies provide guaranties of basic well being, especially to workers. Socialist production in contrast is the state ownership of enterprises, a form of state capitalism.

Russia's approach to ISI was, within its own terms, rational. The Soviet leadership considered obtaining and maintaining the autarchy of the USSR a necessary, legitimate, and attainable goal.<sup>17</sup> Given the historical fact that Russia has suffered invasion after invasion, the Soviet goal of economic autarchy as a means to national security, though definitively economically suboptimal to trade and international economic integration, was politically justifiable, albeit increasingly inapt due to sub-optimal economic performance.

Pursuant to the ISI strategy, the USSR created a ruble currency economic zone, and made the ruble inconvertible.<sup>18</sup> Capital restrictions were the norm as were border controls, such as customs duties and passport checks. The policy of autarchy complemented military security by enabling independent political choices. Soviet leaders saw military security as a precondition to economic security and well-being.<sup>19</sup> To circumvent the problem of a lack of foreign currency, the inability to use the ruble for currency exchanges overseas, and related problems arising from the nature of a closed economic system, barter in, and for, real goods was taken up between the COMECON countries. That practice was known as "countertrade" i.e. cashless goods-for-goods barter. For example, the USSR would barter with Cuba, trading sugar for finished Soviet goods.<sup>20</sup> Barter also occurred at the

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(describing the exposition of the import substitution industrialization model of development).

<sup>16</sup> ERIC ENGLE, MARXISM, LIBERALISM, AND FEMINISM: LEFTIST LEGAL THOUGHT 33-35 (Serials Publ'ns 2010).

<sup>17</sup> Ronald A. Francisco, *The Foreign Economic Policy of the GDR and the USSR: The End of Autarky?*, in EAST GERMANY IN COMPARATIVE PERSPECTIVE 190 (David Childs et al. eds., 1989).

<sup>18</sup> Vladimir Sobell, *Convertibility in the CMEA: The Long Road Ahead*, RADIO FREE EUROPE RESEARCH 4 (Nov. 5, 1987), <http://www.osaarchivum.org/files/holdings/300/8/3/pdf/128-5-21.pdf>.

<sup>19</sup> USSR CONSTITUTION, *supra* note 3, at art 31.

<sup>20</sup> José F. Alonso & Ralph J. Galliano, *Russian Oil-For-Sugar Barter Deals 1989-1999*, in CUBA IN TRANSITION: VOLUME 9, PAPERS AND PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY (ASCE) 335 (1999), available at <http://www.ascecuba.org/publications/proceedings/volume9/pdfs/alonso.pdf>.

micro-economic level, though not as a legitimate de jure instrument of state policy, but as a de facto necessity of everyday life, albeit of questionable legality.<sup>21</sup> “Gifts” could be justified as “social” and “fraternal” acts under the Marxist logic of transforming monetary economic compulsion into cooperative voluntary social acts. With capitalist restoration, however, the primitive version of a “gift economy” warped into generalized bribery, undermining the rule of law in the post-Soviet era.<sup>22</sup>

Preferential tariff treatment for the COMECON and Soviet client states was a key feature of the Socialist bloc’s international trade policy.<sup>23</sup> High tariff barriers were created to protect the autarchic COMECON home market.<sup>24</sup> These tariff barriers would also encourage infant industries.<sup>25</sup> Non-tariff technical barriers such as restrictions on imports for health and safety reasons also served the ISI logic. Meanwhile, intellectual property would be either unprotected or weakly protected to use Western innovation to support the USSR.<sup>26</sup> For example, piracy of Western computer software and microchip technology was the norm during the Soviet era.<sup>27</sup> Intellectual property law enforcement in Russia remains a sore spot in United States-Russian

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<sup>21</sup> See, e.g., JIM LEITZEL, *RUSSIAN ECONOMIC REFORM* 128 (Routledge 1995); see also Byung-Yeon Kim, *Informal Economy Activities of Soviet Households: Size and Dynamics*, 31 *J. COMP. ECON.* 532, 532-551 (2003).

<sup>22</sup> BARBARA WALKER, MAXIMILIAN VOLOSHIN AND THE RUSSIAN LITERARY CIRCLE: CULTURE AND SURVIVAL IN REVOLUTIONARY TIMES 174 (Ind. Univ. Press 2005).

<sup>23</sup> MARIE LAVIGNE, *INTERNATIONAL POLITICAL ECONOMY AND SOCIALISM* 175 (David Lambert trans., Cambridge Univ. Press 1985). See generally ADAM ZWASS, *THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE: THE THORNY PATH FROM POLITICAL TO ECONOMIC INTEGRATION* (M.E. Sharpe 1989).

<sup>24</sup> COMECON (also known as the CMEA) was the USSR’s effort to form a common market within the Soviet bloc. See, e.g., J. J. BRINE, *COMECON: THE RISE AND FALL OF AN INTERNATIONAL SOCIALIST ORGANIZATION* xvi (1992).

<sup>25</sup> *Id.*

<sup>26</sup> Intellectual property remains weakly protected in the Russian Federation and the USSR successor states. “[C]ounterfeiting and piracy activity in Russia remains on a high level. The lack of effective enforcement affects Russian markets on a large scale. To be fully integrated in the world trading system, to continue to attract foreign investment and to prevent major losses for right-holders, Russia has to implement all its international obligations, in particular the ones related to Intellectual Property Rights and their Enforcement.” Directorate-General for Trade, *Intellectual Property: Dialogues*, EUROPEAN COMM’N (Aug. 22, 2011), [http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/dialogues/#\\_russia](http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/dialogues/#_russia).

<sup>27</sup> See, e.g., Shane Hart, *Computing in the Former Soviet Union and Eastern Europe*, 5 *CROSSROADS* 23, 23-25 (Mar. 1999).

relations to this day.<sup>28</sup> Most importantly, the centrally-planned economy's taxing and subsidization systems aimed to accumulate the surplus capital needed for economic development through the creation of infrastructure (e.g., housing, roads, airports) via forced saving<sup>29</sup> and also, ominously, for military production.

The political and legal institutions in the USSR and its satellites paralleled those of the West. Legal and institutional parallels included: the Warsaw Treaty Organization (the Warsaw Pact), which paralleled the North Atlantic Treaty Organization (NATO);<sup>30</sup> the Council for Mutual Economic Assistance (COMECON, also known as CMEA), for its part, paralleled the European Economic Community (EEC).<sup>31</sup> Other parallels could be found fairly readily and, in my opinion, Soviet socialist legalism should be seen as a variant of civilianist law.

Legal and political parallels arose because each system sought the same goals (economic development, technical progress, national security) albeit by somewhat different methods and justified by differing rationales. The Soviet system was an authoritarian egalitarian variant of late modernity that sought to attain economic development using the Western import substitution industrialization (ISI) model.<sup>32</sup> The Soviet systemic rationales were substantive equality and social solidarity; the West's were freedom, property and individual rights. These rationales also served as principles for organizing production and social life generally.

The Soviets, like the West, sought the same goals: to obtain a better life for workers (the people) and physical (military) security (i.e., *defense*). The means to those ends, however, differed. The USSR sought to obtain prosperity not through the capitalist anarchy of production but through centralized economic planning.<sup>33</sup> Similarly, the USSR sought to attain security through autarchy (isolation and independence) rather than through economic interdependence.<sup>34</sup> Economic

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<sup>28</sup> U.S. DEPT. OF STATE, BACKGROUND NOTE: RUSSIA (Aug. 28, 2011), <http://www.state.gov/r/pa/ei/bgn/3183.htm>.

<sup>29</sup> See generally Eric Engle, *A Social-Market Economy for Rapid Sustainable Development*, 2 J.L. DEV. & POL. 42, 42-62 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1424695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424695) (explaining the ISI model in the context of Soviet development theory).

<sup>30</sup> Malcome Byrne & Vojtech Mastny, *The Warsaw Pact, Gone with a Whimper*, N.Y. TIMES, (Mar. 14, 2005), <http://www.nytimes.com/2005/05/13/opinion/13iht-edbyrne.html>.

<sup>31</sup> See BRINE, *supra* note 24.

<sup>32</sup> Engle, *A Social-Market*, *supra* note 29, at 43.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

interdependence was the path to peace the West took, as the EU and WTO exemplify.<sup>35</sup>

The Soviet economy's key problem was the fact that it was defined around building up a military-industrial complex to fight and win a World War III if ever attacked again: autarchy as a means to security.<sup>36</sup> Tragically,<sup>37</sup> in pursuit of its military defense, the USSR and its Warsaw Pact allies wasted almost all their surplus production on unproductive military spending.<sup>38</sup> Ultimately, the United States response to the failure of rollback and the Brezhnev doctrine was to compete in fields where the USSR could not compete due to technological inferiority or due to the structure of a closed dictatorship. The United States' own arms buildup aimed to bankrupt the USSR by forcing it into an unsustainable arms race, a policy that worked.<sup>39</sup> The resulting economic strains led to constant shortages that seriously undercut the USSR's claim to be creating a workers' paradise with the highest standard of living for ordinary people on earth.<sup>40</sup> The USSR was undermined by economic dislocations, the inability of the planned economy to deliver high quality goods to the most needed areas on time, and due to the increasing strain of militarism. "The party of Lenin," despite such stunning initial success, was ultimately unable to match capital-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Recall that tragedy, strictly speaking, means the *inevitable* downfall of a *hero* (or anti-hero) due to his *excess* of virtue. In the Soviet Union "defense of the motherland" taken to its excess became paranoia, crippling production and dooming the system to (inevitable) collapse. However, the West did not win the cold war; rather, the Soviets lost it.

<sup>38</sup> *Russian Military Budget*, GLOBALSECURITY.ORG (Aug. 25, 2011), <http://www.globalsecurity.org/military/world/russia/mo-budget.htm> ("By the mid-1980s, the Soviet Union devoted between 15 and 17 percent of its annual gross national product to military spending. . . . Until the early 1980s, Soviet defense expenditures rose between 4 and 7 percent per year."); see also ANDERS ÅSLUND, BUILDING CAPITALISM: THE TRANSFORMATION OF THE FORMER SOVIET BLOC 131 (2001).

<sup>39</sup> Kremlinology often focuses on budget questions. See, e.g., Bill Keller, *Soviet Budget Deficits Are Disclosed By Kremlin; Wasteful Subsidies Blamed*, N.Y. TIMES, (Oct. 28, 1988), <http://www.nytimes.com/1988/10/28/world/big-soviet-budget-deficits-are-disclosed-by-kremlin-wasteful-subsidies-blamed.html>; see also Timothy Sosnovy, *The Soviet Military Budget*, 42 FOREIGN AFF. 487, 487-94 (1964), available at <http://www.foreignaffairs.com/articles/23604/timothy-sosnovy/the-soviet-military-budget>.

<sup>40</sup> See, e.g., 31 V. I. LENIN, COLLECTED WORKS 516 (1966) (stating "Communism is Soviet power plus the electrification of the whole country." That is, the Soviet system justified itself as the fastest route to development, which it was for at least one generation. However, ultimately, the system lost legitimacy as it became clear and clearer that the west produced better quality consumer goods and in greater numbers).

ism in the quality and abundance of consumer goods.<sup>41</sup> This, coupled with the increasing tendency of the nomenklatura to serve its own goals rather than to seek the well-being of all the Soviet peoples, and the fact that the U.S., unlike Nazi Germany, was not threatening to invade the USSR to seize resources, led to a crisis of purpose, of legitimacy, and a capitalist restoration.

### B. *The Objectives of the EU*

The EU aims to form a single, integrated European market to: (1) break the link between territory and trade which drove Europe into at least two global wars; and (2) generate the prosperity through trade that results from specialization in production, economies of scale, and reduced transaction costs.<sup>42</sup> At one extreme, Euro-Federalists have cautiously and tentatively argued for the formation of a “United States of Europe.”<sup>43</sup> The Euro-Federalists’ ultimate goal is both unrealistic and undesirable - recreating mercantilist nation states as mercantilist continental empires would only lead to more global conflict.<sup>44</sup>

Good, practical reasons, however, validated the EU’s creation. The EU’s objectives, also (and more importantly) included preventing another European war and improving the well-being of all workers.<sup>45</sup> Those objectives were attained through the functionalist method of forming specialized institutions defined around particular goals to take advantage of unbiased expert judgment. This expert judgment in specific sectors in turn enabled the EU to attain socially desirable goals in the common interest of all Europeans in an incremental step-by-step fashion. The functionalist method first pooled together the military industries: coal, steel, and atomic power via the European Coal

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<sup>41</sup> See ALEX F. DOWLAH & JOHN E. ELLIOTT, *THE LIFE AND TIMES OF SOVIET SOCIALISM* 182 (1997).

<sup>42</sup> Engle, *Europe Deciphered*, *supra* note 2, at 65.

<sup>43</sup> See, e.g., EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY 260 (Alberta M. Sbragia ed., 1992).

<sup>44</sup> Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COM. L.J. 351, 352-53 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1020467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020467).

<sup>45</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, available at [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf) [hereinafter Treaty of Rome]. The Treaty of Rome was succeeded by the Treaty of Amsterdam (Maastricht) and then the Treaty of Lisbon which reiterated those goals: “The Union’s aim is to promote peace, its values and the well-being of its peoples.” Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community art.2, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm) [hereinafter Treaty of Lisbon].

and Steel Community (ECSC)<sup>46</sup> and the European Atomic Energy Community (EURATOM).<sup>47</sup> European states also formed a customs union, the European Economic Community (EEC) to disaggregate national cartels, which were seen as a cause of wars for market share, because trade and territory had been linked and as a result the only way any state could expand its economy and resource base was by war.<sup>48</sup> Thus, the customs union aimed to attain a single integrated market via the free movement of goods, workers, capital, and enterprises (the four freedoms). Ultimately, the EU evolved into a supranational body with a common currency (the Euro), common citizenship and passports, common borders (the Schengen Area), and to some extent, a common foreign and security policy.<sup>49</sup> As a confederation,<sup>50</sup> the EU began to share many elements of classical Westphalian nation-states.<sup>51</sup>

### C. *The Objectives of the CIS*

The CIS arose in the chaotic aftermath of the collapse of the USSR, which saw competing concerns hamper political movements toward cooperative relations in the former Soviet states.<sup>52</sup> Unlike the

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<sup>46</sup> See EUROPEAN UNION, TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY (Aug. 29, 2011), [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_ecsc\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm) (explaining that the ECSC merged into the E.U.).

<sup>47</sup> See generally *The European Atomic Energy Community (EURATOM)*, EUROPEAN COMM'N (Aug. 25, 2011), [http://ec.europa.eu/energy/nuclear/euratom/euratom\\_en.htm](http://ec.europa.eu/energy/nuclear/euratom/euratom_en.htm) (indicating that the EURATOM's Atomic Energy Commission (AEC) maintains a separate legal existence as an international organization).

<sup>48</sup> Namely, the unity of trade and territory under the Westphalian state system led to war because any state which wished to expand its economy also had to expand its territory. See, e.g., Eric Engle, *Europe Deciphered*, *supra* note 2, at 63.

<sup>49</sup> See generally Eric Engle, *I Am My Own Worst Enemy: Problems and Possibilities of European Foreign Policy Vis-a-Vis the United States*, 18 ST. THOMAS L. REV. 737, 737-38 (2006).

<sup>50</sup> See, e.g., Eric Engle, *Theseus's Ship of State: Confederated Europa between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism*, 8 FLA. COASTAL L. REV. 27, 28-30 (2006).

<sup>51</sup> See Eric Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23, 23-25 (2004).

<sup>52</sup> See Michael Roberts & Peter Wehrheim, *Regional Trade Agreements and WTO Accession of CIS Countries*, 36 INTERECONOMICS 315, 315 (2001), available at <http://www.springerlink.com/content/4164206503711583/> ("Shortly after the collapse of the Soviet Union most of its successor states, with the exception of the Baltic States, joined the Commonwealth of Independent States (CIS). At the same time many CIS countries opened up their trade regimes by dismantling various trade restrictions, state trading monopolies, multiple exchange rate regimes as well as formal tariff barriers. However, in the course of the 1990s pressure for the

USSR or the EU, the CIS never had well-articulated goals. While one faction of the former Russian nomenklatura may well have seen the CIS as the Soviet Union by other means, another faction of Russians, comprised of those who had been the former economic criminals, may well have seen the CIS as merely a vast economic opportunity.<sup>53</sup> Even presupposing the unity of Russian nationalist leaders, the fact that such unity centered on “great Russian nationalism” rather than “proletarian internationalism” indicates that the CIS’s centralizing tendencies were disunited and unattractive to the newly independent national states. On the part of the CIS leaders, this indicates disunity of factions and of objectives. Nevertheless, even if there were a unity, if only of great Russian factions and objectives, then that unitary vision was not able to attract adhesion or persuade the newly independent national republics in, e.g. former Soviet Central Asia, to help form some variant of confederation featuring a customs union and/or common currency and/or common defense.<sup>54</sup>

The lack of a compelling and attractive central vision of shared goals and objectives for the CIS crippled it as an institution for transnational governance. Absent a common teleology or purpose, the CIS

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protection of domestic industries has increased. Import tariffs on “sensitive imports”, such as refined sugar, have started to pop up. By far the most serious barriers to trade and the ones most frequently used are non-tariff barriers. The ever more complex and constantly changing trade regimes of many CIS countries have also opened the door for corruption and smuggling.”)

<sup>53</sup> See Theodore P. Gerber, *Membership Benefits or Selection Effects? Why Former Communist Party Members Do Better in Post-Soviet Russia*, 29 SOCIAL SCIENCE RESEARCH 25, 47 (2000) (“It seems likely that such individual attributes as ambition, career-mindedness, a willingness to submit to organizational discipline, a penchant for organizational and administrative work, and perhaps what might be termed ‘opportunism’ may characterize Party members. These attributes are just as readily translated into material advantage in market institutional contexts as in the institutional context of the Soviet Union.”); Frederico Varese, *The Transition to the Market and Corruption in Post-socialist Russia*, 45 POLI. STUDIES 579, 594 (1997) (“It is harder to secure property right in the new market economy because the number of criminal opportunities is immense. . . People have had novel opportunities to cooperate and, at the same time, to defect, to cheat, and to commit crimes.”).

<sup>54</sup> See STEPHAN K. BATALDEN & SANDRA L. BATALDEN, *THE NEWLY INDEPENDENT STATES OF EURASIA: HANDBOOK OF FORMER SOVIET REPUBLICS* 18 (1997) (considering factional conflict within the Russian Soviet Federative Socialist Republic at the outset of the CIS); see also SCOTT L. GREER, *QUESTIONING GEOPOLITICS: POLITICAL PROJECTS IN A CHANGING WORLD-SYSTEM* 216-17 (2000) (noting the factionalism prevalent within the nomenklatura); Boris Grushin, *The Emergence of a New Elite: Harbinger of the Future or Vestige of the Past*, in *THE NEW ELITE IN POST-COMMUNIST EASTERN EUROPE* 53, 57 (Vladimir Shlapentokh et al. eds., 1999) (discussing the lack of vision prevalent in CIS elites).



degenerated into the political overseer of the peaceful dissolution of the USSR<sup>55</sup> and, to a limited extent, the introduction of market mechanisms to replace the planned economic system. Consequently, in Western literature the CIS is typically described as “moribund” and can accurately be compared to the present day British Commonwealth.<sup>56</sup>

### 1. *The Breakdown of the CIS*

The CIS failed to evolve into a viable transnational governing institution due to a lack of a common vision<sup>57</sup> and elite inexperience in transnational institutionalism,<sup>58</sup> particularly with regards to market liberalization.<sup>59</sup> The CIS sought to undertake the simultaneous tasks of privatization, political and economic liberalization, and the implementation of the rule of law to replace rule-by-command. However, the CIS lacked experts and practical proficiency in transnational governance beyond the context of a strong vertical hierarchy of a one-party dictatorship. Consequently, liberal western transnational governance models such as those of the European Communities could not inform the CIS’s already overwhelmed managerial class. Moreover, some of the new managerial class were Soviet era “economic

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<sup>55</sup> See Roberts & Wehrheim, *supra* note 52, at 323 (“Ten years after the break up of the USSR, CIS countries are still struggling to find the appropriate format to govern their mutual trade relations. At present a patchwork of half-implemented bilateral agreements and a series of paper framework agreements govern intra-CIS trade relations. Most of the RTAs among CIS member states remain de jure agreements. If one were to characterise this institutional framework, one might term it ‘managed disintegration’.”).

<sup>56</sup> See *Commonwealth of Independent States (CIS)*, GLOBALSECURITY.ORG (Aug. 24, 2011), <http://www.globalsecurity.org/military/world/int/cis.htm>.

<sup>57</sup> See Rilka Dragneva & Joop de Kort, *Russia’s Role in Fostering the CIS Trade Regime*, Memorandum from the Dept. of Econ. Research of Leiden University 9 (Mar. 2006), available at <http://ssrn.com/abstract=1440809> (“The CIS was burdened with ambivalent goals. On the one hand, it aimed to assist the newly independent countries to gain economic independence, while on the other hand it was the intended institution to bring the newly independent states together in an economic union. The ambivalent character of the CIS, and the increasing self-consciousness, both politically and economically, of the newly independent states, resulted in numerous bilateral and multilateral agreements at the same time.”).

<sup>58</sup> See Margot Light, *International Relations of Russia and the Commonwealth of Independent States, in 1999* EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES 21 (4th ed.1999).

<sup>59</sup> See Philip Hanson, *The Economics of the Former USSR: An Overview, in 1999* EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES 74, 79 (4th ed. 1998).

criminals,"<sup>60</sup> while others were former nomenklatura. Consequently, factionalism soon ensued both between and within these two historically conflicting groups. The CIS's failure is unsurprising, and was perhaps even inevitable, given those conditions.<sup>61</sup> Lacking a common vision, the CIS defaulted into the role of the clearinghouse for the USSR's remarkably peaceful dissolution via two distinct factors: (i) privatization; and (ii) the devolution of former federal powers to individual Republics.<sup>62</sup>

The institutional problems mentioned contributed to the breakdown of CIS. For example, the CIS's transnational trade policy was characterized by incoherence. Numerous overlapping multilateral and bilateral treaties covered similar issues,<sup>63</sup> leading to economic disputes due to the contradictory obligations imposed by the various treaties.<sup>64</sup> However, these overlapping multilateral and bilateral treaties also left many issues unaddressed.<sup>65</sup> For example, the CIS' agreements were not sophisticated enough to take into account non-tariff

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<sup>60</sup> See Leonard Orland, *Perspectives on Soviet Economic Crime*, in SOVIET LAW AND ECONOMY 169, 177-78 (Olimpiad S. Ioffe & Mark W. Janis eds.) (1987) (outlining what defined a Soviet-era economic criminal). See generally Charles A. Schwartz, *Economic Crime in the USSR: A Comparison of the Khrushchev and Brezhnev Eras*, 30 INT'L & COMP. L.Q. 281, 295 (1981) (discussing the scaling back of the rigidity of economic rules allowing more economic freedom).

<sup>61</sup> Nonetheless, its failure was remarkable in that it contributed to the peaceful transition from one-party dictatorships to independent republics with varying degrees of democratic participatory government.

<sup>62</sup> See Stephen Kux, *From the USSR to the Commonwealth of Independent States: Confederation or Civilized Divorce*, in FEDERALIZING EUROPE? 325, 346-347 (Joaquim Jens Hesse & Vincent Wright eds. 1996).

<sup>63</sup> "What can be observed in the CIS is that economic cooperation takes the form of overlapping bilateral and multilateral agreements of very distinct legal quality. From an economic point of view it does not make sense that countries that have concluded a multilateral free trade agreement, as the CIS countries did in 1994, an agreement that they amended in 1999, subsequently conclude bilateral free trade agreements with their partners as well. It creates overlap, increases transaction costs, and obfuscates the status of multilateral and bilateral agreements." See Dragneva & de Kort, *supra* note 57, at 1.

<sup>64</sup> *Id.* ("What can be observed in the CIS is that economic cooperation takes the form of overlapping bilateral and multilateral agreements of very distinct legal quality. From an economic point of view it does not make sense that countries that have concluded a multilateral free trade agreement, as the CIS countries did in 1994, an agreement that they amended in 1999, subsequently conclude bilateral free trade agreements with their partners as well. It creates overlap, increases transaction costs, and obfuscates the status of multilateral and bilateral agreements.").

<sup>65</sup> See *id.* ("The agreements that are concluded often are partial and selective, while their ratification and implementation also is a mixed affair.").

trade barriers such as health, safety, and technical restrictions to trade.<sup>66</sup> In sum, CIS institutions and rules were simply ineffective.

Any effort to bring the USSR's customs and monetary union into the CIS era was thus doomed for several interlocking reasons. The absence of legal concepts important to coordinating supranational and intergovernmental tendencies and attaining by accretion the objectives of economic integration—such as “basic economic rights” (the four freedoms)<sup>67</sup> subsidiarity, proportionality, and acquired community positions (*acquis communautaire*)<sup>68</sup>—within the CIS treaties further crippled the CIS. Common institutions such as the Economic Court of the CIS were weak or entirely absent<sup>69</sup> because of a lack of a common will, common goals, and common concepts.

Although the CIS lacked the institutional expertise and juridical structure to transform the USSR into something like the EEC, this does not mean that it is currently impossible or undesirable. Accordingly, this paper considers the Eurasian Economic Community

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<sup>66</sup> See *id.* at 3 (“The CIS trade regime can be described as a symbiosis between bilateral and multilateral regimes, both of which can be described as weak regimes. Bilateral agreements cover some key free trade rules, such as tariffs, but remain minimal and quite basic. Non-tariff barriers, for instance, are generally left out, as are liberalisation of services or intellectual property to name a few issues that have become important in international trade agreements. Disputes are generally resolved through consultations”).

<sup>67</sup> The central concept to the foundation of the European Union as an economic area are the four freedoms (basic rights): the free movement of goods, workers, capital and of enterprises among the Member States. See, e.g., Engle, *Europe Deciphered*, *supra* note 2.

<sup>68</sup> Knud Erik Jørgensen, *The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice*, 3 EUROPEAN INTEGRATION ONLINE PAPERS 1, 3, 10-12 (Apr. 29, 1999), <http://eiop.or.at/eiop/texte/1999-005a.htm> (using the Nietzsche-Foucauldian genealogical method to explore various definitions of *acquis communautaire*); *Acquis Communautaire*, BBC NEWS (Apr. 30, 2001), [http://news.bbc.co.uk/1/hi/in\\_depth/europe/euro-glossary/1216329.stm](http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1216329.stm).

<sup>69</sup> Dragneva & de Kort, *supra* note 57, at 2 (“[T]he CIS presents a mix of, often overlapping, bilateral and multilateral agreements. The picture gets even more complicated as bilateral and multilateral agreements often differ in the strength of commitment they require from the signatories. Bilateral agreements rarely envision a mechanism for resolving disputes between its parties, relying on negotiations to do so. Multilateral agreements on the other hand often do attempt to strengthen the bindingness of the commitments undertaken. In 1993, the Treaty of the Economic Union even went as far as to strengthen the role of the Economic Court, by requiring that ‘if the Economic Court recognises that [. . .] a member state has not fulfilled its obligation ensuing from the Treaty, this state is obliged to take measures connected with the implementation of the decision of the Economic Court’. A year later, in 1994, a Free Trade Agreement (FTA) was concluded which ‘undermines’ the position of the Economic Court. . .”).

(EurAsEC) to see whether and how the CIS may consider and implement EU principles.

## 2. *The Eurasian Economic Community (EurAsEC)*<sup>70</sup>

Following the instauration of market mechanisms to replace the planned economic system, and because of the EU's continual success as an institution of transnational governance, the Russian Federation, Belarus, and Kazakhstan together instituted a customs union known as the "Eurasian Economic Community."<sup>71</sup> The EurAsEC could, and should, look directly to the EU's growth and evolution as a source of inspiration and also for basic legal concepts such as:

*Direct effect* of treaty provisions (that private persons have directly enforceable rights and duties under the EurAsEC treaty).

*The four freedoms* (free movement of goods, labor capital, workers and enterprises)<sup>72</sup>

*Acquis communautaire* (the idea that each step toward a single integrated market is irreversible, and that new adherents to the EurAsEC must agree to abide by the existing *acquis*)<sup>73</sup>

"*General principles of international law*" as a source of EurAsEC law

*The principle of legality* (that EurAsEC institutions should be legal, not political)

*Functionalism* (that the EurAsEC institutions should be built out incrementally to progressively attain a single integrated market)

Economic development occurs more quickly through open borders.<sup>74</sup> Thus, despite critiques of the rule of law and democracy in the former Soviet republics, the path forward is through free trade. Eco-

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<sup>70</sup> *About EurAsEC*, ЕВРАСЕЕ́СКОЕ Ў́КОНОМЪ́ЕСКОЕ СООА́УЕСТВО (Aug. 24, 2011), <http://www.evrazes.com/en/about> ("[A] customs union within the EurAsEC framework, with the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation as initial members. Other EurAsEC member states will join the customs union when their economies are ready to take this step.")

<sup>71</sup> Roberts & Wehrheim, *supra* note 52, at 321 ("Russia and two other CIS countries - Kazakhstan and Belarus - established a customs union (CU) in 1995. The Kyrgyz Republic joined in March 1996 and Tajikistan in 1999. The text of the customs provided for discontinuation of all trade tariffs between member countries, tariffs for trade with other countries were adjusted to one level, [i.e., harmonized into a common external tariff] and the system of privileges was unified. In addition, certain measures were taken to unify tax policy (tax rates and application of indirect taxes). The agreements on the customs union called for coordination of customs, excise, and value-added dues.")

<sup>72</sup> See, e.g., Engle, *Europe Deciphered*, *supra* note 2, at 75.

<sup>73</sup> See Jørgensen, *supra* note 68, at 3.

<sup>74</sup> CLEMENS L. J. SIERMANN, *POLITICS, INSTITUTIONS, AND THE ECONOMIC PERFORMANCE OF NATIONS* 131 (Edward Elgar Publ'g 1998).

conomic development is the most practical and effective way to build stronger and more democratic institutions in the former Soviet Republics because wealth creates the conditions that enable genuine human rights protection.<sup>75</sup> The authoritarian democracies in the former Soviet Republics are not *systematic* violators of *the most basic* human rights.<sup>76</sup>

Functionalist incrementalism is thus more effective than extreme methods at securing human rights protection.<sup>77</sup> Economic integration resulting from freer trade and improved economic performance are positively correlated.<sup>78</sup> Likewise, improved economic performance and improved human rights protection are positively correlated.<sup>79</sup> Consequently, through a constructive engagement policy,<sup>80</sup> aid and

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<sup>75</sup> Nat'l Intelligence Council, Conference Report, *Russia in the International System* (June 1, 2001), [http://www.dni.gov/nic/confreports\\_russiainter.html](http://www.dni.gov/nic/confreports_russiainter.html) ("Living in the post-Cold War era has lent some air of stability—a peace dividend—to life in Russia. This may have a positive effect on the development of the economy and democratic institutions.”).

<sup>76</sup> Eleanor Bindman, *Russia's Response to the EU's Human Rights Policy*, OPENDEMOCRACY.NET (Oct. 1, 2010), <http://www.opendemocracy.net/od-russia/eleanor-bindman/russia%E2%80%99s-response-to-eu%E2%80%99s-human-rights-policy> (“[T]he election of President Medvedev in 2008 has led to gradual changes in the previously more hard-line policy regarding human rights in EU-Russia relations. The new foreign policy doctrine appears to emphasise less confrontational and more pragmatic relations with partners such as the EU with the aim of promoting Russia's modernisation.”); HUMAN RIGHTS WATCH, 2011 WORLD REPORT 456, 460, 462 (2011), available at <http://www.hrw.org/en/world-report-2011/russia> (“In 2010 Russia demonstrated increased openness to international cooperation on human rights . . .

In January 2010 - after years of delay - Russia ratified Protocol 14 to the European Convention for Human Rights, becoming the last Council of Europe (CoE) member state to do so. Protocol 14 streamlines the case review process at the ECtHR and strengthens the enforcement mechanisms of the CoE's Committee of Ministers. . . .

In 2010 Russia showed some improved cooperation on human rights, but Russia's international partners did not do enough to encourage human rights reform.”).

<sup>77</sup> Elena Klitsounova, *Promoting Human Rights in Russia by Supporting NGOs: How to Improve EU Strategies* 19 (Ctr. for European Policies Studies, Working Document, No. 19, Apr. 2008), available at [www.ceps.be/system/files/book/1637.pdf](http://www.ceps.be/system/files/book/1637.pdf).

<sup>78</sup> See, e.g., U.N. Econ. & Soc. Comm'n for W. Asia, *Assessment of Trade Policy Trends and Implications for the Economic Performance of the ESCWA Region*, at 3, U.N. Doc E/ESCWA/EDGD/2009/1 (Apr. 14, 2009), available at <http://www.escwa.un.org/information/publications/edit/upload/edgd-09-1-e.pdf>.

<sup>79</sup> SIERMANN, *supra* note 74, at 131.

<sup>80</sup> Sanford J. Ungar & Peter Vale, *South Africa: Why Constructive Engagement Failed*, 64 FOREIGN AFF. 234 (Winter 1985/86) (defining constructive engagement),

trade can help improve economic well-being, leading to both improved human rights protection, and improved rule of law within the former Soviet Republics.

Supranational and intergovernmental governance worked well in the EU to leverage Member States and their immediate neighbors out of war.<sup>81</sup> The former Soviet Republics can and should use those same methods – economic integration leading to increased prosperity to foster peace and the progressive realization of human rights<sup>82</sup> – to support the rule of law and human rights protection.<sup>83</sup> Free trade generates economic prosperity, which in turn generates improved human rights protection.<sup>84</sup> Thus, free trade improves human rights protection.

### 3. Comparing CIS and EU institutions

Marx demonstrated that the business cycle of booms, panics, and depressions causes wars to obtain markets and raw materials as well as to burn off surplus production and employ the unemployed.<sup>85</sup>

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available at <http://www.foreignaffairs.com/articles/40525/sanford-j-ungar-and-peter-vale/south-africa-why-constructive-engagement-failed>.

<sup>81</sup> See, e.g., PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 3-6 (2008).

<sup>82</sup> Štefan Füle, Address at Columbia University (Aug. 25, 2011), [http://www.europa-eu-un.org/articles/fr/article\\_10447\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_10447_fr.htm).

<sup>83</sup> Zbigniew Brzezinski, *Living With Russia*, 61 THE NATIONAL INTEREST 5, 5 (Fall 2000) (“Both Russia and China may be susceptible to a strategy aimed at their inclusion in cooperative international structures. To that end, two Eurasian power triangles must be steadily managed and, over time, more directly connected: one involving the United States, the European Union and Russia; and the other involving the United States, Japan and China. For that linkage to be effective, the constructive engagement of Russia is essential.”); Jonathan M. Winer & Phil Williams, *Russian Crime and Corruption in an Era of Globalization: Implications for the United States*, in RUSSIA’S UNCERTAIN FUTURE, S. PRT. 107-5, at 97, 121 (Joint Comm. Print 2001), available at <http://econ.la.psu.edu/~bickes/jecrussia.pdf> (“Following the collapse of the Soviet Union and the ascendancy of Boris Yeltsin, U.S. policy could be defined in brief as one of constructive engagement, in which the United States aggressively and assiduously worked to secure Russian integration with the world economy, Russian political, economic and legal reform, and democratization.”); see Graham Timmins, *German-Russian Bilateral Relations and EU Policy on Russia: Reconciling the Two-Level Game?*, in RUSSIA AND EUROPE IN THE TWENTY-FIRST CENTURY: AN UNEASY PARTNERSHIP 169-70 (Jackie Gower & Graham Timmins eds., 2009) (describing diplomatic tensions between a post-Putin CIS and the European Union).

<sup>84</sup> See SIERMANN, *supra* 74, at 131; Füle, *supra* note 82.

<sup>85</sup> KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 11 (The Echo Library 2009) (1888).

Both the EU<sup>86</sup> and the USSR sought to prevent such wars and to attain well-being for ordinary workers. However, their similar teleological goals were to be attained by differing means. Institutionally, the USSR was, at least nominally, a workers' and peasants' dictatorship: an advanced vanguard party would exercise a dictatorship on behalf of the proletariat<sup>87</sup> to prevent<sup>88</sup> the wars for market share that capitalism unleashed in economic crises at the trough of business cycles.<sup>89</sup> While we might criticize the idea of a vanguard party exercising a dictatorship on behalf of workers and peasants, we should also understand that the USSR's proletarian dictatorship shared the same stated objectives as the EU. Paradoxically, the EU and USSR both sought to transform the state (coercion) into society (voluntarism), but through opposite means. The USSR, following Marx's prescription to transform the state into civil society,<sup>90</sup> sought to end market relations entirely<sup>91</sup> to attain the goal of peace and prosperity. The EU sought to use market forces to attain that same goal.<sup>92</sup>

Like the EU, the USSR was multinational, multilingual, and attained a monetary union with the free movement of goods, labor, and capital. But, the USSR did not in fact attain the best standard of living for workers. Life expectancy was only a few years lower than in

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<sup>86</sup> See, e.g., DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: CASES AND MATERIALS* 7 (Cambridge Univ. Press 2010).

<sup>87</sup> See generally PETER BÜRGER, *THEORY OF THE AVANT-GARDE* (Michael Shaw trans., Univ. of Minn. Press 1984).

<sup>88</sup> See VLADIMIR ILYICH LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM* (1916), reprinted in 1 LENIN: *SELECTED WORKS* 667 (Progress Publishers 1963), available at <http://www.marxists.org/archive/lenin/works/1916/imp-hsc/ch09.htm>.

<sup>89</sup> See 1 KARL MARX, *CAPITAL* (Samuel Moore & Edward Aveling trans., Frederick Engels ed., 1867), available at <http://www.marxists.org/archive/marx/works/1867-c1/>; 2 KARL MARX, *CAPITAL* (I. Lasker trans., Progress Publisher 1956) (1885), available at <http://www.marxists.org/archive/marx/works/1885-c2/index.htm>; 3 KARL MARX, *CAPITAL* (Tim Delaney et al. trans., 1999) (1894), available at <http://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-III.pdf>; see also VLADIMIR ILYICH LENIN, *STATE AND REVOLUTION* (1917), in 25 *Collected Works* 381-492, available at <http://marxists.org/archive/lenin/works/1917/staterev/index.htm>; MARX & ENGELS, *supra* note 85, at ch. 2.

<sup>90</sup> FRIEDRICH ENGELS & KARL MARX, *SOCIALISM: UTOPIAN AND SCIENTIFIC* 68 (Andrew Moore ed., Edward Aveling trans., Mondial 2006).

<sup>91</sup> See, e.g., *USSR CONSTITUTION*, *supra* note 3, at art. 4 ("The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist system of economy, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man, constitute' the economic foundation of the U.S.S.R. 1936.").

<sup>92</sup> See, e.g., *Treaty of Rome*, *supra* note 45, at pmbl.

the West but double that of Tsarist Russia.<sup>93</sup> Leisure was assured, but consumer goods were always in short supply.<sup>94</sup> The quality of goods suffered from production deadlines at the end of the five-year planning cycles when production goals had to be met, though this improved over time.<sup>95</sup> However, in sum, the quality of Soviet life did not match Western European standards. This was mostly because so much of the government's resources were wasted on building a military-industrial complex that did not advance the well-being of Soviet citizens.<sup>96</sup>

Moreover, the planned economy faced an increasingly complex task: the centralized coordination of production and distribution of a growing variety of goods.<sup>97</sup> Central planning of a primitive industrializing economy with only a few basic inputs is considerably easier than for a diversified industrial economy with hundreds of consumer goods. The Soviet planned economy succeeded in shifting the USSR from a semi-feudal economy producing but a score of basic goods into an industrial economy.<sup>98</sup> This newly created industrial economy, however, produced a myriad of different goods.<sup>99</sup> This production diversity doomed the centrally planned economy. Namely, the ever-greater product variety made central planning increasingly complex and thus less efficient when coordinating production and consumption. Soviet production was not, however, entirely inefficient. Soviet weaponry was cheap, durable, easily maintained and reliable. The USSR was the first country to put a satellite into space, and later a man into orbit. Still, the USSR's centrally planned economic production system was more appropriate for a semi-feudal industrializing society with few goods than for a highly developed industrial economy producing a myriad of goods.<sup>100</sup>

The institution of a single party dictatorship and the teleology of the USSR were not apt to liberalism.<sup>101</sup> Thus, the customs and mon-

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<sup>93</sup> WHITE, *supra* note 5, at 43.

<sup>94</sup> See generally Robert Whitesell, *Why Does the Soviet Economy Appear to be Allocatively Efficient?*, 42 SOVIET STUDIES 259, 259-268 (Apr. 1990).

<sup>95</sup> Zigurds L. Zile, *Consumer Product Quality in Soviet Law: The Tried and the Changing*, in 2 SOVIET LAW AFTER STALIN: SOCIAL ENGINEERING THROUGH LAW 202 (Donald D. Barry ed., 1978) (discussing the rising quality of Soviet goods between 1960s and 1970s).

<sup>96</sup> See Engle, *A Social-Market*, *supra* note 29, at 42.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Engle, *A Social-Market*, *supra* note 29.

<sup>100</sup> See generally Ludwig von Mises, *Introduction to LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* 2, 2-3 (S. Alder trans., 1920), available at <http://mises.org/econcalc.asp>.

<sup>101</sup> I mean liberalism in the sense intended by Aristotle and Locke; an open democratic form of governance in which people are free to enter into economic transac-



etary union of the CIS quickly degenerated into national economies with separate currencies and tariff barriers still trying to implement the ISI development model – a model that neoliberalism had long surpassed.<sup>102</sup> The establishment of inter CIS customs and tariff barriers raised transaction costs and reduced economies of scale.<sup>103</sup> Restructuring a centrally planned dictatorial economy centered on autarchy and war into a consumer oriented networked globalizing economy exacerbated those problems. The result was sub-optimal economic performance.<sup>104</sup> At times, the newly independent Republics were trying to implement outdated and inefficient liberal or Soviet models of economic development. At other times, they became disposable experiments in neoliberalism. All too often the results were chaos, corruption, asset stripping, and economic failure<sup>105</sup> resulting in a *declining* average life expectancy in the post-Soviet years.<sup>106</sup> These results explain why multiparty liberal democracy did not take root in some of the former Soviet Republics. The return of one-party rule in some former Soviet Republics after the collapse of the USSR resulted from the chaos of the failed Soviet planned economy model, the failed ISI model, and the asset stripping and kleptocracy which resulted from neoliberal experimentation. The CIS's lack of institutional experience and personnel expertise in the principles and practices of liberal markets and transnational governance in any context other than that

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tions as they themselves choose. See JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (1690), available at <http://www.constitution.org/jl/2ndtreat.htm>.

<sup>102</sup> See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (Univ. of Chicago Press 1962). While I critique certain points of Friedman, Friedman's views on monetary policy seem entirely correct to me and replaced the failed theory of John Maynard Keynes's "General Theory of Employment, Interest and Money." Compare FRIEDMAN, *supra*, with ERIC ENGLE, LEX NATURALIS, IUS NATURALIS 220-428 (Donna M. Lyons & Jacob D. Zillhardt eds., 2010), available at <http://tinyurl.com/lexnaturalis>, and JOHN MAYNARD KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936), available at <http://www.marxists.org/reference/subject/economics/keynes/general-theory/>.

<sup>103</sup> WORLD BANK, BELARUS: PRICES, MARKETS, AND ENTERPRISE REFORM 1 (1997).

<sup>104</sup> See, e.g., *id.*

<sup>105</sup> *Privatization: Lessons from Russia and China - Employment Sector*, INT'L LABOR ORG. (Joseph Prokopenko ed.), available at <http://www.ilo.org/public/english/employment/ent/papers/emd24.htm> ("By the beginning of 1997 the Russian economy had perhaps reached its lowest point. GNP fell by 6 percent in 1996, compounding a decline of more than 50 per cent since 1991 (although the shadow economy has expanded). Many enterprises are on the brink of collapse; the proportion of loss-making enterprises in the main economic sectors is approximately 43 per cent.").

<sup>106</sup> See, e.g., D. A. Barr & M. G. Field, *The Current State of Health Care in the Former Soviet Union: Implications for Health Care Policy and Reform*, 86 AM. J. PUB. HEALTH 307, 308 (1996).

of a single party dictatorship in turn explains the failure of the CIS member states to have adopted EU governance models in the late 1990s.

### III. CONCEPTS IN TRANSNATIONAL GOVERNANCE

This section describes the relationships between the rule of law, the economy, human rights protection, and democracy. It outlines ideas about political legitimation and presents practical methods to advance transnational relations to explain how international relations between the United States, the E.U., and the former Soviet Republics may be improved.

#### A. *Historical Materialism Revisited*

A key question for transnational governance is: how to untangle the relationships among the rule of law, democracy, the economic system, and human rights? The rule of law, democracy, free trade, and human rights protection are all positively associated - improving the protection of one tends to improve protection of the others.<sup>107</sup> Does any hierarchy order their relations?

I hypothesize that the rule of law is needed for an optimally productive market economy, and that a productive economy and the rule of law in turn lead to effective human rights protection *de jure* and *de facto* respectively. I also argue that democratic institutions are less important to human rights protection or to the attainment of the rule of law than is usually thought to be the case.<sup>108</sup> That is because, in practice, democratic processes are used only to reinforce and legitimize policies which were already formed by elites rather than to actually create public policies.<sup>109</sup> Most legislative bills are introduced not by democratic referenda but by elected republican representatives.

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<sup>107</sup> See, e.g., AMAZU A. ASOUZA, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 42 (2001); Henry J. Steiner, *in Do Human Rights Require a Particular Form of Democracy?*, in DEMOCRACY, THE RULE OF LAW AND ISLAM 193, 202-204 (Eugene Cotran & Adel Omar Sherif eds., 1999); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

<sup>108</sup> See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96-97 (1998).

<sup>109</sup> EVA ETZIONI HALEVY, FRAGILE DEMOCRACY: THE USE AND ABUSE OF POWER IN WESTERN SOCIETIES 16 (1989); DAVID HELD, MODELS OF DEMOCRACY 164 (2006); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (1942); see HARRY ECKSTEIN ET AL., CAN DEMOCRACY TAKE ROOT IN POST-SOVIET RUSSIA?: EXPLORATIONS IN STATE SOCIETY RELATIONS 134 (1998) (explaining government institutions in the context of Russia).

Policies are typically proposed by elites<sup>110</sup> which are then either taken up or rejected by masses through the democratic process.<sup>111</sup>

The West tends to equate democracy with the rule of law,<sup>112</sup> and wrongly presumes that the democratic process is necessary to the rule of law and human rights protection. I maintain that the rule of law leads to a productive economy.<sup>113</sup> The rule of law and a productive economy together foster democratic processes and provide substantive human rights protection. These ideas are summed up in the following “key points”:

The rule of law is necessary for a productive open market;<sup>114</sup>  
 A market economy with social protections favors prosperity;  
 Economic prosperity favors protection of human rights;  
 Democratic deficit can be *ex post facto* legitimized by the success of public policies that were politically unpopular at the time of their enactment.

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<sup>110</sup> See CHARLES WRIGHT MILLS & ALAN WOLFE, *THE POWER ELITE* 3-4 (2000).

<sup>111</sup> Anne Peters argues, as does this paper, for “legitimation *ex post*” i.e. legitimation by success. See ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* 517, 580 (2001); see also Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* 165, 186 (Michel Rosenfeld ed., 1994); ALAN KEENAN, *DEMOCRACY IN QUESTION: DEMOCRATIC OPENNESS IN A TIME OF POLITICAL CLOSURE* 28 (2003).

<sup>112</sup> See, e.g., Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy - Political Theory and the American Constitution*, 27 *BRIT. J. POL. SCI.* 595 (1997).

<sup>113</sup> David Silverstein & Daniel C. Hohler, *A Rule-Of-Law Metric for Quantifying and Assessing the Changing Legal Environment of Business*, 47 *AM. BUS. L.J.* 795, 818-19 (2010) (“For more than half a century, a prevailing view motivating Western foreign aid approaches was that rule of law correlated in some positive and significant way with economic development and an attractive business climate for foreign investment . . . . More recent literature in this field, however, has led to growing skepticism about the validity and general application of the assumptions that served as the touchstones for Western development initiatives. Debate continues, for example, over whether a causal relationship between rule of law and a successful market economy exists and, if so, in which direction that causation runs, whether these variables may be mutually reinforcing, what key elements characterize a rule-of-law system, and how does one explain away the many anomalies.”)

<sup>114</sup> See, e.g., Edgardo Buscaglia, U.N. Office for Drug Control & Crime Prevention [UNODCCP], Ctr. for Int’l Crime Prevention [CICP], *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* 6-7, U.N. Doc. CICP-14 (Mar. 2001), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp14.pdf>.

Rather than adopting the position that democratic processes are either the source of human rights protection or a necessary precondition to the rule of law, I argue that the rule of law and economic development positively correlate<sup>115</sup> and that each is a precondition to effective and meaningful human rights defense. I also argue that democratic legitimation can be an outcome of economic and legal development.<sup>116</sup>

These arguments reiterate the historical materialist claims that economic processes ultimately drive legal and ideological rationalizations of any given political system.<sup>117</sup> The dialectical materialist refinement of that argument is to note that the economic base (the forces of production) *generally* determines the legal forms of the superstructure (the relations of production), but that *exceptionally*, at particular times and under certain conditions, the superstructure (ideology) can determine the base (production).<sup>118</sup> In other words, the material forces of production *generally* constitute and constrain the ideological superstructure that rationalizes them – but, *exceptionally*, at certain times and places in history, the ideological superstructure can influence and compel the structure of the material forces of production.

Marxism aimed to act as a catalyst for the natural and inevitable movement of history by intervening “at the margins,” - these excep-

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<sup>115</sup> Frank Richardson, *Pro Bono Work Has Burgeoned Over the Past Few Years Both Geographically and in Its Legal Range*, 64 INT’L B. NEWS 26 (Aug. 2010) (explaining the positive correlation between rule of law and economic performance; negative correlation between corruption and economic performance).

<sup>116</sup> There is a plethora of literature, much of it contradictory, on the relationships among the rule of law, prosperity, democracy, and human rights. See, e.g., Susan D. Franck, *Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development: Foreign Direct Investment, Investment Treaty Arbitration, and Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DIV. L.J. 337, 342-43 (2007); Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008); James R. Jones, *Open Markets, Competitive Democracy, and Transparent and Reliable Legal Systems: The Three Legs of Development*, 83 CHI.-KENT L. REV. 25 (2008); Randall Peerenboom, *Social Networks, Rule of Law and Economic Growth in China: The Elusive Pursuit of the Right Combination of Private and Public Ordering*, 31 GLOBAL ECON. REV. 3 (2002); John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for Int’l Peace, Democracy and Rule of Law Project, Working Paper No. 26, 2002), available at <http://carnegieendowment.org/files/wp26.pdf>.

<sup>117</sup> See generally G. A. Cohen, *Base and Superstructure: A Reply to Hugh Collins*, 9 OXFORD J. LEGAL STUD. 95 (1989).

<sup>118</sup> The dialectical relationship between the material forces of production (base) and the ideological relations of productions (superstructure) is a basic tenet of Marxism. See KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (R. Rojas trans., Progress Publishers 1977) (1859), available at <http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface>.

tional points in social life where superstructure can influence base.<sup>119</sup> Perhaps the vanguard party's altruism outran the basic needs for consumption of the productive base (the workers) it was leading. Perhaps the vanguard party became corrupted. Perhaps both explanations apply. Nevertheless, the USSR shows that vanguard parties exercising a dictatorship on behalf of the proletariat are very effective at ending illiteracy and starvation, and at introducing sex equality, but are not terribly effective at coordinating production and consumption in a complex consumer economy.<sup>120</sup>

The rule of law, economic development via free trade and open markets, human rights protection, and democracy all correlate positively and are mutually reinforcing.<sup>121</sup> These concepts form an interrelated hierarchy. I postulate their priority as follows. Without basic laws, economic development is impossible due to physical insecurity and legal uncertainty. Without economic development, human rights protection is impossible or at least meaningless. Meanwhile, democratic processes require a basic legal system and at least minimal economic well-being. Human rights protections without economic development are sub-optimal. For example, religious freedom in the face of starvation is merely the right to receive one's last rites, so to speak. While dying with dignity isn't utterly meaningless, would it not be better to choose life, somehow? By placing survival rights, such as the right to food,<sup>122</sup> ahead of psychological rights, or even political rights, we will better protect people in real terms.

In any case, *democracy, productive open markets, human rights protection, and the rule of law* are all positively correlated, and mutually reinforcing. As Russia increasingly implements the rule of law, transaction costs will decline, which will strengthen the economy. This, in turn, creates an environment where it is possible to envision better human rights protections and practically apply the material re-

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<sup>119</sup> See, e.g., KARL MARX, *Afterword to the Second German Edition*, CAPITAL (1873); MARX, CAPITAL, *supra* note 87, at ch. 24 § 1; see also FRIEDRICH ENGELS, DIALECTICS OF NATURE (Andy Bluden et al. trans., 2006) (1883), available at <http://www.marxists.org/archive/marx/works/1883/don/index.htm>.

<sup>120</sup> See generally ENGLE, MARXISM, *supra* note 16.

<sup>121</sup> See Pamela K. Star, *The Two "Politics of NAFTA" in Mexico*, 16 L. & BUS. REV. AM. 839, 841 (2010) (discussing how trade liberalization, economic performance, democratization are correlated positively); see, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

<sup>122</sup> See, e.g., Jean Ziegler, Special Rapporteur on the Right to Food, *Economic, Social and Cultural Rights: The Right to Food*, U.N. Doc. E/CN.4/2001/53 (Feb. 7, 2001), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/f45ea4df67ecca98c1256a0300340453?OpenDocument> (indicating that a well-functioning economy facilitates the furtherance of the right to eat).

sources needed for substantive human rights protection and enjoyment.

### B. *Functionalism*<sup>123</sup>

Functionalism argues that institutions should be understood and formed in terms of the functions that they aim to fulfill.<sup>124</sup> Functionalist approaches to transnational governance seek to safeguard peace by drawing nations together,<sup>125</sup> rather than splitting them apart.<sup>126</sup> Functionalism forms specialized institutions incrementally<sup>127</sup> to attain specific practical purposes.<sup>128</sup> When functionalism is linked to market liberalism, it seeks to obtain peace, obviate war, and generate prosperity and economic interdependence by delink-

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<sup>123</sup> As a theory of sociology, functionalism analogizes society to an organism, with each member having particular functions, like organs of a body. See, e.g., Kent McClelland, *Functionalism*, GRINNELL COLLEGE (Oct. 15, 2011, 12:15 PM), <http://web.grinnell.edu/courses/soc/s00/soc111-01/IntroTheories/Functionalism.html>.

<sup>124</sup> Steve Charnovitz, *Triangulating The World Trade Organization*, 96 AM. J. INT'L L. 28, 48 (2002) ("The core idea of functionalism is that international governance should be organized according to 'tasks' and 'functional lines.'").

<sup>125</sup> BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY 14-15 (1992) ("Functionalism is a theory of international organization which holds that a world community can best be achieved not by attempts at the immediate political union of states, but by the creation of non-political international agencies dealing with specific economic, social, technical, or humanitarian functions. Functionalists assume that economic, social and technical problems can be separated from political problems and insulated from political pressures.").

<sup>126</sup> Juliet Lodge, *Preface: The Challenge of the Future*, in THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE, at xix (Juliet Lodge ed., 2d ed. 1993) ("The logic behind the approach is to prevent war not negatively - by keeping states apart - but positively by engaging them in cooperative ventures . . . to establish functionally specific agencies, initially in what were then seen as non-contentious areas like welfare. These were to transcend national boundaries and be managed by rational technocrats (not swung by the vagaries of political ideology and power-hungry political parties) owing their allegiance to a functionally specific organization not to a given nation state . . . Their tasks will cover those areas of the economy essential to running military machines. Governments, deprived of control over those areas, will be unable to pursue war and will eventually be left to manage residual areas not covered by functional bodies . . .").

<sup>127</sup> Sabino Cassese, *European Administrative Proceedings*, 68 L. & CONTEMP. PROBS. 21, 23 (2004) ("functionalism . . . has enabled the incremental, progressive development of the European Union").

<sup>128</sup> Lodge, *supra* note 126 ("Functionalism starts from the premise that by promoting functional cooperation among states it may be possible to deter them from settling disputes over competition for scarce resources aggressively.").

ing trade and territory.<sup>129</sup> One tenet of functionalism is that economic and political integration is best achieved not at one fell swoop with grandiose and impossible ideas,<sup>130</sup> but rather through incremental efforts in diverse fields.<sup>131</sup> Functionalism is realistic and pragmatic: it seeks to attain the possible here and now rather than utopian dreams that never really come true. Its methods obtain political legitimacy after the fact because of the success of the institution at achieving practical goals.<sup>132</sup> Ultimately, functionalists aim to prevent war not by keeping states apart, but by drawing them together - by establishing transparent, responsible, and effective transnational governance structures in specific sectors. Neo-functionalism takes functionalism one step forward by seeking political integration.<sup>133</sup>

Just as functionalist methods were successfully applied to create the EEC and grow them into the EU, so can they be used to build stable prosperous transnational governance among the former Soviet Republics, and foster the rule of law and human rights protection through increased economic prosperity.<sup>134</sup> Specifically, the functionalist method would focus on developing the idea of the rule of law in Eastern Europe. First is the idea of an impartial independent judici-

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<sup>129</sup> There is vast literature on functionalism. *See, e.g.*, ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950-57* (Stanford Univ. Press 2004).

<sup>130</sup> Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260, 283 (1940) ("Grandiose legalistic schemes purporting to solve the ills of the world have replaced the less spectacular, painstaking search for the actual laws and the facts underlying them.").

<sup>131</sup> *See id.* at 284.

<sup>132</sup> Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 *TEX. INT'L L.J.* 527, 540 n.86 (2003) ("The neo-functionalist theory that has driven much of European integration, for example, posits that supranational institutions formed for fairly narrow purposes will attract political support over time and will thereby be able to expand their functions.") (citing BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION* 51-52 (2000)).

<sup>133</sup> Lodge, *supra* note 126 ("Neofunctionalists have a common starting point with functionalists in their attachment to . . . learning processes, allegedly apolitical, technocratic socio-economic welfare functions, consensus-building and functional specificity, neofunctionalists adopt a pluralist perspective. They argue that competitive economic and political elites mediate in the process and not only become involved in it but become key players. . . . Neofunctional integration sees integration as a process based on spillover from one initially non-controversial, technical sector to other sectors of possibly greater political salience, involving a gradual reduction in the power of national government and a commensurate increase in the ability of the centre to deal with sensitive, politically charged issues.").

<sup>134</sup> Jackie Gower, *EC Relations with Central and Eastern Europe*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 286 (Juliet Lodge ed., St. Martin's Press, 2d ed. 1993).

ary seeking to implement the national will as expressed in legislation. Second is the idea of law as more than mere positive command, but law also as persuasive attractive, and moral appeal. Third is the idea of legal certainty. This requires further construction of a but partially existent legal culture. In Estonia, for example, Soviet era judges were effectively shunted aside to secondary tasks, retrained, and entered retirement or academia. New judges were selected from shockingly young candidates. To a much lesser extent this is also happening in Russia. The lack of institutional retraining initiatives extending from the United States or E.U., however, can be partly to blame. Educating and reforming an entire legal culture is necessary, but initiatives to do so are starkly lacking. With the formation of a neutral independent unbiased judiciary it would then be possible to form transparent, responsible and effective institutions. A functionalist approach would then seek to protect human rights sequentially, focusing first on survival rights, then on economic rights, progressively attaining ever greater human rights protections: the hierarchy of norms<sup>135</sup> to attain the hierarchy of needs.<sup>136</sup> I have argued elsewhere for hierarchizing some of the basic human rights as follows: the right to one's own life, then the right to food,<sup>137</sup> then the right to shelter, then political rights and cultural rights.<sup>138</sup> In other words, one's basic needs in the hierarchy must be met before the more advanced and complex needs can be satisfied.<sup>139</sup> All these rights are vital to a good life, but some naturally precede others.

From the Russian perspective, establishing a judiciary or administrative institution is easy: The President and Prime Minister issue the order. But the question is, how can Russia form an

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<sup>135</sup> See Eric Allen Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 236 n.120 (2006), available at <http://ssrn.com/abstract=1020464> (explaining the hierarchical evolution of human rights); see also ENGLE, *LEX NATURALIS*, *supra* note 102 (discussing the logical hierarchization of human rights).

<sup>136</sup> See, e.g., JIM IFE, *HUMAN RIGHTS AND SOCIAL WORK: TOWARDS RIGHTS-BASED PRACTICE* 83 (2001).

<sup>137</sup> Universal Declaration of Human Rights, art. 25 ¶ 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.").

<sup>138</sup> AMITAVA MUKHERJEE, *HUNGER: THEORY, PERSPECTIVES AND REALITY* 83-84 (2002).

<sup>139</sup> See e.g., Babu Joseph, *Human Rights and Poverty: A Philosophical Perspective*, in 2 HUMAN RIGHTS AND POVERTY IN INDIA: THEORETICAL ISSUES AND EMPIRICAL EVIDENCES 24 (S. N. Chaudhary ed., 2005).



*independent and unbiased* judiciary? From the EU perspective, forming judicial expertise is not difficult. It is a matter of training in western legal methods. Joint E.U.-Russian judicial and administrative bodies might enable the positive implementation of neutral unbiased adjudication. EU judges would also thereby be able to compare experiences, methods, and ideas with their Russian counterparts. This is to merely indicate the extent of the problem and suggest possible ways ahead.

### C. *Ex Post Legitimacy and Democratic Deficit in the EU*

Democratic deficit in the EU was not an obstacle to economic and political integration because of legitimation after the fact. As long as processes are transparent (i.e. open, governed by the rule of law) and not tainted with secrecy and deception (i.e. political), policies can attain legitimacy after their implementation by virtue of their efficacy.

The EU was a long term project driven by elites with minimal mass support.<sup>140</sup> It was built gradually and sequentially, using the functionalist method that focused first on aggregating the war industries, and then on dissolving national cartels by building a single integrated market for goods, labor, capital, and services. The war industries were made subject to common control not to prepare for a war against the Soviet bloc, but to prevent yet another Western European War. While NATO greatly facilitated the EU's development by providing a defensive umbrella under the premise of collective security, two World Wars had already shown that collective security alone is insufficient to prevent war. Something beyond nation-state alliances are necessary to achieve lasting peace. That something is economic integration.

The EU was built without the mass public support often thought needed for political legitimization. Despite this democratic deficit, the EU has emerged to become one of the world's most competent and effective transnational organizations. One lesson of the EU for the former Soviet Republics is that the former Soviet Republics problem of democratic governance is surmountable. We can and should draw all the lessons from the EU's experiences. Democratic institutions in Eastern Europe can be built gradually over time using functionalist methods. Transnational governance via functionalism will generate the economic well-being necessary to create a foundation for improved respect of human rights.

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<sup>140</sup> See, e.g., PAUL C. ADAMS, ATLANTIC REVERBERATIONS: FRENCH REPRESENTATIONS OF AN AMERICAN PRESIDENTIAL ELECTION 50 (2007) (discussing how whole forests have been felled to rehash the famous issue of "democratic deficit"); see also Jeffrey J. Anderson, *Introduction* to REGIONAL INTEGRATION AND DEMOCRACY: EXPANDING ON THE EUROPEAN EXPERIENCE 1 (Jeffrey J. Anderson ed., 1999).

We now turn our attention to the relationship between the EU and Eastern Europe. This will help us understand exactly how Eastern Europe can apply EU governance models to build effective, transparent participatory state systems governed by the rule of law, and thus enjoy economic prosperity and improved human rights protections.

#### IV. THE EU AND RUSSIA

“We propose the creation of a harmonious economic community stretching from Lisbon to Vladivostok” - Vladimir Putin<sup>141</sup>

The success of the EU as an example of transnational governance and the growing number of Eastern European legal scholars familiar with the basics of EU law explain the growing acceptance of the EU in the former Soviet republics. The Russian Federation’s ultimate long-term goal with the EU is to form an economic union to achieve trading synergies and encourage technological innovation<sup>142</sup> to generate economic development. Schumpeter rightly noted that innovation generates wealth.<sup>143</sup> EurAsEc and the EU complement each other<sup>144</sup> because each has the same goals: to attain economic development via free trade and to engage in economic integration to create the economic base needed for human rights protection, to guarantee the rule of law, and to obviate the risk of war. EurAsEc could develop independently of the EU, but the logic of economic synergy resulting from specialization and economies of scale enjoyed as a result of free trade, however, explains why both transnational organizations are more effective when cooperating rather than when competing with each other. These economic benefits are further augmented by the fact that good foreign relations means fewer resources wasted on weapons.

France’s Nicholas Sarkozy supports Russia’s desire for economic integration with Europe, as does Italy’s Silvio Berlusconi.<sup>145</sup> As earlier noted, the desire for increased economic integration is partly driven by the fact that trade between Russia and Europe is growing.

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<sup>141</sup> C. G. H., *From Lisbon to Vladivostok: Putin Envisions a Russia-EU Free Trade Zone*, SPIEGEL ONLINE INT’L (Nov. 25, 2010, 11:44 AM), <http://www.spiegel.de/international/europe/0,1518,731109,00.html>.

<sup>142</sup> Valentina Pop, *Putin Proposes Russia-EU Union*, EU OBSERVER (Nov. 26, 2010, 09:29 AM), <http://euobserver.com/19/31361>.

<sup>143</sup> JOSEPH SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 154 (Redvers Opie trans., 1934).

<sup>144</sup> European Parliament Resolution of 17 June 2010 on the Conclusions of the EU/Russia Summit (31 May – 1 June 2010), 2011 O.J. (C 236 E/103) para. 1, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:236E:0101:0104:EN:PDF> [hereinafter EU/Russia Summit].

<sup>145</sup> *See, e.g., Berlusconi Wants EU-Russia Visa Tegime to be Scrapped*, RIANOVOSTI (Apr. 18, 2008, 7:25 PM), <http://en.rian.ru/world/20080418/105424007.html>.

This growing trade reflects Russia's comparative advantage in hydrocarbons<sup>146</sup> and, to a lesser extent, atomic energy. This growing trade also reflects the asymmetric European comparative advantage in certain industrial goods. Though Western Europe is even more dependent than the U.S. on imported petroleum, alternatives exist to Russian natural gas. Solar energy has become much more efficient in the past decades.<sup>147</sup> Wind turbines, too, are increasingly competitive. Though Germany largely rejects atomic energy<sup>148</sup> for environmental reasons, France uses it extensively.<sup>149</sup> It is even possible, albeit expensive, to liquefy coal into petroleum products.<sup>150</sup> Likewise, ethanol has been used successfully in Brazil as an alternative automotive fuel.<sup>151</sup> Thus, the energy dependence on petroleum imports of countries such as the United States or Germany is only relative. Russian energy exports are driven not by geopolitical ambitions, but by the practical fact of who

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<sup>146</sup> *Balance Human Rights & Energy with Russia Says Knut Fleckenstein MEP*, EUROPEAN PARLIAMENT (June 23, 2010, 2:52 PM), <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20100618STO76329> ("The European Union's relationship with Russia is one of its most important and most complicated. Strong trade and energy ties bind both although many in the EU are concerned about Moscow's human rights record.").

<sup>147</sup> FEDERAL MINISTRY FOR THE ENVIRONMENT, NATURE CONSERVATION AND NUCLEAR SAFETY, RENEWABLE ENERGY SOURCES IN FIGURES 8 (2010), *available at* [http://www.erneuerbare-energien.de/files/english/pdf/application/pdf/broschuere\\_ee\\_zahlen\\_en\\_bf.pdf](http://www.erneuerbare-energien.de/files/english/pdf/application/pdf/broschuere_ee_zahlen_en_bf.pdf) ("The expansion of renewable energy sources in Germany has been an exemplary success. Since 2000, renewable energies' contribution to final energy supply has increased 2.5-fold to a level of 10.3 %. In the electricity sector, the German Government had originally aimed to achieve a 12.5 % renewables' share of gross electricity demand by 2010. This target was already surpassed, considerably, by 2007. In 2009, a share of over 16% had been reached.").

<sup>148</sup> Eben Harrell, *Germany Decides to Extend Nuclear Power*, TIME (Sept. 6, 2010, 7:38 AM), <http://ecocentric.blogs.time.com/2010/09/06/germany-decides-to-extend-nuclear-power/> ("Every [sic] since Chernobyl puffed its radioactive plume over Europe in 1986, Germany has been deeply suspicious of nuclear power. Opposition to *Atomkraft* is at the center of the country's green movement, and almost a decade ago the country decided to phase out its nuclear plants by 2021.").

<sup>149</sup> *Nuclear Power in France*, WORLD NUCLEAR ASS'N (Oct. 15, 2011, 12:35 PM), <http://www.world-nuclear.org/info/inf40.html> ("France derives over 75% of its electricity from nuclear energy. This is due to a long-standing policy based on energy security.").

<sup>150</sup> *Sasol's Synthetic Fuels Go Global*, S. AFRICA INFO (Mar. 16, 2007), <http://www.southafrica.info/business/success/sasol-130307.htm>.

<sup>151</sup> Larry Rohter, *With Big Boost from Sugar Cane, Brazil Is Satisfying its Fuel Needs*, N.Y. TIMES (Apr. 10, 2006), [http://www.nytimes.com/2006/04/10/world/americas/10brazil.html?\\_r=1&pagewanted=1&sq=Bush%20Brazil%20ethanol&st=nyt&scp=5](http://www.nytimes.com/2006/04/10/world/americas/10brazil.html?_r=1&pagewanted=1&sq=Bush%20Brazil%20ethanol&st=nyt&scp=5).

will pay the most.<sup>152</sup> Recall that, during the Cold War, the USSR did not participate in the Arab oil embargos and continued to sell petroleum to the U.S.<sup>153</sup> This experience demonstrates that energy issues are not determinative of foreign relations between the Russian Federation and other states, but merely constrain outcomes because of the fact that energy dependence is *relative*, not absolute. While the importance of those economic relationships is obvious, they are not the EU's primary *legal* concern. Nor are these economic relationships the driving force of efforts toward Russia's *de jure* economic integration into the EU or the WTO. Meanwhile, *de facto* economic integration is, and will continue to further deepen regardless of political issues because of practical economic facts.

Mutual economic interests between the EU and Russia are leading to *de facto* economic integration. Europe is dependent on Russian primary resources and exchanges them for investments into Russia's secondary and tertiary markets.<sup>154</sup> This creates conditions under which the rule of law is likely to be increasingly respected because 1) Increasing wealth makes rule breaking less frequent due to reduced desperation; 2) Foreign investors do not wish to see their economic interests nationalized and foster the rule of law through private contractual mechanisms such as jurisdiction and binding arbitration clauses; and 3) International commerce requires legal stability so that contracts clear quickly and efficiently, thus incentivizing the Russian judiciary to professionalism. This extensive wealth creation in turn indirectly makes the real protection of human rights much likelier in practice. I argue that *de jure* economic integration will accelerate the inevitable process of *de facto* economic integration *and* help contribute to the formation of the rule of law in the former Soviet Republics, at least in an exemplary fashion, though hopefully also through formation of institutions and comparison of expertise.

What about human rights? Often people think of the false dichotomy: "either the market or human rights." In fact, trade leads to prosperity resulting in better human rights protection.<sup>155</sup> Trade also

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<sup>152</sup> MARSHALL GOLDMAN, *PETROSTATE: PUTIN, POWER AND THE NEW RUSSIA* 136-70 (Oxford Univ. Press 2010).

<sup>153</sup> Dina R. Spechler & Martin C. Spechler, *The Soviet Union and the Oil Weapon: Benefits and Dilemmas*, in *THE LIMITS TO POWER: SOVIET POLICY IN THE MIDDLE EAST* 96, 96-98 (Yaacov Ro'i ed., 1979).

<sup>154</sup> See, e.g., *Europe and Russia's Resources: "We Are Mutually Dependent on Each Other"*, SPIEGEL ONLINE INT'L (July 14, 2006), <http://www.spiegel.de/international/spiegel/0,1518,426555,00.html>.

<sup>155</sup> See, e.g., Céline Charvériat & Romain Benicchio, *Trade and Human Rights: Friends or Foes?*, in *PEACE AND PROSPERITY THROUGH WORLD TRADE* 279 (Fabrice Lehmann & Jean-Pierre Lehmann eds., 2010); Craig Forcese, *Human Rights Mean Business: Broadening the Canadian Approach to Business and Human*

leads to interdependence, making war unprofitable. Accordingly, the EU seeks to create an open integrated market with the Russian Federation. Both partners desire increased integration because the EU is Russia's main trading partner<sup>156</sup> and because the level of trade between the EU and Russia continues to rapidly grow.<sup>157</sup>

Key institutions created to channel EU-Russia relations include the EU-Russia Partnership and Cooperation Agreement ("PCA"), the four "common spaces" pursuant to the PCA, and the Northern Dimension. Finally, to understand how the EU relates to other former Soviet Republics that are not EU Member States, we must also understand the EU's Eastern Partnership program.

#### A. *The EU's Concerns with respect to the Russian Federation*

To understand the relations between the EU and the Russian Federation, we must understand the perceptions of the EU toward the Russian Federation. The issues that cause concern among the EU's leadership or its citizens with respect to the Russian Federation are political, economic, and legal in nature. This section briefly summarizes the EU's position on all three issues to show how they, albeit discretely, interact to a significant degree. Ultimately, this section illustrates how the EU and Russia are moving closer to each other in the post-Soviet era.

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*Rights, in* GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 74 (Isfahan Merali & Valerie Oosterveld eds., 2001); ADAM GEAREY, GLOBALIZATION AND LAW: TRADE, RIGHTS, WAR 133 (2005).

<sup>156</sup> Directorate-General for Trade, *Trade: Russia (Bilateral relations)*, EUROPEAN COMM'N (Oct. 7, 2011), [http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/index\\_en.htm](http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/index_en.htm) ("The EU is by far Russia's main trading partner, accounting for 52.3% of its overall trade turnover in 2008. It is also by far the most important investor in Russia.")

<sup>157</sup> Press Releases, European Union, Review of Russia-EU Relations (Nov. 5, 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/678&format=> ("*Trade and investment* between the EU and Russia are substantial and growing, and it is in our mutual interest that this trend should continue. Russia is our third most important trading partner and we see growth rates of up to 20% every year. Energy is a major factor, but impressive growth figures have also been seen in services. With its sustained high growth rates and emerging middle class, Russia is an important emerging market on our doorstep that offers opportunities to EU enterprises. The EU is the major investor in Russia, accounting for 80% of cumulative foreign investment.") [hereinafter Russia-EU Relations].

### 1. Political Concerns

Politically, the EU's concerns with respect to the Russian Federation go to questions of the rule of law, democracy,<sup>158</sup> and human rights protection.<sup>159</sup>

As to the rule of law, a Russian procedural rule of law state enables construction of durable and predictable *legal* institutions, rather than uncertain *political* ones, with the aim of transforming zero-sum political interactions into positive-sum economic interactions. Corruption in the domestic governance of the Russian Federation is a substantive problem for Russia's relationship with the EU because it threatens the security of economic relations<sup>160</sup> and undermines protection of human rights.

The EU's desire to foster democracy, in turn, is not merely an issue of the legitimacy of state power. The existence of democratic institutions is also taken – to some extent erroneously – as evidence or guarantor of the rule of law.<sup>161</sup> The EU's concern with democracy in

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<sup>158</sup> European External Action Service, *Freedom, Security and Justice*, EUROPEAN UNION (Oct. 15, 2011, 4:50 PM), [http://www.eeas.europa.eu/russia/common\\_spaces/fsj\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/fsj_en.htm) (“The EU has supported the development of democracy, the protection of human rights and the development of a healthy civil society in Russia notably through the European Initiative for Democracy and Human Rights (EIDHR).”) [hereinafter *Freedom, Security and Justice*].

<sup>159</sup> With democracy, respect for human rights, fundamental freedoms and the rule of law an essential element of EU-Russia relations, it is only natural that these issues are regularly discussed at all levels. In 2005 regular, six-monthly EU-Russia human rights consultations were established. They have provided for a substantial dialogue on human rights issues in Russia and the EU and on EU-Russian cooperation on human rights issues in international fora. The EU also maintains a regular dialogue with both Russian and international NGOs on human rights issues. Issues that the EU raises with Russia in the human rights consultations include: the human rights situation in Chechnya and the rest of the North Caucasus, including torture and ill-treatment; freedom of expression and assembly, including freedom of the media; the situation of civil society in Russia, notably in light of the laws on NGOs and extremist activities; the functioning of the judiciary, including independence issues; the observation of human rights standards by law enforcement officials; racism and xenophobia; legislation relating to elections. For its part the Russian side raises matters of concern to it in developments inside the EU. *Id.* (“The EU has supported the development of democracy.”).

<sup>160</sup> European Union Action Plan on Common Action for the Russian Federation on Combating Organised Crime, 2000 O.J. (C 106/5) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:106:0005:0012:EN:PDF>.

<sup>161</sup> EU/Russia Summit, *supra* note 144, at para. 1 (“[the EU] [r]eaffirms its belief that Russia remains one of the EU's most important partners in building long-term cooperation and a commitment to working together to address common chal-

the Russian Federation<sup>162</sup> can be seen as a proxy for concerns about the rule of law.<sup>163</sup> However, *equating* democracy and the rule of law – and they do correlate – means that failure to attain the former is seen, wrongly, as *necessarily*, i.e. *inevitably*, impinging on attainment of the latter, and this can prevent progress. The rule of law is a precondition to stable business relations, in turn generating prosperity<sup>164</sup> and leads to effective human rights protection.<sup>165</sup> Democratic legitimation can thus be obtained after the fact and is not a *necessary*, indispensable precondition to improving human well-being in real terms.

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lenges by means of a balanced, results-oriented approach based on democracy and the rule of law.”).

<sup>162</sup> See, e.g., Maria Elena Efthymiou, *Fact Sheets on the European Union: Russian Federation*, EUROPEAN PARLIAMENT (Jan. 25, 2011), [http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=EN&id=73&ftuId=FTU\\_6.4.2.html](http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=EN&id=73&ftuId=FTU_6.4.2.html) (“The fundamental values and principles of democracy, human rights, the rule of law and the market economy underpin the EU-Russia bilateral relationship and its legal basis, the Partnership and Cooperation Agreement (PCA). Russia and the EU are committed to work together to combat new threats to international security, such as terrorism, organised crime, illegal migration and trafficking in people as well as drugs.”).

<sup>163</sup> See, e.g., EU/Russia Summit, *supra* note 144, at para. F (“whereas, as a member of the Council of Europe and of the Organisation for Security and Cooperation in Europe (OSCE), Russia has committed itself to protect and promote human rights, fundamental freedoms and the rule of law, and to respect the sovereignty of its European neighbours; whereas EU-Russia relations have faced a number of serious challenges over the last few years, notably as regards concerns about democracy and human rights in Russia”).

<sup>164</sup> Cf. Smock, *Kozlovsky on Russia's Failed Democracy*, BOYCOTTSOCHI.EU (Nov. 24, 2009), <http://boycottsochi.eu/breaking-human-rights/401-kozlovsky-on-russias-failed-democracy> (reviewing Oleg Kozlovsky, *Russia: Lessons of Russia's Failed Liberalization, in 20 YEARS AGO, 20 YEARS AHEAD: YOUNG LIBERAL IDEAS* (Ulrich Niemann & Neli Kaloyanova eds., 2009)) (“Property rights are not guaranteed and can easily be violated via the corrupt police, courts and other government agencies. As a result, free markets cannot function and the best competitor is not the most efficient but the one with the best connections.”). While I respectfully think Mr. Kozlovsky overstates the case, his identification of the rule of law as a needed precondition to the most productive open market economy is accurate. However, I argue that even a corrupt yet productive economy will generate improved human rights protection and the rule of law indirectly over time, but not as rapidly as a “clean” economy would. Corruption is a significant transaction cost and a source of inefficiency.

<sup>165</sup> Cf. *Country Strategy Paper 2007-2013: Russian Federation*, EUROPEAN UNION, at 3 (2007), [http://ec.europa.eu/external\\_relations/russia/docs/2007-2013\\_en.pdf](http://ec.europa.eu/external_relations/russia/docs/2007-2013_en.pdf) (“The EU places emphasis on the promotion of democracy, the rule of law and good governance in general, as well as respect for human rights and fundamental freedoms.”).

Open governance institutions and processes are needed for the economy;<sup>166</sup> the rule of law is *also* crucial for human rights protection.<sup>167</sup> Poverty resulting from legal uncertainty and corruption reduces the real level of human rights protection and the legitimacy of Russian democracy.<sup>168</sup>

The relationships between the rule of law, a productive economy (which results from an open market, free trade, and the rule of law), democracy, and the attainment of human rights are mutually reinforcing and intertwined in complex ways. They are, however, all positively associated: improvement in one tends to encourage improvement in the others.

## 2. *Economic Concerns*

As mentioned earlier, the economic context of Russian-EU trade can be summed up as “raw materials for finished goods,” a normal pattern of trade between developed and developing countries.<sup>169</sup> In other words, the EU and the Russian Federation have an economic relationship based on interdependence. Nevertheless, Russian-EU

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<sup>166</sup> See Sergei Guriev, *Tackling Corruption in the Russian Economy*, OPENDEMOCRACY.NET (Nov. 12, 2009), <http://www.opendemocracy.net/od-russia/sergei-guriev/tackling-corruption-in-russian-economy> (“Growth requires specific economic institutions: the protection of ownership rights and of competition, the fulfillment of contracts (i.e. an independent and effective court system.”).

<sup>167</sup> Cf. Murad Tangiev, *Political Leadership and Transitional Democracy in the Russian Federation: Challenges and Prospects*, 11 J. PEACE CONFLICT & DEV. 3 (2007) (“Democracy and human rights are considered to be fundamental prerequisites for a [sic] sustainable development and long-term peace.”).

<sup>168</sup> See, e.g., Jonathan D. Weiler, *Human Rights in Post-Soviet Russia*, DEMOKRATIZATSIIYA (Spring 2002), available at [http://findarticles.com/p/articles/mi\\_qa3996/is\\_200204/ai\\_n9062371/](http://findarticles.com/p/articles/mi_qa3996/is_200204/ai_n9062371/) (“declining state capacity, fiscal austerity, and growing social inequality, characteristic features of many of the new democracies, translate into gross violations of the rights of socially vulnerable groups.”).

<sup>169</sup> See *EU-Russia Energy Relations*, EUROPEAN COMM’N (Sept. 13, 2011), [http://ec.europa.eu/energy/international/russia/russia\\_en.htm](http://ec.europa.eu/energy/international/russia/russia_en.htm) (“The Russian Federation is the 3rd biggest world trade partner of the EU. Energy represents 65% of total EU imports from Russia. Russia is the biggest oil, gas, uranium and coal exporter to the EU. In 2007, 44.5% of total EU’s gas imports (150bcm), 33.05% of total EU’s crude oil imports, and 26% of total EU coal imports came from Russia. In total, around 24% of total EU gas sources are originating from Russia. In general, energy dependency varies significantly between different Member States / regions in the EU. The EU is by far the largest trade partner of the Russian Federation: 45% of Russia imports originate from the EU, and 55% of its exports go to the EU, including 88% of Russia’s total oil exports, 70% of its gas exports and 50% of its coal exports. The export of raw materials to the EU represents around 40% of the Russian budget, and the EU represents 80% of cumulative foreign investments in Russia.”).



trade has not, to present, coalesced into a binding legal document or relationship<sup>170</sup> beyond the existing partnership and cooperation agreement.

The key to peace and prosperity in the war 21st century is economic interdependence rather than isolation. Trading states have a strong incentive to renounce war against each other.<sup>171</sup> For example, the United States, unlike the EU, does not trade heavily with the Russian Federation.<sup>172</sup> Perhaps as a consequence, U.S. analysts seem to overemphasize security aspects of the West's relationship with Russia.<sup>173</sup>

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<sup>170</sup> See *id.* (“[F]ollowing the gas crisis from 2009, it is essential to reinforce mutual confidence and to establish a strong and stable legal framework for EU-Russia energy relations.”).

<sup>171</sup> PAUL D’ANIERI, *INTERNATIONAL POLITICS: POWER AND PURPOSE IN GLOBAL AFFAIRS* 184 (2d ed. 2010); see BRINK LINDSEY, *AGAINST THE DEAD HAND: THE UNCERTAIN STRUGGLE FOR GLOBAL CAPITALISM* 71 (2002).

<sup>172</sup> *Russia*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Aug. 30, 2011), <http://www.ustr.gov/countries-regions/europe-middle-east/russia-and-eurasia/russia> (“Russia is currently our 24th largest goods trading partner with \$31.7 billion in total (two way) goods trade during 2010. Goods exports totaled \$6.0 billion; Goods imports totaled \$25.7 billion. The U.S. goods trade deficit with Russia was \$19.7 billion in 2010. Russia was the United States’ 37th largest goods export market in 2010 U.S. goods exports to Russia in 2010 were \$6.0 billion, up 11.9 percent (\$636 million) from 2009.”); *Trade in Goods with Russia*, U.S. CENSUS BUREAU, available at <http://www.census.gov/foreign-trade/balance/c4621.html#2010> (showing data that in 2010 the U.S. exported but 6.0064 billion dollars of goods to Russia and imported only 25.6910 billion dollars of goods from Russia.).

<sup>173</sup> See, e.g., NORMAN A. GRAEBNER, RICHARD DEAN BURNS & JOSEPH M. SIRACUSA, *REAGAN, BUSH, GORBACHEV: REVISITING THE END OF THE COLD WAR* 2, 47 (2008); John Prados, *A World of Secrets: Intelligence and Counterintelligence*, in *THE CENTRAL INTELLIGENCE AGENCY: SECURITY UNDER SCRUTINY* 143 (Athanasios G. Theoharis et al. eds., 2006) (explaining that errors in U.S. analysis of Russian capabilities and intentions are a fairly consistent historical fact). See generally Eric Engle, *Beyond Sovereignty? The State After the Failure of Sovereignty*, 15 *ILSA J. INT’L & COMP. L.* 1 (2008); Engle, *Europe Deciphered*, *supra* note 2; Engle, *The Transformation*, *supra* note 51; Eric Engle, Working Paper, Contemporary Legal Thought in International Law: A Synopsis (2010), <http://www.law.harvard.edu/students/orgs/hela/working%20papers/2010/EngleContemporaryLegalThought.doc> (explaining that this results from 1) individualist method which does not consider historical tendencies of groups 2) presuming the opponent has the same experiences and objectives (failure in opponent modeling) 3) presuming the opponent is an (implacable) adversary and cannot be a partner. These sorts of errors are the result of applying the outmoded realist state centric view of the world to international relations).

### 3. *Legal Concerns*

The EU's legal concerns with Russia touch a myriad of issues. This section covers only some of the most salient ones. One concern is criminality,<sup>174</sup> which includes arms and drug trafficking.<sup>175</sup> Human migration is also a concern, with fears that Russian workers might flood European labor markets.<sup>176</sup> These fears, however, are not particularly realistic. Most people are not criminals, and most criminals are eventually caught. The EU's eastward expansion did not lead to the flooding of Western European labor markets with cheap Eastern labor.<sup>177</sup> Western European fears of a flood of Eastern European workers have shown themselves to be unrealistic and overstated.<sup>178</sup> Like most modern industrialized countries, the Russian Federation faces net labor inflows rather than outflows.<sup>179</sup> In fact, about ten million foreigners, mostly from China and Northern Korea, work in the Rus-

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<sup>174</sup> See Matthew Day, *EU Immigration Fears over Polish Visa Deal with Russia*, THE INDEPENDENT.IE (Dec. 28, 2010), <http://www.independent.ie/world-news/europe/eu-immigration-fears-over-polish-visa-deal-with-russia-2475682.html> ("Poland is pushing for citizens of the Russian enclave of Kaliningrad to have visa-free travel, despite fears this could increase smuggling and illegal migration into the European Union.").

<sup>175</sup> Cf. *Freedom, Security and Justice*, *supra* note 158 ("Our cooperation contributes to the objective of building a new Europe without dividing lines and facilitating travel between all Europeans while creating conditions for effectively fighting illegal migration. Moreover, the EU has a considerable interest in strengthening cooperation with Russia by jointly addressing common challenges such as organised crime, terrorism and other illegal activities of cross-border nature.").

<sup>176</sup> *Russia-EU summit: Is Russia Part of Europe?*, RIANOVOSTI (June 2, 2010, 5:04 PM), <http://en.rian.ru/analysis/20100602/159271440.html> ("The visa barrier between the EU and its eastern neighbors has been growing stronger since the 1990s as a result of Europe's fear of a wave of poor immigrants from the East. As it turns out, this fear was unjustified. Even after Poland joined the EU and all restrictions on Polish immigration were lifted, Poles continued to immigrate to other European countries legally for jobs they had already secured and with enough travel money in their pockets. There was no wave of immigrants from Belarus, Ukraine or Russia, even though Ukrainians, for example, can get a Schengen visa from Poland free of charge.").

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Russia to Announce Amnesty for Millions of Illegal Guest-Workers*, RUSS. DAILY NEWS INFO. SERV. (Sept. 13, 2011), <http://www.english-to-russian-translation.com/russian-translation-news-091105.html> ("The chairman of the Federal Migration Service said that there were up to 15 million illegal workers living in present-day Russia. About 80 percent of them come from the countries of the former USSR.").

sian Federation, most of them illegally.<sup>180</sup> Thus, Russian-EU economic integration will not cause a flood of Russian labor into the EU.

The aforementioned political, economic and legal concerns return us to the question of the relationships between the rule of law, democracy, the economic system, and human rights – questions to which we now focus our attention.

### B. *The EU-Russia Partnership and Cooperation Agreement (PCA)*

The EU and the Russian Federation aim to create an open integrated market. Just as the EU created a single integrated market in order to generate prosperity and interdependence to obviate and avert war, so too do the EU and Russian Federation seek to create an integrated market.<sup>181</sup> This open and integrated market is to be attained via the Partnership and Cooperation Agreement, which is the principal legal instrument governing EU-Russia relations.<sup>182</sup> The EU also uses PCAs to relate to several other former Soviet Republics.<sup>183</sup> The PCAs seek, via functionalist incrementalism, to create over time the same base found in the EU: a customs union featuring the free movement of goods and capital, the right to establish enterprises, and eventually to include the exchange of professional services and workers.<sup>184</sup>

The EU-Russia PCA forms the basis of the four “common spaces” between the EU and the Russian Federation<sup>185</sup> resulting in an

<sup>180</sup> *Russia Cracking Down on Illegal Migrants*, N.Y. TIMES (Jan. 15, 2007), <http://www.nytimes.com/2007/01/15/world/europe/15iht-migrate.4211072.html>.

<sup>181</sup> *EU-Russia Common Spaces Progress Report 2009*, EUROPEAN COMM’N (Mar. 2010), at 5, available at [http://www.st-gaterus.eu/\\_media/commons\\_spaces\\_prog\\_report\\_2009\\_en.pdf](http://www.st-gaterus.eu/_media/commons_spaces_prog_report_2009_en.pdf) (“The overall objective of the Common Economic Space is the creation of an open and integrated market between the EU and Russia.”) [hereinafter *Progress Report*].

<sup>182</sup> See Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and their Member States, of One Part, and the Russian Federation, of the Other Part, 2007 O.J. (L 327), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A1128\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A1128(01):EN:HTML).

<sup>183</sup> See *Partnership and Cooperation Agreements (PCAs): Russia, Eastern Europe, the Southern Caucasus and Central Asia*, EUROPEAN UNION (Sept. 29, 2010), [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17002\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm) (showing that the EU has signed PCAs with almost all of the former Soviet Republics).

<sup>184</sup> *Id.*

<sup>185</sup> JOSEPH FRANCOIS & MIRIAM MANCHIN, ECONOMIC IMPACT OF A POTENTIAL FREE TRADE AGREEMENT (FTA) BETWEEN THE EUROPEAN UNION AND THE COMMONWEALTH OF THE INDEPENDENT STATES 102 (CASE Network Reports, ENEPO Project, No. 84/2009), available at [http://www.case-research.eu/upload/publikacja\\_plik/23704363\\_CNR\\_84\\_final.pdf](http://www.case-research.eu/upload/publikacja_plik/23704363_CNR_84_final.pdf). (“The Partnership and Co-operation Agreement (PCA) which entered into force in 1997 has been the framework of the EU-Russia

effective institutional framework functioning through the Permanent Partnership Council.<sup>186</sup> At the 2003 Petersburg Summit, the EU and Russia agreed to strengthen cooperation by creating four “common spaces” in the framework of the Partnership and Cooperation Agreement.<sup>187</sup> These are:

1. The Common Economic Space, covering economic issues and the environment;
2. The Common Space of Freedom, Security and Justice;
3. The Common Space of External Security, including crisis management and non-proliferation; and
4. The Common Space of Research and Education, including cultural aspects.

This approach parallels the “pillar” structure that was one aspect of the EU prior to the Lisbon Treaty. The Russian Federation wants to be treated as an equal partner to the EU. Thus, a pillar approach, rather than the European Neighborhood Policy (ENP), was established. The pillar approach, however, in fact parallels the ENP approach.<sup>188</sup>

### 1. *Common economic space*

The essence of the European Union is a “single integrated market.” The EU-Russian common economic spaces seek to attain “an open integrated market.” Formation of the common economic space re-

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relationship for a decade. The agreement regulates the political, economic and cultural relations between the EU and Russia and is the legal basis for the EU’s bilateral trade with Russia. In 2003 the EU and Russia agreed to create four EU-Russia “common spaces”, within the framework of the existing Partnership and Co-operation Agreement (PCA). The Common Economic Space (CES) aims at increasing economic cooperation with creating grounds for establishing a more open and integrated market between the EU and Russia.”).

<sup>186</sup> Russia-EU Relations, *supra* note 157 (“EU-Russia relations are based on the Partnership and Cooperation Agreement (PCA) in force since 1997, which was further complemented by the Four Common Spaces in 2005. This results in an institutional framework which in many respects works well, particularly at political level [sic] through the Cooperation Council (now Permanent Partnership Council in Foreign Ministers’ format).”).

<sup>187</sup> European External Action Service, *EU-Russia Common Spaces*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/index\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/index_en.htm).

<sup>188</sup> *Commission Report Reviews Progress Under EU-Russia Common Spaces*, N. DIMENSION P’SHP IN PUB. HEALTH AND SOC. WELL-BEING (Apr. 23, 2010), [http://www.enpi-info.eu/maineast.php?id=21349&id\\_type=1&lang\\_id=450](http://www.enpi-info.eu/maineast.php?id=21349&id_type=1&lang_id=450) (“Russia is not part of the European Neighbourhood Policy. Its relationship with the EU is defined as a Strategic Partnership, consistent with the ENP but evolving along different lines.”).

quires the “gradual approximation of legislation.”<sup>189</sup> Legal harmonization is one means to the end of improving the rule of law in Russia. Legal harmonization increases legal certainty and reduces transaction costs as do the suppression of tariff barriers, quantitative restrictions, and legal provisions with similar effect.

## 2. *Common Space on Freedom, Security and Justice*

This common space essentially governs police cooperation.<sup>190</sup> Here, the EU addresses its concerns earlier mentioned of criminality.<sup>191</sup> The essence of this common space is cooperative and largely a political, rather than legal, arrangement. Regarding travel freedoms, travel to and from Russia is still generally subject to visas. Second is the ongoing concern of unauthorized migration. As to security, the central focuses are countering the problems of crime and terrorism. As to justice, the primary human rights issues involve press freedoms and overreactions against terrorism by the Russian State, and secondarily is the concern with ultra-nationalist violence.<sup>192</sup>

## 3. *Common Space on External Security*

This common space parallels the former common foreign and security policy (CFSP) pillar of the EU.<sup>193</sup> The goals here are non-proliferation of weapons of mass destruction (especially nuclear weapons), anti-terrorism collaboration, and EU-Russia security cooperation. Today, the EU and the Russian Federation cooperate militarily in

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<sup>189</sup> European External Action Service, *Common Economic Space*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/economic\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/economic_en.htm).

<sup>190</sup> *Freedom, Security and Justice*, *supra* note 158 (“The EU and Russia agreed at the St. Petersburg Summit of May 2003 to create in the long-term a ‘Common Space on Freedom, Security and Justice’. A road map agreed in 2005 sets out the objectives and areas for cooperation in the short and medium term. Its gradual development takes place in the framework of the Partnership and Cooperation Agreement.”).

<sup>191</sup> *Id.* (“Our cooperation contributes to the objective of building a new Europe without dividing lines and facilitating travel between all Europeans while creating conditions for effectively fighting illegal migration. Moreover, the EU has a considerable interest in strengthening cooperation with Russia by jointly addressing common challenges such as organised crime, terrorism and other illegal activities of cross-border nature.”).

<sup>192</sup> *See generally Progress Report*, *supra* note 181, at 41-43.

<sup>193</sup> European External Action Services, *External Security*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/external\\_security\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/external_security_en.htm) (“The EU and Russia have agreed to reinforce their cooperation in the area of external security. . .”).

certain peacekeeping missions in Africa pursuant to the common space of external security.

#### 4. *Common Space of Research and Education, Including Cultural Aspects*

This common space seeks to foster intellectual exchanges and encourage scientific and technical innovation as a key contributor to economic growth.<sup>194</sup> From the Russian perspective, it involves developing the Skolkovo research and industrial park, which is considered the Russian Silicon Valley.<sup>195</sup>

#### C. *The Northern Dimension*

The Northern Dimension's objective is to promote environmentally sustainable development throughout the region.<sup>196</sup> It is a regional political framework established to govern the Baltic and Arctic regions.<sup>197</sup> Most notably, it focuses on environmental pollution and cleanup issues that particularly concern radioactive waste<sup>198</sup> resulting from the decommissioning of Soviet-era nuclear vessels, and related issues such as health and maritime transit.<sup>199</sup> The Northern Dimension's objective is to promote environmentally sustainable development throughout the region.<sup>200</sup>

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<sup>194</sup> European External Action Services, *Research and Development, Education, Culture*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/research\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/research_en.htm) ("In the area of research and development the objective is to enhance EU-Russia cooperation in mutually agreed priority fields. . .").

<sup>195</sup> *Russia to Spend \$132 Million on Skolkovo Research Hub in 2010*, RIA NOVOSTI (Aug. 29, 2010, 19:29), <http://en.rian.ru/business/20100729/159987299.html>.

<sup>196</sup> *NDPHS - About NDPHS - Background, Mission, Priorities, Strategy, Actors and Activities*, N. DIMENSION P'SHIP IN PUB. HEALTH AND SOC. WELL-BEING (Aug. 29, 2011), [http://www.ndphs.org/?about\\_ndphs](http://www.ndphs.org/?about_ndphs) ("The mission of the NDPHS is to promote the sustainable development of the Northern Dimension area by improving peoples' health and social well-being.").

<sup>197</sup> European External Action Services, *European Union: Northern Dimension*, EUROPEAN UNION (Aug. 29, 2011), [http://ec.europa.eu/delegations/russia/eu\\_russia/fields\\_cooperation/regional\\_issues/northern\\_dimension/index\\_en.htm](http://ec.europa.eu/delegations/russia/eu_russia/fields_cooperation/regional_issues/northern_dimension/index_en.htm) ("The Northern Dimension Policy of the European Union answers to the EU's intensive cross-border relations with Russia in the Baltic Sea and Arctic Sea regions.").

<sup>198</sup> *Id.*

<sup>199</sup> European External Actions Services, *Northern Dimension*, EUROPEAN UNION (Aug. 29, 2011), [http://eeas.europa.eu/north\\_dim/](http://eeas.europa.eu/north_dim/) ("To facilitate project implementation within the framework of the ND policy, partnerships on the following issues were created: the environment (NDEP), public health and social wellbeing (NDPHS), culture (NDPC) and transport and logistics (NDPTL).").

<sup>200</sup> *NDPHS - About NDPHS - Background, Mission, Priorities, Strategy, Actors and Activities*, N. DIMENSION P'SHIP IN PUB. HEALTH AND SOC. WELL-BEING (Aug. 29, 2011), [http://www.ndphs.org/?about\\_ndphs](http://www.ndphs.org/?about_ndphs) ("The mission of the NDPHS is to

#### D. *The Eastern Partnership*

The EU frames its relations with the Ukraine, Moldova, and the Caucasian republics within its Eastern Partnership framework.<sup>201</sup> The *Joint Declaration of the Prague Eastern Partnership Summit* stated that “[t]he main goal of the Eastern Partnership is to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries.”<sup>202</sup> To attain this goal of open borders and economic integration to foster economic development and ultimately political stability, the respect of human rights, and the rule of law, “[t]he European Commission proposed a ‘differentiated, progressive, and benchmarked approach’ to the new neighbors which was specified in the European Neighborhood Policy (ENP) Strategy paper.”<sup>203</sup> To promote this strategy, the EU has jointly mobilized aid and trade as rewards for the attainment of the rule of law and human rights protections to EU standards.<sup>204</sup>

Both Russia and the EU have sometimes perceived the Eastern Partnership as a point of contention between the EU and the Russian Federation. Each side inaccurately perceived the other as trying to carve out “spheres of influence” to “freeze out” the other.<sup>205</sup> The obsta-

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promote the sustainable development of the Northern Dimension area by improving peoples’ health and social well-being.”).

<sup>201</sup> See European External Action Services, *Eastern Partnership*, EUROPEAN UNION (Aug. 29, 2011), [http://eeas.europa.eu/eastern/index\\_en.htm](http://eeas.europa.eu/eastern/index_en.htm) (“The European Commission put forward concrete ideas for enhancing our relationship with: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. This would imply new association agreements including deep and comprehensive free trade agreements with those countries willing and able to enter into a deeper engagement and gradual integration in the EU economy.”).

<sup>202</sup> Press Release, Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit* (May 7, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/78&format=HTML&aged=0&language=EN&guiLanguage=EN>.

<sup>203</sup> FRANCOIS & MANCHIN, *supra* note 185, at 9.

<sup>204</sup> See, e.g., *European Neighbourhood and Partnership Instrument: Georgia, National Indicative Programme 2007-2010*, EUROPEAN COMM’N 4 (Sept. 13, 2011), [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_georgia\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_georgia_en.pdf).

<sup>205</sup> See, e.g., *Motion for a Resolution on the EU-Russia Summit*, COM (2010) B7-0297 (June 9, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0297&language=EN> (“whereas there is a latent dispute between the EU and Russia on creating spheres of influence in the common neighbourhood; whereas this competition prevents the solution of frozen conflicts and risks to create new one’s; whereas the European Union and the Russian Federation could and should play together an active role in promoting peace and stability in the common neighbourhood,”); Pop, *supra* note 142; Andrew Wilson et al., *The Future of EU-Russia Relations*, EUR. PARL. 15-16 (2009), <http://>

cles that had been hindering improved economic integration, however, will be increasingly surmounted by visionary leadership in the EU, Russia, and the other former Soviet Republics. This is because of increased transnational institutional awareness and improved mutual understanding. Most importantly, it is also because of the mutual recognition that EU cooperation with the formation of EU-modeled transnational governance in the Russian Federation and the former Soviet Republics is complementary and not conflicting.

### E. WTO Accession

The EU views Russia's accession to the WTO as a means of achieving the end of increased prosperity through freer trade, and the construction of legal institutions as the formation of a Russian rule of law state.<sup>206</sup> The United States shares this view.<sup>207</sup> For its part, the Russian Federation wishes to join the WTO<sup>208</sup> and coordinates its accession with EurAsEC<sup>209</sup> and the EU<sup>210</sup> toward that goal. This paper

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[www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/pe407011en\\_wilsonpopes/pe407011en\\_wilsonpopescu.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pe407011en_wilsonpopes/pe407011en_wilsonpopescu.pdf).

<sup>206</sup> EU/Russia Summit, *supra* note 144, at para. G (“whereas Russia’s accession to the World Trade Organisation (WTO) would make a substantial contribution to further improving economic relations between the EU and Russia, subject to a binding commitment on Russia’s part to full compliance with and implementation of WTO undertakings and obligations, and would pave the way for a far-reaching, comprehensive economic integration agreement between the two partners on the basis of genuine reciprocity, and whereas Russia established a customs union with Kazakhstan and Belarus on 1 January 2010”).

<sup>207</sup> 2007 EU-U.S. Summit Promoting Peace, Human Rights and Democracy Worldwide, EUROPEAN UNION 2 (2007), [http://www.eeas.europa.eu/us/sum04\\_07/statement\\_political\\_security\\_issues.pdf](http://www.eeas.europa.eu/us/sum04_07/statement_political_security_issues.pdf) (“We note the importance of our relationship with Russia. A stable, prosperous and democratic Russia remains in our common interest. We seek in our relations with Russia to promote common values such as political pluralism, the rule of law, and human rights, including freedom of media, expression and assembly, and note our concerns in these areas. We will continue to work with Russia in areas of mutual interest, including non-proliferation, counterterrorism, energy security and regional issues, such as the resolution of frozen conflicts. We will also continue to work with Russia towards its accession to the World Trade Organization.”).

<sup>208</sup> *Events: Russia’s WTO Accession is Our Foreign Economic Policy Priority – Deputy Prime Minister Alexander Zhukov*, OFFICIAL WEBSITE OF THE GOV’T OF THE RUSS. FED’N (Dec. 1, 2010), <http://government.ru/eng/docs/13142/> (“Russia’s WTO accession is our foreign economic policy priority.”).

<sup>209</sup> *Prime Minister Vladimir Putin Meets with Representatives of the German Business Community*, OFFICIAL WEBSITE OF THE GOV’T OF THE RUSS. FED’N (Nov. 26, 2010), <http://premier.gov.ru/eng/events/news/13120/> (“We believe that we have come close to meeting every requirement for this. Moreover, I can tell you that, as our negotiators report, in practical terms we have agreed, at least with the Euro-



argues that free trade leads to specialization and economies of scale, and that the rule of law increases legal certainty and reduces transaction costs. This in turn leads to increased prosperity and the reduced likelihood of war. The EU and EurAsEc are aiming to achieve the same goals of greater prosperity and political security through free trade. Thus, the EU and EurAsEc are not in conflict, but rather compliment each other.<sup>211</sup> The WTO extends the logic of free trade as the path to peace and prosperity to the global level.<sup>212</sup> It is therefore desirable for the Russian Federation to join the WTO, since joining will both reflect and increase acceptance by the West of the Russian Federation's economic growth and future potential. Political issues appear to have needlessly hindered that economic process.

Following derailment of Russia's WTO accession process because of its 2008 war with Georgia, the Russian Federation is now back on track to conclude its accession to the WTO Treaty.<sup>213</sup> The EU

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pean Union (EU), on every major issue. I hope that we will document this in the near future. And, finally I'd like to comment on an issue that is worrying many people. I'm referring to our Customs Union, which is to be followed by the Common Economic Space (CES), and that will mean further integration with Belarus and Kazakhstan. I see here a lot of my acquaintances and even friends. And this is what I want to tell you: I think you should be grateful to us for our enormous and complicated work on coordinating the positions of our partners from Belarus and Kazakhstan. . . . the process of coordinating those positions, which are almost identical to WTO rules, was indeed complicated and exhausting. This means that our partners in Europe . . . will be able to work, in the near future, both in Belarus and in Kazakhstan by nearly common rules, rules that are very close to WTO requirements. If you study in detail what we are negotiating, you will see that there are practically no deviations from WTO rules.”)

<sup>210</sup> Press Release, European Union, Joint Statement of the Delegations of the Russian Federation and of European Union on the Occasion of the Conclusion of the Bilateral Talks on the Key Issues in the Accession of the Russian Federation to the WTO (Nov. 24, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1599&format=HTML&aged=0&language=EN&guiLanguage=EN> [hereinafter Joint Statement on Russia] (“Both sides are confident that this agreement will greatly facilitate the overall process of accession of Russia to the WTO.”).

<sup>211</sup> EU/Russia Summit, *supra* note 144, at para. G.

<sup>212</sup> *The 10 Benefits: 1. Peace*, WORLD TRADE ORG. (Feb. 6, 2011), [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b01\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b01_e.htm); *see also Comparative Advantage*, WORLD TRADE ORG. (Aug. 22, 2011), [http://www.wto.org/english/res\\_e/reser\\_e/cadv\\_e.htm](http://www.wto.org/english/res_e/reser_e/cadv_e.htm); DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 7.13-7.16 (Library of Econ. & Liberty 1999) (1817); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3 (Univ. of Chi. Press 1976) (1776) (noting an example of increased production in a pin factory due to specialization).

<sup>213</sup> *See* Joint Statement on Russia, *supra* note 210 (“Both sides are confident that this agreement will greatly facilitate the overall process of accession of Russia to the WTO, and they re-affirm their shared commitment to continue working in a

and Russia appear to have worked out their differences<sup>214</sup> and are prepared to see the Russian Federation join the WTO.<sup>215</sup> Both the EU and the Russian Federation consider Russian participation in the WTO as desirable since it creates new economic opportunities on both sides of the ledger.<sup>216</sup> Russian adhesion to the WTO should not be impeded by Russia's existing free trade with areas such as EurAsEC.<sup>217</sup> The bottom line: Russia and the EU need each other, and the United States should foster that process as part of globalization because it will lead to greater stability and productivity for all.

## V. CONCLUSION

This paper has argued that the Russian Federation and other former Soviet Republics can apply EU governance models in their relations with each other, and with the EU. To make that case, this paper

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constructive and co-operative spirit on the remaining questions in this multilateral process to achieve this goal as soon as possible.”).

<sup>214</sup> Lyudmila Alexandrova, *No Key Differences Left at Russia's Talks on WTO Membership*, THE ORG. OF ASIA-PACIFIC NEWS AGENCIES (Nov. 27, 2010), <http://www.oananews.org/view.php?id=143824>.

<sup>215</sup> *Russia to Sign WTO Accession Document with EU Next Week - EU Official*, RIA Novosti: JOHNSON'S RUSSIA LIST (Nov. 29, 2010), <http://www.cdi.org/russia/johnson/russia-wto-europe-nov-366.cfm>.

<sup>216</sup> See Joint Statement on Russia, *supra* note 210 (“Both sides stressed their strong expectation that the rapid accession of Russia to the WTO will greatly contribute to the opening of new opportunities to do business with and in Russia and strengthen the international competitiveness of the Russian economy by harmonising its economic regime with global trading rules.”).

<sup>217</sup> See Roberts & Wehrheim, *supra* note 52, at 316 (“Normally, setting up a customs union or free trade area would violate the WTO's ‘most-favoured-nation’ principle which assures equal treatment for all trading partners. However, three WTO articles provide derogations from this principle. Article XXIV of the GATT (complemented by an ‘Ad Art XXIV’, and updated by the 1994 Understanding) allows regional trading arrangements to be set up under certain conditions. Article XXIV contains the primary provisions covering customs unions (CUs), free trade areas (FTAs) and interim trade agreements (necessary for the formation of CUs and FTAs). It is based on four main criteria: Duties and other restrictive regulations of commerce must be eliminated (XXIV:8) on ‘substantially all trade’ between constituent territories of a customs union or free trade area. Interim arrangements leading to the formation of a free trade area or customs union should exceed ten years only in exceptional circumstances. Furthermore, Article V of the General Agreement on Trade in Services allows WTO members to sign regional agreements on services provided that such agreements have substantial sectoral coverage, eliminate existing discriminatory measures and/or prohibit new or more discriminatory measures. Finally, the ‘Enabling Clause’ allows derogations from the most-favoured nation treatment principle in favour of developing countries and permits preferential arrangements among developing countries in goods trade.”).

compared the objectives and institutional structure of the USSR, the EU, and the CIS. The USSR and EU both tried to react to the problem of war to obtain the best standard of living possible for their people. Nevertheless, they pursued these objectives in radically different manners. Recognizing that both the USSR and EU shared common goals helps us to contextualize the USSR's collapse and the CIS' failure. It also enables us to propose workable governance models based on the EU's extensive historical experiences in transnational governance. Such institutions and rules can serve as a basis for the formation of the rule of law in Eastern Europe that, in turn, will generate economic prosperity, especially through trade liberalization. This will consequently improve the real protection of basic human rights in the region and make conflict less likely. Understanding the mutually reinforcing character of a market economy, the rule of law, and human rights protection enables all actors to pursue the best rules and processes to obtain optimal outcomes for all. Common teleologies, coupled with conflicting methods of competing governance models contextualize historical experiences: understanding these broad tendencies enables mutual understanding, and enables us to build bridges instead of walls.









