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PUTTING REMEDIAL SECESSION BACK ON THE TABLE TO REVERSE THE ETHNIC CLEANSING OF NAGORNO-KARABAKH

Sheila Paylan* and Lusine Sargsyan**

Abstract

In the wake of the forced dissolution of the de facto Republic of Nagorno-Karabakh and the ensuing ethnic cleansing of its Armenian population, international legal mechanisms have proven insufficient in addressing and reversing the egregious human rights violations committed. This article reevaluates the doctrine of remedial secession, arguing its necessity as a countermeasure to such violations, particularly in the context of unrecognized states like Nagorno-Karabakh. Through a detailed analysis of the blockade of the Lachin Corridor and the Armenian accession to the Rome Statute of the International Criminal Court, this article highlights the shortcomings of the international community's response and proposes remedial secession not only as a theoretical framework but as a practical necessity. Furthermore, this article discusses the implications of remedial secession in light of the Responsibility to Protect principle, emphasizing the need for a human rights-based approach to international conflicts that transcend traditional sovereignty and territorial integrity debates. This article draws on a comprehensive review of international law, human rights

* Sheila Paylan is a human rights lawyer and war crimes investigator with more than 15 years of experience advising the United Nations on international legal issues across countries and regions. Now based in Yerevan, she frequently consults for various international organizations, NGOs, think tanks, and governments. She holds a B.Sc. in Psychology and a B.C.L./J.D. from McGill University, along with an L.L.M. specializing in public international law from the University of London.

** Lusine Sargsyan holds an M.Sc. in Human Rights with a focus on public international law from London School of Economics and Political Science, and a B.A. in English and Communications with a minor in Philosophy, Politics and Economics from the American University of Armenia. Her experiences range from producing analysis on human rights issues in Armenia for EVN Report, research for the development of a transitional justice agenda for the Government of Armenia, and employment at Armenia's Constitutional Court, and the United Nations. The authors gratefully acknowledge the Armenian Bar Association and the Southwestern Journal of International Law for the opportunity to present this work at the symposium, "Void in International Law? Human Rights in Unrecognized and Partially Recognized States," held in Los Angeles on May 18, 2024.

treaties, and recent judicial decisions to argue for a shift in the discourse towards prioritizing human security and dignity in conflict resolution.

I. INTRODUCTION

The *de facto* Republic of Nagorno-Karabakh was compelled to dissolve after twenty-four hours of heavy bombardment by Azerbaijan from September 19 to 20, 2023.[1] The entire region was immediately ethnically cleansed in a matter of days almost entirely of its indigenous population, with more than 100,000 ethnic Armenians pouring into neighboring Armenia.[2] According to the United Nations ("UN"), as few as fifty Armenians are left in Nagorno-Karabakh.[3] The dissolution of the Nagorno-Karabakh Republic, agreed to under duress, took effect on January 1, 2024.[4] The plight of ethnic Armenian refugees who suffered a myriad of severe human rights violations since 2020 remains in obscurity and largely unaddressed.[5]

Despite the efforts of international legal mechanisms, including the International Court of Justice ("ICJ") and the European Court of Human Rights ("ECHR"), Azerbaijan's ten-month blockade of the Lachin Corridor and forced displacement of Armenians from Nagorno-Karabakh have not

1. Sheila Paylan, *Forced Displacement of Armenians from Nagorno-Karabakh: A Response,* OPINION JURIS 2 (Nov. 6, 2023), https://opiniojuris.org/2023/11/06/forced-displacement-of-armenians-from-nagorno-karabakh-a-response/.

2. *See* United Nations, *UN Karabakh Mission told 'Sudden' Exodus Means as few as 50 Ethnic Armenians may Remain*, UN NEWS (Oct. 2, 2023), https://news.un.org/en/story/2023/10/1141782.

3. United Nations, *supra* note 2.

4. *See* European Parliament Resolution on Closer Ties Between the EU and Armenia and the Need for a Peace Agreement Between Azerbaijan and Armenia, EUR. PARL. DOC. B9-0168 (2024), ARTICLE L.

5. *See* Anthony Deutsch & Stephanie Van den Berg, *Nagorno-Karabakh Exodus Amounts to a War Crime, Legal Experts say*, REUTERS (Sept. 29, 2023), https://www.reuters.com/world/asia-pacific/nagorno-karabakh-exodus-amounts-war-crime-legal-experts-say-2023-09-29/.

been effectively prevented or punished.[6] Several international legal scholars have determined that the blockade and deportation amount to international crimes including genocide and crimes against humanity.[7] With Armenia's recent accession to the Rome Statute of the International Criminal Court ("ICC"), there is now a renewed opportunity for pursuing criminal accountability for the actions of Azerbaijani authorities. The doctrine of the Responsibility to Protect ("R2P") has also been long triggered and the international community's failure to take timely and decisive action under R2P's third pillar can arguably be identified as a problematic source of leading Azerbaijan's leadership to abide by the "might is right" principle, to which they expressly adhere.[8] If left unchecked, the unfortunate result will be the further strengthening of authoritarianism in international law as a whole.

In the wake of such a catastrophe, which lies in the shadow of a current global mega-crisis largely focused on Ukraine and the Middle East, shedding a light on the Nagorno-Karabakh crisis is now more important than ever. This paper will explain that there remains a concerning dearth in taking a human-rights based approach when discussing matters of international law concerning unrecognized States such as Nagorno-Karabakh. It will further explore how the concept of the right to self-determination has been unjustly relegated in importance compared to the principles of sovereignty and territorial integrity, significantly disadvantaging the inhabitants of regions like Nagorno-Karabakh. Additionally, this paper will argue that the latest phase of the ethnic cleansing of the Armenian population of Nagorno-Karabakh calls for putting the concept of remedial secession back on the table as a conceivable measure of R2P or the obligation to remedy and repair. Finally, measures that could align with the ICJ's latest provisional measures order against Azerbaijan to ensure the safe return of the Armenian refugees

6. JUAN ERNESTO MENDEZ, PRELIMINARY OPINION ON THE SITUATION IN NAGORNO-KARABAKH AND ON THE NEED FOR THE INTERNATIONAL COMMUNITY TO ADOPT MEASURES TO PREVENT ATROCITY CRIMES (2023), https://un.mfa.am/file_manager/un_mission/Preliminary%20Opinion%20-%2023.08.2023.pdf.

7. Luis Moreno Ocampo, *Starvation as a Means of Genocide: Azerbaijan's Blockade of the Lachin Corridor Between Armenia and Nagorno-Karabakh*, JUST SECURITY (Aug. 11, 2023), https://www.justsecurity.org/87574/starvation-as-a-means-of-genocide-azerbaijans-blockade-of-the-lachin-corridor-between-armenia-and-nagorno-karabakh; *see also* MENDEZ, *supra* note 6; Paylan, *supra* note 1; Deutsch & Van den Berg, *supra* note 5.

8. *President Ilham Aliyev: Today, 'Might is Right' Principle Prevails in the World*, MENAFN. (Feb. 15, 2015), https://menafn.com/1098123627/President-Ilham-Aliyev-Today-might-is-right-principle-prevails-in-the-world.

back to Nagorno-Karabakh,[9] which Azerbaijan has yet to comply with, will be suggested.

II. TAKING A HUMAN RIGHTS-BASED APPROACH

The international legal discourse surrounding conflicts in unrecognized States such as Nagorno-Karabakh often gravitates towards sovereignty and territorial integrity, overshadowing the essential human rights dimensions. For instance, in the aftermath of the 2020 Nagorno-Karabakh War, a spirited debate arose in the international legal space over whether Azerbaijan's use of armed force starting on September 27, 2020, and invoking the right of self-defense to "recover" Nagorno-Karabakh was legitimate.[10] On the one hand, some scholars conclude that Azerbaijan was well within its right, arguing that an occupation that is a direct consequence of an armed attack by another state is a "continuing armed attack," and that the attacked state therefore never loses its right to self-defense, regardless of how much time passes.[11] On the other hand, there are those who conclude that Azerbaijan's use of force was unjustified—arguing that the right of self-defense stops where there exists a territorial status quo, characterized by a prolonged absence of fighting and peaceful administration of the territory concerned.[12] What is striking is how little consideration of human rights is involved in this otherwise sophisticated discussion where human rights might have shed new light on the problematic character of the 2020 Nagorno-Karabakh War.

A human rights-based approach offers a lens through which it is possible to reevaluate such conflicts, arguing that the essence of international law

9. Press Release from the International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, (Arm. v. Az.), I.C.J. ¶ 69 (Nov. 13, 2023).

10. Tom Ruys & Felipe Rodriguez Silvestre, *Military Action to Recover Occupied Land: Lawful Self-Defense or Prohibited Use of Force*, GHENT UNIV., Jan. 2021, at 1, 1.

11. *See* Dapo Akande & Antonios Tzanakopoulos, *Legal: Use of Force in Self-Defence to Recover Occupied Territory*, 32 EUR. J. INT'L L. 1299, 1300 (2021); *see also* Dapo Akande & Antonios Tzanakopoulos, *Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?*, EJIL TALK (Nov. 18, 2020), https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/.

12. *See* Tom Ruys & Felipe Rodríguez Silvestre, *Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War*, 32 EUR. J. INT'L L. 1287, 1289 (2021); *see also* Tom Ruys & Felipe Rodríguez Silvestre, *The Nagorno-Karabakh Conflict and the Exercise of "Self-Defense" to Recover Occupied Land*, JUST SECURITY (Nov. 10, 2020), https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/; Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and Around Nagorno-Karabakh*, EJIL TALK (Nov. 17, 2020), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/.

should not merely orbit around State-centric norms but should also prioritize the well-being and rights of individuals within these territories. This perspective is particularly relevant in situations like Nagorno-Karabakh, where the application of traditional international law paradigms fails to address or prevent the dire human consequences of prolonged conflicts.[13] The ten-month blockade of the Lachin Corridor, which started on December 12, 2022, and the subsequent humanitarian crisis, exemplify how a narrow focus on territorial disputes can lead to grave violations of human rights, including rights to life, health, and freedom of movement.[14]

Moreover, the international community's response, or lack thereof, to these crises through mechanisms such as the UN Security Council, demonstrates a stunted capacity to address these issues effectively. The entrenched reliance on diplomatic and sovereignty-centric dialogues often sidelines pressing human rights issues, leaving populations at risk without substantive international advocacy or protection. A shift towards a human rights-based approach in discussing and resolving conflicts in unrecognized States is therefore not merely necessary, but imperative. This approach would ensure that the fundamental rights and dignities of all affected populations are upheld, moving beyond the traditional paradigms that have hitherto dominated international responses to these crises.

III. SELF-DETERMINATION OF PEOPLES

Although marred with reports of serious war crimes,[15] the 2020 Nagorno-Karabakh War did little to move the international community beyond the usual rhetoric of calling the parties back to peaceful negotiations through the OSCE Minsk Group.[16] It also failed to inspire most international lawyers beyond merely recalling that the world—guided by the principle of territorial integrity as reflected in the doctrine of *uti possidetis juris*[17]—still

13. *See generally* Paylan, *supra* note 1.

14. Amnesty International, *Azerbaijan: Blockade of Lachin Corridor Putting Thousands of Lives in Peril Must be Immediately Lifted*, AMNESTY INT'L (Feb. 9, 2023), https://www.amnesty.org/en/latest/news/2023/02/azerbaijan-blockade-of-lachin-corridor-putting-thousands-of-lives-in-peril-must-be-immediately-lifted/.

15. Sheila Paylan, *Remedial Secession and the Responsibility to Protect: The Case of Nagorno-Karabakh,* OPINIO JURIS (Dec. 23, 2020), https://opiniojuris.org/2020/12/23/remedial-secession-and-the-responsibility-to-protect-the-case-of-nagorno-karabakh/.

16. *Id.*

17. *Id.*; *see generally* Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, 1986 I.C.J. 565-66, ¶ 20, 23 (Dec. 22) ("[Uti possidetis juris is a] general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the

officially considers Nagorno-Karabakh to be part of Azerbaijan, and that, accordingly, any realistic hope for the former to exercise its right to self-determination lies squarely within the framework of the latter.

The Nagorno-Karabakh conflict underscores the clash between the right to self-determination of the Armenian population in the region and Azerbaijan's sovereignty claims. The Armenians' attempt to secede conflicted with Azerbaijan's insistence on maintaining its territorial integrity, a principle strongly supported internationally to uphold State borders and prevent external interference.[18] Internationally, there is a tendency to prioritize State sovereignty and territorial integrity over the aspirations of sub-national groups, which led to the non-recognition of Nagorno-Karabakh's independence, leaving it vulnerable.[19] This conservative stance on sovereignty often overshadows the human rights of the populations involved, treating them as secondary to State interests. Major international actors, including the UN Security Council, have placed a premium on respecting sovereignty and territorial integrity, typically addressing human rights abuses only subsequently.[20] This approach not only perpetuates conflicts like that in Nagorno-Karabakh by neglecting root causes such as the right to self-determination and human rights but also enables aggressive State actions under the guise of protecting territorial claims. This has been evident in Azerbaijan's military actions to reclaim territory, supported implicitly by international passivity towards a human rights-focused resolution.

Recognized as one of the cardinal principles of international law, the right to self-determination is believed to be "deficient,"[21] an "indeterminate, incoherent, and unprincipled" area of international law,[22] as well as full of "gaps, contradictions and incongruences."[23] To better understand the scope of its contemporary application, it is necessary to provide a brief sketch of

withdrawal of the administering power . . . . Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored.").

18. Paylan, *supra* note 15.

19. *Id*.

20. *See* U.N. Security Council, Greater Acceptance, Participation in International Court of Justice's Compulsory Jurisdiction Key for Improving Global Dispute Settlement, Security Council Hears, U.N. Doc. SC/15171 (Jan. 12, 2023).

21. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 343 (Will Kymlicka et al. eds., 1st ed. 2004).

22. Fernando R. Tesón, Introduction*, The Conundrum of Self-Determination*, *in* THE THEORY OF SELF-DETERMINATION 1, 1 (CAMBRIDGE UNIV. 2016).

23. Elizabeth Rodriguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law, in* THE THEORY OF SELF-DETERMINATION, *supra* note 22, at 202.

how the legal meaning attached to the right has evolved throughout the twentieth century.

Referred to as the "golden age" of the principle,[24] the ongoing popularity of the right is primarily associated with the decades of decolonization that peaked between the 1960s through 1970s.[25] After first being recognized and ratified in the UN Charter as among the purposes of the UN, the right to self-determination is protected by Article 1 common to the two major international human rights treaties: the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights.[26] The conundrum with the right begins with the very first words invoked in the covenants, since it is unclear what constitutes "peoples."[27] In fact, as the discussion of the literature on self-determination demonstrates, the definition of "peoples" has evolved over time. It is believed to be a key shortcoming of the existing accounts of self-determination which view the application of self-determination based on what "peoples" is instead of anchoring it on what "peoples" should do to earn it.[28] In line with the latter interpretation, self-determination is not inherent and those "worthy of self-determination emerge from the experience and struggle for self-determination."[29] In other words, a claim for sovereignty and statehood is a process and those aspiring for political existence must demonstrate that they deserve it and qualify for it.

The international practice that was developed during the Cold War period restricted the exercise of the right to indigenous populations that were conquered by the Europeans and subjected to unjust colonial domination between the fifteenth and the nineteenth centuries.[30] A key development for the expansion of the meaning of the principle was the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which elevated the status of self-determination to a right that "all peoples" have.[31] By recognizing that all those territories that have not yet gained independence, including Trust and Non-Self-Governing

24. Frédéric Mégret, *The Right to Self-Determination: Earned, Not Inherent, in* THE THEORY OF SELF-DETERMINATION, *supra* note 22, at 49.

25. *Id.*

26. Patrick Macklem*, Self-Determination in Three Movements, in* THE THEORY OF SELF-DETERMINATION, *supra* note 22, at 96 (article 1 says that "all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development").

27. *See* Tesón, *supra* note 22, at 2; Rodriguez-Santiago, *supra* note 23, at 201.

28. *See* Mégret, *supra* note 24, at 54.

29. *Id*. at 47.

30. *See* Macklem, *supra* note 26, at 109.

31. *Id.* at 99–100.

Territories, have a right to self-determination, the Declaration contributed to the inclusion of those that have historically been marginalized and excluded from international law. The incorporation of self-determination in the Declaration can be viewed as an effort aimed at addressing "international law's complicity with colonialism."[32] The discussion on the expansion of the meaning of self-determination would be incomplete without the Declaration on Friendly Relations (1970), which cemented the status of self-determination as a human right and the paradigm shift in the UN's treatment of the colonial legacy of international law.[33] The two declarations taken together treat the right to self-determination as a vehicle for acquiring sovereign statehood both within the colonial context as well as in the circumstances pertaining to alien subjugation. To capture the scope of the right's applicability, it is worth mentioning that between the enactment of the UN Charter and the 1970s, seventy territories gained independence.[34]

Although the applicability of the right to self-determination has become narrower with the formal end of the decolonization process, its legal understanding has evolved further. In the post-Cold War era, interpretation of the right has taken multiple forms, with some authors endorsing a nationalist view and arguing that its exercise should be restricted to comprehensive cultures only,[35] some others insisting that it is collective entities, such as States, that are entitled to it,[36] and some suggesting that self-determination should be viewed as a remedy for groups that have been victimized, subjected to unjust persecution and oppression by the parent State.[37] Arguing in favor of a comprehensive normative framework when assessing self-determination claims, Allen Buchanan further stipulates that secession is the most "dramatic form" that the right to self-determination can take,[38] only when there is ample evidence suggesting that internal self-determination is not a viable option for the seceding group.[39] It is this interpretation of self-determination, as a force against territorial integrity and a remedy for protecting vulnerable groups of people, that has gained particular traction and which this article will further elaborate on.

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32. *Id.* at 100.

33. *See id.* at 102–03.

34. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 74–75 (1995).

35. Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 446–49 (1990).

36. CARA NINE, GLOBAL JUSTICE AND TERRITORY 45–67, (2012).

37. *See* BUCHANAN, *supra* note 21, at 331.

38. *Id*. at 332.

39. *See* CASSESE, *supra* note 34, at 17–23.

IV. THE RISE AND FALL OF REMEDIAL SECESSION

The concept of remedial secession for Nagorno-Karabakh has been a contentious issue within international law and politics, particularly leading up to and following the 2020 war.[40] Nagorno-Karabakh, a region predominantly inhabited by ethnic Armenians, has long sought independence from Azerbaijan.[41] The dissolution of the Soviet Union escalated these tensions, culminating in a violent conflict in the early 1990s, which ended with Nagorno-Karabakh establishing a *de facto* independent status, albeit unrecognized internationally.[42] The doctrine of remedial secession was intermittently considered a potential resolution to the conflict, predicated on the notion that secession might be justified as a last resort remedy for the serious and persistent violation of fundamental human rights.[43]

However, the resurgence of the conflict in 2020, which saw Azerbaijan reclaim significant territories, substantially altered the power dynamics in the region.[44] The international community's earlier flirtations with the concept of remedial secession as a potential solution for Nagorno-Karabakh quickly evaporated as geopolitical interests and alliances shifted. Following Azerbaijan's military success, supported by Turkey and bolstered by an influx of advanced military technology,[45] the international discourse pivoted towards stabilization and the reassertion of territorial integrity under Azerbaijani governance. This shift effectively sidelined discussions of Nagorno-Karabakh's independence or autonomy, leaving the region's ethnic Armenian population in a precarious position, vulnerable to the Armenophobic policies of the Azerbaijani government.[46]

The systemic discrimination against ethnic Armenians in Azerbaijan is well-documented in reports by the European Commission on Racism and

40. *See* Heiko Krüger, *Nagorno-Karabakh, in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 214, 220–21 (Christian Walter et al. eds., 2014).

41. *Id.* at 215–16.

42. *Id.*

43. *Id.* at 220–21.

44. *See* Hula Kinik & Senem Celik, *The Role of Turkish Drones in Azerbaijan's Increasing Military Effectiveness: An Assessment of the Second Nagorno-Karabakh War*, 23 INSIGHT TURK. (2014), https://www.rferl.org/a/technology-tactics-and-turkish-advice-lead-azerbaijan-to-victory-in-nagorno-karabakh/30949158.html.

45. *See id.*; *see also* Ron Synovitz, *Technology, Tactics, And Turkish Advice Lead Azerbaijan To Victory In Nagorno-Karabakh*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 13, 2020), https://www.rferl.org/a/technology-tactics-and-turkish-advice-lead-azerbaijan-to-victory-in-nagorno-karabakh/30949158.html.

46. *See* Synovitz, *supra* note 45.

Intolerance ("ECRI")[47] and decisions by the ECHR.[48] These sources highlight a deep-rooted policy of animosity, where Armenians face physical and psychological abuse, employment discrimination, and denial of public services.[49] ECRI reports from 2002 through 2023 consistently describe Armenians as the most vulnerable group in terms of racial discrimination in Azerbaijan, subject to a persistent negative climate that includes hate speech perpetuated by State institutions and media.[50] Such discriminatory practices are not only deeply entrenched but also routinely overlooked by Azerbaijani authorities, who show little initiative to change the status quo, further exacerbating the ethnic tensions rooted in the Nagorno-Karabakh conflict.

The abandonment of remedial secession as a viable solution thus coincided with a marked increase in hostilities and human rights abuses, culminating in the ethnic cleansing of Nagorno-Karabakh's Armenian population following the 2020 war.[51] The cessation of serious consideration for Nagorno-Karabakh's independence removed a significant leverage point against Azerbaijan, emboldening its position and actions in the region.[52] This historical and political context points to the need to revisit the concept of remedial secession not merely as a theoretical framework but as a practical necessity to address the ongoing humanitarian crisis and reverse the ethnic cleansing. Reintroducing this option into the international legal and policy discourse could provide a pathway to justice and security for the displaced and persecuted population of Nagorno-Karabakh.

However, challenges currently exist with respect to advocacy for remedial secession for Nagorno-Karabakh. With the *de jure* dissolution of Nagorno-Karabakh's existence as an entity, the traditional channels for pushing such an agenda are significantly constrained. In this context, the

47. *See* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, REPORT ON AZERBAIJAN 14 (2002); *see also* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, SECOND REPORT ON AZERBAIJAN 6 (2011); EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, REPORT ON AZERBAIJAN 10, 16, 20–21 (2023).

48. *See e.g.,* Petrosyan v. Azerbaijan, App. No. 32427/16, ¶¶ 51-61, 70–71 (Feb. 28, 2022), https://hudoc.echr.coe.int/eng?i=001-212965; Saribekyan and Balyan v. Azerbaijan, App. No. 35746/11, ¶¶ 71–74, 85–88 (Sept. 7, 2020), https://hudoc.echr.coe.int/eng?i=001-200439; Badalyan v. Azerbaijan, App. No. 51295/11, ¶¶ 39–48 (Oct. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-211103; Khojoyan and Vardazaryan v. Azerbaijan. App. No. 62161/14, ¶¶ 52–54 (Feb. 28, 2022), https://hudoc.echr.coe.int/eng?i=001-212964; Makuchyan and Minasyan v. Azerbaijan and Hungary, App. No. 17247/13, ¶¶ 109–20 (Oct. 12, 2020), https://hudoc.echr.coe.int/eng?i=001-202524.

49. Petrosyan, *supra* note 48.

50. *Id.*

51. *See* Nerses Kopalyan, *The Limitations of Remedial Secession and the Need for Remedial Sovereignty*, EVN REP. (Dec. 2, 2021), https://evnreport.com/politics/resolving-the-problem-of-nagorno-karabagh-s-sovereignty/.

52. *Id.*

primary responsibility for advocating remedial secession could logically fall back to the Armenian government, which would then revert to assuming the role of a protector or guarantor for the rights of the Nagorno-Karabakh Armenians. However, such a scenario is unforeseeable, in the light of ongoing peace negotiations with Azerbaijan.

Alternatively, the establishment of a government in exile could serve as a symbolic and practical platform to continue the pursuit of self-determination and remedial secession on the international stage. Such a government in exile could work to maintain the identity and political aspirations of the Armenians of Nagorno-Karabakh, mobilizing international support and potentially coordinating with global human rights organizations to advocate for their cause. This approach would help maintain the issue on the international agenda, ensuring that the rights and voices of the displaced population are represented in diplomatic discussions and international forums.

V. THE PROMISE OF REMEDIAL SECESSION

Over the past several decades, only a handful of secessionist movements including Bangladesh, South Sudan, Eritrea, East Timor, and Kosovo have been successful in garnering international support, while the predominant majority have been doomed to failure. Simply put, although the international community does not seem to be reluctant to recognize successful secessionist movements, it remains cautious to recognize a right to it.[53]

International law has a rather neutral position regarding the question of secession, and although it is not explicitly prohibited, it is not endorsed as well.[54] International legal scholars are in consensus that international law does not recognize a general right to secede unless it is aimed at overthrowing colonial subjugation or repudiating an unjust military occupation.[55] In fact, an exhaustive survey of State practices demonstrates that, since the end of the Second World War, States that were created through unilateral secession

53. Mégret, *supra* note 24, at 52–53.

54. *See* Alain Pellet, *Kosovo - The Questions Not Asked: Self-Determination, Secession, and Recognition, in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 268, 273 (Marko Milanović & Michael Wood eds., 2015); *see also* James Crawford, *Kosovo and the Criteria of Statehood in International Law, in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION, *supra* note 54, at 280–90; Katherine D. Mar, *The Myth of Remedial Secession, in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 79, 79–108 (Duncan French ed., 2013).

55. *See* BUCHANAN, *supra* note 21, at 333.

did not gain UN membership without the explicit endorsement of the parent State.[56]

Remedial secession was developed in the wake of ethnic conflicts in the 1990s that were notorious for their disturbing track record of human rights abuses.[57] It extended the parameters of external self-determination, the application of which was restricted to contexts of decolonization and alien domination and justified the exercise of the right as a remedy of last resort to egregious human rights violations.[58] Authors who put forward a justice-based conception of self-determination argue that, although a putative right to self-determination of peoples is dangerous, international law should recognize a right to secede as a last resort and as a remedy to injustices endured by the victim population.[59] Some of the underlying conditions that can facilitate remedial secession include systemic human rights abuses, persistence of discriminatory practices, arbitrary arrests, exhaustion of negotiations, and support from influential states, as well as commitment of the seceding territory to human rights.[60]

The doctrine of remedial secession gained momentum in the post-Cold War period with several judicial decisions in both international and domestic legal settings engaging with it. The case of Kosovo is particularly illuminating for uncovering the unique conditions and circumstances that warrant the applicability of remedial secession. The ICJ's Advisory Opinion is significant both for the question that it was asked,[61] and those it was not explicitly asked to elaborate on, namely the extent of the right to self-determination, the legal foundation for remedial secession as well as the recognition of Kosovo's independence by other States.[62] While the ICJ only focused on the interpretation of the specific question posed by the UN General Assembly, parties to the proceedings, who made written and oral interventions before the ICJ, addressed the contested terrain of international legal concepts and principles that are worth scrutinizing.[63] It is particularly

56. *See* JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 417–18 (Oxford, 2nd ed. 2007).

57. *See* Daniel H. Meester, *The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession*, 48 CAN. Y.B. INT'L L. 215, 218 (2010).

58. *Id*.

59. *See* BUCHANAN, *supra* note 21, at 342.

60. *See id*.; *see* generally MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE (2009).

61. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 49 (July 22, 2010).

62. *See* Pellet, *supra* note 54, at 271–79.

63. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 49.

illuminating to view the courtroom as a place of public contestations about international legal norms such as the right to self-determination and remedial secession, which can be viewed as valuable indications of *opinio juris*. Besides Kosovo and Serbia, forty-two other States made submissions before the ICJ, eleven of which provided an explicit endorsement of the doctrine of remedial secession in their submissions;[64] fourteen states maintained that the right exists in principle, while twenty-five states remained neutral.[65]

The concept of remedial secession was also addressed by two of the judges in their separate opinions. When speaking about the exceptional circumstances that would warrant external self-determination, Judge Yusuf mentioned "the existence of discrimination, persecution, and the denial of autonomous political structures"[66] against ethnically or racially distinct groups. Judge Cançado Trindade, although not providing explicit endorsement of remedial secession, employed the language associated with the principle and similarly underlined that "the principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny"[67] and should take priority over the principle of territorial integrity as well as State sovereignty. His position resonates with the principle of R2P, which, as will be discussed below, capitalizes on the responsibility aspect of sovereignty, while failed fulfillment of that responsibility amounts to an abdication of the right to rule over the victim population. Simply put, the government's commission of systemic and egregious human rights violations amounts to an abdication of the right to represent the subjugated population.

In its landmark decision concerning the legality of Quebec's push for secession, the Supreme Court of Canada confirmed that the right to self-determination may ground a right to unilateral secession in circumstances when the exercise of meaningful internal self-determination is not a viable option.[68] Authors like Alain Pellet apply the reasoning adopted by the Supreme Court of Canada, according to which the lack of meaningful internal self-determination is what triggers the application of remedial secession, to argue that Kosovar people qualify for it.[69]

64. *See* Meester, *supra* note 57, at 223.

65. Marko Milanović, *Arguing the Kosovo Case, in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION, *supra* note 54, at 43.

66. G.A. Dec. 64/881, U.N. Doc, A/64/881 (Vol. 1), at 126 (Jan. 13, 2011).

67. *Id.* ¶ 175.

68. *See* Reference re Secession of Quebec, (1998) 2 S.C.R. 217 (Can.).

69. *See* Pellet, *supra* note 54, at 272.

VI. SOVEREIGNTY AS RESPONSIBILITY

It was in response to and against the backdrop of genocide in Rwanda and the massacres in the former Yugoslavia that the principle of R2P was developed. Coined by the International Commission on Intervention and State Sovereignty in 2001, the doctrine of R2P "colonized the international agenda,"[70] previously dominated by the concept of humanitarian intervention. It was largely aimed at finding a balance between the traditional claims of States to immunity from external intervention and the imperative to prevent the occurrence of human rights catastrophes. The idea behind R2P is that sovereign States bear a responsibility to protect their population from being subjected to mass atrocity crimes, especially the following four: genocide, ethnic cleansing, war crimes, and crimes against humanity.[71] If the sovereign State is unable to fulfill its responsibility because it lacks the necessary resources and capabilities for it, the doctrine of R2P requires UN Member States to assist one another to protect vulnerable peoples.[72] It is only when the host State fails to protect its population because of unwillingness or inability that the international community is assumed to have a responsibility to take collective action in compliance with the UN Charter and, if necessary, through the authorization of the UN Security Council to prevent the commission of the atrocity crimes that fall within the purview of the doctrine.[73] In this manner, international recognition of remedial secession functions analogously to R2P, where sovereignty and territorial integrity are not assured when a State abuses the rights of its inhabitants, especially when it commits atrocity crimes against them.

In other words, R2P grounds "the legitimacy of authority—both of states and of the international community—on the capacity to provide effective protection to populations at risk."[74] The scope of actions can vary from diplomatic and humanitarian efforts to more drastic measures, such as the use of military force. The institutionalization of the principle of R2P began with the adoption of the 2005 World Summit Outcome Document, which was embraced unanimously by heads of States at the UN General Assembly,[75] and has been reaffirmed by several UN Security Council resolutions across

70. Anne Orford, *Lawful Authority and the Responsibility to Protect, in* LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 248 (Richard Falk ed., 2012).

71. *See id.* at 298.

72. *Id.* at 248.

73. *Id.*

74. *Id.*

75. *See* ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: A DEFENSE 1–2 (2015).

various contexts, including country-specific situations and thematic issues.[76] The adoption of these resolutions should not only be viewed as an endorsement of the doctrine but also as an acknowledgment that the UN Security Council's role is not limited to countering threats to international peace and security but also prevention and termination of mass atrocity crimes.[77]

The overwhelming reluctance to embrace the doctrine of R2P, especially by developing countries, stems from the assumed challenge it poses to State sovereignty.[78] States that have endured colonial subjugation tend to view the concept of R2P as an "imperialist doctrine"[79] that can pose an imminent threat to national sovereignty. In fact, the potential of R2P to undermine national sovereignty was among the concerns raised by countries like Algeria ahead of the World Summit, which viewed sovereignty as the "last defense against the rules of an unequal world"[80] and was reluctant to embrace a principle that would potentially pose a challenge to it. It appears that the commitment of the UN Charter to national sovereignty coupled with the cardinal rule of non-intervention in domestic affairs of any State are incompatible with the principle that prioritizes the protection of fundamental human rights above all. In fact, Article 2(4) of the UN Charter stipulates that all members shall "refrain from the threat or use of force against the territorial integrity or political independence of any state."[81]

The only two exceptions to the general prohibition against the use of force can be observed in Article 51 of the UN Charter, which stipulates the inherent right of every State to individual or collective self-defense, and in Chapter VII, which authorizes the use of force by the UN Security Council in pursuit of maintaining and restoring international peace and security.[82] In other words, the UN Charter does not explicitly endorse the application of R2P.[83] But instead of viewing R2P as a threat to State sovereignty, the

76. *See* U.S. Security Council, U.N. Security Council Resolutions and Presidential Statements Referencing R2P, (May 30, 2024), https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/.

77. *See* Spencer Zifcak, *The Responsibility to Protect, in* INTERNATIONAL LAW 484, 495 (Malcolm D. Evans ed., 5th ed. 2018).

78. *See* Edward C. Luck, *Sovereignty, Choice and the Responsibility to Protect, in* THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 13, 14 (Alex J. Bellamy & Sara E. Davies eds. et al., 2011).

79. *Id.*

80. Zifcak, *supra* note 77, at 493.

81. U.N. Charter art. 2, ¶ 4.

82. U.N. Charter art. 51, ch. VII, https://www.un.org/en/about-us/un-charter/chapter-7 (last visited Sept. 9, 2024).

83. *See* Christine Gray, *The Use of Force and the International Legal Order, in* INTERNATIONAL LAW 601 (Malcolm D. Evans ed., 5th ed. 2018).

principle of State responsibility should be viewed as an inalienable part of statehood and sovereignty.[84] Although, in its contemporary application, justifications for R2P are found in international humanitarian and human rights law, the doctrine also has its deep roots in the notion of sovereignty.[85] According to the classical canon, the exercise of sovereignty is contingent upon the protection of those under the rule of the sovereign.[86] In other words, responsibility is the essence of sovereignty and lawfulness of authority is contingent upon the protection provided to the populations under a government's control.[87]

The fulfillment of the commitment to the promise of "Never Again" to the commission of mass atrocities is contingent upon the willingness of the international community to abandon its inaction that had disastrous implications for the people in Rwanda and the former Yugoslavia in the 1990s, and in Nagorno-Karabakh until 2023.[88] The fact that the exercise of the doctrine of R2P is narrow in scope and will be triggered only when specific types of crimes are being committed can be viewed as evidence of concessions that have been made during the negotiations, which although have made the doctrine less ambitious, ensured its unanimous endorsement.[89] In addition, the doctrine of R2P is reflective of well-established principles of international law, with the atrocity crimes that fall within its scope prohibited by major international legal documents.[90] Thus, it would be highly controversial for States to invoke sovereignty as a justification for the commission of those crimes. Although it is unlikely that R2P will put an end to atrocities in the foreseeable future and it is not an ideal solution for the prevention of persistent injustices and human rights abuses, the principle may be defended by arguing that it is equipped to build an international community that is "less tolerant to mass atrocities and more predisposed to preventing them."[91]

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84. *See* Luck, *supra* note 78, at 17.

85. *See* Luck, *supra* note 78, at 16; *see* Orford, *supra* note 70.

86. Orford, *supra* note 70.

87. *See* FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (The Brookings Inst., 1996).

88. *See* Makau W. Mutua, *Never Again: Questioning the Yugoslav and Rwanda* TEMP. INT'L COMPAR. L. J. 167, 168 (1997); Hayk Kotanijan, *Never Again*, ARM. WKLY. (Aug. 1, 2020), https://armenianweekly.com/2020/08/01/never-again/.

89. *See* Zifcak, *supra* note 77, at 494; *see* Luck, *supra* note 78, at 14.

90. *See* Alex J. Bellamy et al., *Introduction, in* THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 1 (Alex J. Bellamy & Sara E. Davies eds. et al., 2011).

91. BELLAMY, *supra* note 75, at 1.

VII. RIGHT OF RETURN

Since Armenia and Azerbaijan have instituted proceedings before the ICJ back in September 2021 on alleged violations of the International Convention on the Elimination of All Forms Racial Discrimination ("CERD"), the ICJ has indicated three sets of provisional measures.[92] Despite the noticeable occurrence of some States' non- or partial compliance with interim measures indicated by the ICJ over the recent years, as stipulated in the *LaGrand* judgement, the indicated measures are of a binding nature.[93]

In its latest provisional measures, indicated after the forced displacement of over 100,000 Armenians from Nagorno-Karabakh, the ICJ ordered Azerbaijan to, *inter alia*, "ensure that persons who have left Nagorno-Karabakh after September 19, 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded and expeditious manner."[94] The possibility to voluntarily exercise their right to return in "safety and dignity" was emphasized by the Council of Europe Commissioner for Human Rights as well, even if "it seems hypothetical for most at the moment."[95] Before conditions are in place for a possible return, the Commissioner has also emphasized that security guarantees should be established "for Karabakh Armenians to temporarily access their homes or places of habitual residence and visit graveyards where loved ones are buried."[96] The Azerbaijani government, which is yet to comply with the interim measures ordered by the ICJ, including the one on return, has already started repopulating the territories it has gained control of in 2023.[97] This section is an exploration of the conditions and guarantees that need to be in place for Armenian refugees to meaningfully exercise their internationally guaranteed right to return.

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92. *See* Davit Khachatryan, *World Court Slaps Azerbaijan with New Measures*, EVN Report (Nov. 29, 2023), https://evnreport.com/politics/world-court-slaps-azerbaijan/.

93. LaGrand Case (Germany v. United States), Judgment, 2001 I.C.J. ¶ 109 (June 27).

94. Application of the International Convention of the Elimination of all Forms of Racial Discrimination (Arm. v. Azer.), Order, 180 I.C.J. ¶ 69 (Nov. 17, 2023). For a list of provisional measures indicated by the Court, *see supra* note 9.

95. Sasbourg, *Armenia and Azerbaijan: Effective Human Rights Protection of All Persons Affected by the Conflict Over the Karabakh Region is Key to the Success of the Peace Process*, COUNS. OF EUR. (Dec. 1, 2024), https://www.coe.int/en/web/commissioner/-/armenia-and-azerbaijan-effective-human-rights-protection-of-all-persons-affected-by-the-conflict-over-the-karabakh-region-is-key-to-the-success-of-the-peace-process.

96. *Id.*

97. *See also* Hannah Lucinda Smith, *The Land That Was Once Nagorno-Karabakh*, FOREIGN POL'Y (Feb. 27, 2024), https://foreignpolicy.com/2024/02/27/nagorno-karabakh-azerbaijan-armenia-environment-climate/.

Although there is no "standard mould for just return," the process should be designed to ensure that returnees are put on an equal footing with their co-nationals.[98] In line with the doctrine of R2P, discussed above, the legitimacy of an authority is conditioned on its ability and willingness to provide protection for its citizens and ensuring that conditions for just return are in place is a demonstration of a State's responsibility towards its citizens.[99] After first being enshrined in the Universal Declaration of Human Rights,[100] the right to return has been codified in binding international human rights instruments, including the ICCPR and CERD. Despite return having the status of a right, the nuances and specifics of its exercise vary depending on the context and will need to be ironed out for Nagorno-Karabakh Armenians. Considering that the return of refugees and internally displaced persons ("IDPs") usually takes place in politically volatile circumstances, conditions of just return capitalize on a set of basic guarantees that can realistically be achieved and replicated across diverse contexts. The core conditions that must be in place for it to happen, including basic conditions of security, respect for human rights and accountability when those rights are violated, and prospects for viable economic integration, lie at the core of States' duties towards its citizens. In other words, these can hardly be viewed as an additional burden for States since they already are under the obligation to ensure their proper fulfillment. The norms and guidelines developed by the UN High Commissioner for Refugees on repatriation and reintegration are also reflective of these conditions.[101]

When addressing the quality aspect of returns, it is widely acknowledged that the process needs to take place in conditions of safety and dignity. The Organization of African Unity Convention and the Cartagena Declaration were the first major international instruments to elaborate on the quality of return. The Cartagena Declaration, in particular, states that repatriation must "be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin."[102] The International Conference on Central American Refugees Declaration and Concerted Plan of Action in favor of Central American Refugees, Returnees and Displaced Persons ("CIREFCA Declaration"), similarly touches on the quality aspect

98. Megan Bradley, *Back to Basics: The Conditions of Just Refugee Returns*, J. OF REFUGEE STUD. 285, 286 (2008).

99. *See* Deng, *supra* note 87, at 32–33.

100. *See* G.A. Res. 217A, art. 13(2) (Dec. 10, 1948) (the right to return is protected under Article 13(2), which says that "everyone has the right to leave any country, including his own, and to return to his country").

101. *See* United Nations High Commissioner for Refugees (UNHCR), Handbook for Repatriation and Reintegration Activities (May 2004).

102. The Cartagena Declaration, art. III, ¶ 12, Nov. 22, 1984, I.L.M. 4.

of return, pledging to ensure that refugees could repatriate "under conditions of personal security and dignity that would allow them to resume a normal life."[103] Since the signing of the CIREFCA Declaration, provisions on safe and dignified return were incorporated in national laws, international agreements, peace treaties, UN Security Council resolutions, and UN General Assembly resolutions.

Deployment of an internationally mandated robust UN peacekeeping mission is viewed among the factors that can alleviate the insecurities that have enabled the displacement in the first place and facilitate the return of refugees in a manner that is just, safe and ultimately dignified.[104] The presence of peacekeepers is by no means the only factor with the potential to shape resettlement dynamics, and literature identifies signing of a peace agreement among the factors that can contribute to refugees' intention to return.[105]

Despite its major failures, the UN peacekeepers can be effective even in the most complex contexts,[106] and can positively shape the intention of refugees to return by improving their perceptions of safety.[107] Forced displacement is often the result of direct victimization or credible fear, and threat of being victimized.[108] There is strong evidence suggesting that the security umbrella that the presence of peacekeepers provides, by restoring and maintaining a sufficiently safe environment, can favorably impact the quality and magnitude of return,[109] as well as act as a deterrent for further instability.[110] Research also shows that the additional layer of security that

103. International Conference Central American Refugees, *Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons*, CIREFCA (May 30, 1989).

104. Vincenzo Bove et al., *What it Takes to Return: UN Peacekeeping and the Safe Return of Displaced People,* WORLD BANK GRP., June 2022, at 2, 25.

105. *See* Komila Zakirova & Bilol Buzurukov, *The Road Back Home is Never Long: Refugee Return Migration,* 34 J. REFUGEE STUD. 4456, 4459 (2021); *see generally* Mashura Akilova et al., *Durable Solutions: Return and Reintegration of Displaced Populations and Reconstruction in Post-Conflict Societies, in* INTEGRATIVE SOCIAL WORK PRACTICE WITH REFUGEES, ASYLUM SEEKERS, AND OTHER FORCIBLY DISPLACED PERSONS 199 (Nancy J. Murakami & Mashura Akilova eds., 2022).

106. *See* Lisa Haltman et al., *United Nations Peacekeeping and Civilian Protection in Civil War,* 57 AM. J. POL. SCI. 875, 875–76 (2013); *see also* Andrea Ruggeri et al., *Winning the Peace Locally: UN Peacekeeping and Local Conflict,* 71 INT'L ORG. 163 (2017); Vincenzo Bove & Andrea Ruggeri, *Peacekeeping Effectiveness and Blue Helmets' Distance from Locals,* 63 J. CONFLICT RESOL. 1630, 1634, 1636 (2019).

107. Haltman et al., *supra* note 106, at 2, 11.

108. Nancy Lozano-Garcia et al., *The Journey to Safety: Conflict-Driven Migration Flows in Columbia,* 33 INT'L REG'L SCI. REV. 157, 162 (2010).

109. Bove et al., *supra* note 104, at 26.

110. *See* Jessica Di Salvatore, *Peacekeepers Against Criminal Violence – Unintended Effects of Peacekeeping Operations,* 63 AM. J. POL. SCI. 840 (2019); Haltman et al., *supra* note 106.

peace missions provide, by acting as security guarantors, also reduces violence and the risk of conflict recurrence.[111] A survey conducted in South Sudan illustrates that security was the single most important factor mentioned by respondents for return, followed by access to services, including education and healthcare, food availability and economic opportunities.[112]

In recent years, the scope of the mandate of peacekeeping missions has expanded beyond providing security to refugees and IDPs and oftentimes includes mitigating the negative perceptions towards them,[113] supporting the government's reintegration agenda, resilience-building efforts as well as the engagement of development and humanitarian actors.[114] In fact, since the 1990s the mandates of many of the UN peacekeeping operations included explicit authorization from the UN Security Council to support refugees, returnees and IDPs.[115] However, even in the absence of such an authorization, "the civil affairs section of a UN operation is often involved in activities such as negotiating that returnees can move back into their occupied houses."[116]

The circumstances and conditions that have led to the ethnic cleansing of Nagorno-Karabakh, taken collectively, establish the presence of credible fear of further victimization and support the argument that meaningful return and reintegration of Armenians can realistically be achieved only when proper security guarantees are in place. The mass exodus of almost the entire population of Nagorno-Karabakh, followed after Azerbaijan held the region under blockade for nearly ten months, despite an ICJ order requiring it to "take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions."[117] It has been established that the blockade led to "acute shortages of food staples, medication, and hygiene products, impacted the functioning of medical and educational institutions, and placed the lives of the residents—especially children, persons with disabilities, older persons, pregnant women, and the

111. *See* Barbara F. Walter, *The Critical Barrier to Civil War Settlement,* 51 INT'L ORG. 335 (1997); *see also* BARBARA F. WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS (2008); VIRGINIA P. FORTNA, DOES PEACEKEEPING WORK? SHAPING BELLIGERENT'S CHOICES AFTER CIVIL WAR (2008).

112. *See* Bove et al., *supra* note 104, at 10.

113. *See id.* at 3.

114. JAIR VAN DERLIN, MULTILATERAL PEACE OPERATIONS AND THE CHALLENGES OF IRREGULAR MIGRATION AND HUMAN TRAFFICKING 6 (2019).

115. *See id.* at 4.

116. *Id*. at 12.

117. Provisional Measures Order from the International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Az.), I.C.J. ¶ 62 (Feb. 22, 2023).

sick—at significant risk."[118] This was followed by warnings by the former Prosecutor of the ICC and former UN Special Advisor on the Prevention of Genocide about having reasonable basis to believe that the blockade constituted an act of genocide.[119]

It is worth noting that, based on the provisional measures that Armenia requested as part of its initial application to the ICJ, the Court required Azerbaijani authorities, *inter alia,* to prevent the "incitement and promotion of racial hatred and discrimination" against ethnic Armenians.[120] Although one of the only two provisional measures instituted against Armenia also includes prevention of "incitement and promotion of racial hatred and discrimination" against people of Azerbaijani origin or nationality, the language used by the ICJ warrants a closer look.[121] Whereas the provisional measure imposed on Armenia singles out the promotion of discriminatory and racially motivated acts "by organizations and private persons," the one issued against Azerbaijan mentions the promotion of such acts "by officials and public institutions."[122] While no comprehensive study has been conducted capturing the sentiments of Armenian refugees regarding the return to Nagorno-Karabakh, considering the institutionalized character of racial discrimination against ethnic Armenians, it seems fair to conclude that proper guarantees would have to be in place for refugees to entertain the idea of return.

VIII. CONCLUSION

The enduring conflict over Nagorno-Karabakh, framed by international law yet deeply rooted in human suffering, compels a reevaluation of traditional legal approaches towards unrecognized States. The escalation in 2020 and the subsequent ethnic cleansing of the Armenian population from their ancestral lands exemplify the limitations of international responses anchored merely in sovereignty and territorial claims. This reality calls for a more vigorous application of the doctrine of R2P and argues for the acceptance of remedial secession as a viable measure thereof, even if one of

118. UN Office of the High Commissioner for Human Rights, *UN Experts Urge Azerbaijan to Lift Lachin Corridor Blockade and End Humanitarian Crisis in Nagorno-Karabakh*, 7 (Aug. 7, 2023), https://www.ohchr.org/en/press-releases/2023/08/un-experts-urge-azerbaijan-lift-lachin-corridor-blockade-and-end.

119. *See* Ocampo, *supra* note 7, at 1; MENDEZ, *supra* note 6, at 2.

120. Application of the International Convention on the Elimination of All Forms of Racial Discrimination, (Arm. v. Az.), Order, 2021 I.C.J. Rep. 2021, ¶ 92 (Dec. 7, 2022).

121. *Id.* at ¶ 98.

122. *Id.*; G.A. Res. A78/4, ¶ 162.

last resort, not just to address the symptoms but to remedy the core injustices that can lead to such dire human consequences.

The global solidarity disparity between the struggles of the Nagorno-Karabakh Armenians and other peoples such as the Palestinians can be attributed to several factors that influence international recognition and support. While both Nagorno-Karabakh Armenians and Palestinians seek statehood and self-determination, the Palestinians have benefitted from extensive media coverage and the longstanding involvement of major international actors in the Middle East, contributing to widespread public and governmental support. In contrast, the struggle of the Armenians of Nagorno-Karabakh has remained relatively under the global radar, partly due to the complex geopolitical dynamics of the South Caucasus region and the lack of a similarly sustained international advocacy campaign. Additionally, the Armenian issue in Nagorno-Karabakh is often perceived through the lens of a territorial dispute between Armenia and Azerbaijan rather than a broader struggle for self-determination, further diluting potential international solidarity.

As this paper has argued, reintroducing the doctrine of remedial secession for Nagorno-Karabakh could serve as a meaningful lever in reasserting the right to self-determination under conditions where traditional diplomatic and legal avenues have faltered or altogether failed. The international community must recognize that the protection of human rights and the preservation of human dignity should transcend geopolitical interests and *realpolitik*. In Nagorno-Karabakh, the feasibility of a peaceful and equitable pending resolution hinges on the willingness of global actors to prioritize human security over State sovereignty, ensuring that past failures do not dictate future possibilities.

In conclusion, the plight of Nagorno-Karabakh exemplifies the urgent need for international law to evolve and adapt to the realities of modern conflicts. The principles of State sovereignty and territorial integrity need not be at odds, but should rather be harmonized, with the promotion of human rights. By embracing a human rights-based approach and reconsidering the applicability of remedial secession, the international legal community can cultivate a more equitable world where the rights of all peoples, especially those marginalized and disenfranchised, are upheld and protected.

FROM PRINCIPLES TO PRACTICE: RESOLVING THE PERCEIVED CONFLICT BETWEEN TERRITORIAL INTEGRITY AND SELF-DETERMINATION IN INTERNATIONAL LAW

Davit Avagyan*

Abstract

Traditionally, the right to territorial integrity and the right to self-determination have been treated as fundamentally in conflict. Governments have used the right to territorial integrity to suppress self-determination movements that seek independence. This paper argues that such a perceived conflict is based on a misunderstanding of the scope and application of these rights. Instead, it demonstrates that the right to self-determination and territorial integrity exist in different spheres entirely, and their perceived conflict is often a result of political manipulation rather than legal incompatibility.

Territorial integrity is a right that applies solely to relations among sovereign states, not between a state and its own people. By contrast, self-determination is an erga omnes right of peoples under international law, which can include the right to secede under certain circumstances. By disentangling the two principles and clarifying their scopes, the article argues that international law accommodates both the protection of state boundaries from external aggression and the legitimate aspirations of

* Davit Avagyan is an attorney based in the United States practicing in the fields of commercial litigation, investigations, and international law. Davit holds a J.D. from the University of Notre Dame and a B.A. in Political Science from the University of California, Davis, with a minor in Human Rights. The author thanks Notre Dame Law Professors Michael K. Addo and Paolo G. Carozza, and Anahit Sargsyan for the invaluable comments and conversations, as well as the Armenian Bar Association and the Southwestern Journal of International Law for the opportunity to present this work at the symposium "Void in International Law? Human Rights in Unrecognized and Partially Recognized States," held in Los Angeles on May 18, 2024.

peoples to determine their own future without the two rights inherently conflicting.

I. INTRODUCTION

The right to self-determination is an old concept: people, being free, must themselves choose their government. Yet so is the concept that each country has a right to territorial integrity — to be free from attempts by others to usurp its territory.

The right to self-determination emerged as a response to colonialism and oppressive regimes and was meant to empower people in their cultural, economic, and political aspirations.[1] Since states typically resist territorial concessions, when exercising a right to self-determination threatens the state's right to territory, it leads to perceived clashes between the concepts of self-determination and territorial integrity. States argue that secession violates their territorial integrity; after all, it forces a change in the state's borders (likely without its consent). But, under international law, a state's right to territorial integrity does not inherently place limits on the exercise of self-determination in a manner that causes territorial changes.

1. MALCOLM N. SHAW, INTERNATIONAL LAW 227, 230-31 (5th ed. 2003).

While various conflicts are discussed here, this article maintains neutrality and merely seeks to outline current issues and arguments. It provides a brief overview of territorial integrity and the right to self-determination without delving into exhaustive historical contexts. The focus is on the perceived conflict between a state's territorial integrity and a peoples' right to self-determination. This article asserts that peoples' right to self-determination is not limited by state's territorial integrity and, when it is exercised in accordance with international law, it does not violate a state's territorial integrity.

II. TERRITORIAL INTEGRITY

Throughout much of early history, from early kingdoms to later republics, nations pursued territorial expansion through warfare.[2] Often, these wars of conquest did not have any justification.[3] Early efforts to regulate warfare emerged with the "just war" theory, which was aimed to temper the regular violence of the age.[4] The just war doctrine, as first contemplated by Augustine, was first conceptualized as a theory of protecting communities, not the borders of or the conquest of the state.[5] From these early theories, the concept of justification to initiate war developed into a more "legal" concept directed towards state action as opposed to intra-community violence.[6] Even then, nations began to enter into agreements that set out the borders between neighbors[7] to protect their rights to the territories claimed. These early origins of territoriality were codified somewhat during the peace of Westphalia.[8] However, the current system of territorial integrity and the concept of the "inviolability of borders" did not truly emerge until the League of Nations.[9]

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2. *See, e.g.*, MARY E. O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 118 (Robert C. Clark et al. eds., 2nd ed. 2009).

3. *See id.*

4. *See id.*

5. *Id.*

6. *Id.* at 119, 120.

7. *See, e.g.,* Beth A. Simmons, *Borders Rules,* U. Pa. L. Sch., Pub. L. & Legal Theory Rsch. Paper Series, Research Paper No. 19-07, (forthcoming 2019) (manuscript at 5-6) (on file with author).

8. *Id.* ("A host of ancient and medieval border agreements were concluded well before the formation of the modern state system. The Treaties of Westphalia (1648) were largely territorial agreements that nurtured the connection between physical space and political jurisdiction. Territorial delineation and nation-statehood were largely co-constitutive processes; and interstate borders defined, reflected and helped to solidify national identities.") (citations omitted).

9. *Id.* (manuscript at 7).

The aftermath of World War I prompted global efforts to prevent future conflicts, culminating in the formation of the League of Nations.[10] Its Covenant, particularly Article 10, underscored the commitment to upholding territorial integrity against external aggression.[11] Article 10 committed members (states) of the League "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[12]

Despite the League's ultimate failure to avert another world war, the imperative for territorial stability persisted. The United Nations, succeeding the League, reinforced this commitment in the new United Nations Charter, prohibiting the threat or use of force against territorial integrity.[13] In relevant part, the United Nations Charter Article 2 commits that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] The United Nations Charter also codifies internal sovereignty through Article 2(7), which precludes the United Nations from intervening in any country's internal matters.[15]

Subsequent treaties and declarations, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, reaffirmed the sanctity of territorial integrity.[16] These principles, enshrined in various UN documents, aimed to deter interstate intrusion and foster global stability.

Since the formation of the United Nations, territorial integrity has been invoked in various conflicts worldwide, from Cyprus, Syria, Armenia, Ukraine, and others. States often cite this principle to safeguard their territorial and sovereign rights, whether the legal right applies or not. Similarly in how states often invoke the right to self-defense as they use force that exceeds the parameters of self-defense.

Membership in the United Nations is limited to sovereign states, through their recognized governmental representatives.[17] The United Nations Charter

10. *See, e.g.*, League of Nations Covenant.

11. League of Nations Covenant, *supra* note 10, at art. 10.

12. *Id.*

13. *See* U.N. Charter art. 2, ¶ 4.

14. *Id.*

15. *Id.* at ¶ 2(7).

16. *See* G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations, at 122 (Oct. 24, 1970).

17. *See generally* U.N. Charter, *supra* note 13, at art. 1.

only talks about "members" and the "threat or use of force" against a "state."[18] This leaves open the possibility that states could seek territorial changes through other means since the charter only prevents other states from interfering with the territorial integrity of another *state* through *the use or threat of force*. Thus, nothing prevents a state from negotiating to give away or take a portion of territory with another state or people.

However, states facing disputes over secession, such as Serbia, have invoked the right to territorial integrity by arguing that secession would violate the states' right to territorial integrity.[19] The argument is that by changing the borders of a state without its consent, the territorial integrity of the state is violated. This argument is the main topic of discussion in this article.

III. SELF-DETERMINATION

The right to self-determination is not a new concept but rather has its roots in the theories of individual and community rights from centuries ago. We can see some of the earlier concepts of self-determination in the writings of St. Thomas Aquinas in the thirteenth century, advocating for the right of people to rebel against a tyrant.[20] Several centuries later, John Locke would make significant contributions to the modern concept of the right to self-determination by advancing the idea of individual rights and the concept of "consent of the governed."[21] His view placed individual rights as supreme to the government and would come to take center stage in revolutions of the seventeenth century, such as the American Revolution.[22] While the American revolutionaries did not specifically invoke a "right to self-determination," that is because the concept had not been solidified by then. However, the U.S. Declaration of Independence and the arguments used for the revolution appeal to the early concepts that would develop into what is known today as the right to self-determination.[23] In particular, Locke's ideas of the consent

18. *See id.* at art. 2, ¶ 4.

19. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. (July 10).

20. *See* MARY E. O'CONNELL, THE ART OF LAW IN THE INTERNATIONAL COMMUNITY 240 (2019).

21. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 181-82 (Thomas I. Cook ed., 1947).

22. *See* O'CONNELL, *supra* note 20, at 159.

23. *See* The Declaration of Independence para. 2 (U.S. 1776) (arguing "Governments are instituted among Men, deriving their just powers from the consent of the governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government").

of the governed were found prominent in the argument to break away from English rule.[24] Years later, the French used similar arguments to overthrow the monarchy, and in the nineteenth century, the Greeks successfully fought the Greek War of Independence against the Ottoman Empire.[25] More than anything, the use of the early concepts that would become the building blocks of the right to self-determination showed the practical application of the ideas of human rights rather than the rights of states or monarchs.

The concept of self-determination continued to evolve,[26] and by the early twentieth century, it had been solidified enough for world leaders to use it as a justification for foreign policy.[27] The right also found more prominence in the twentieth century as the world order shifted significantly, with growing resentment towards the imperial powers. Colonization in the earlier centuries had subjugated millions and imposed on the peoples of colonies tyrannical rule and suffering. With the end of World War II, the calls for independence from the peoples of the colonies finally began to break through.

Thus, when the UN Charter was drafted, it did not simply recognize a right to self-determination. Instead, it states that the *purpose* of the organization is "[t]o develop friendly relations among nations based on respect for the principle of *equal rights and self-determination of peoples*,"[28] making a right to self-determination a cornerstone of the United Nations. In 1960, UN Resolution 1514 was adopted in support of decolonization, stating unequivocally that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[29] As a result, the

24. Among other arguments, such as the natural law and natural rights of men.

25. *See, e.g.*, O'CONNELL, *supra* note 20.

26. As well as development of international law and international human rights law, which took on a greater role in international affairs and became more sophisticated as a legal tool, rather than merely a political one.

27. Woodrow Wilson used the right to self-determination after World War I as a means of decolonization, though despite his best efforts the right would not become a central pillar of the League of Nations as it later did for the United Nations. *See* Michael Ajemian, *Territorial Stalemate: Independence of Nagorno-Karabakh Following the Dissolution of the Soviet Union, and its Lingering Effects Decades Later*, 34 SUFFOLK TRANSNAT'L L. REV. 375, 386 (2011) (citing to MALCOLM N. SHAW, INTERNATIONAL LAW 178, 225 (5th ed. 2003)). Self-determination would even find itself in domestic law, such as the United Soviet Socialist Republics constitution.

28. U.N. Charter art. 1, ¶ 2 (emphasis added).

29. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) (While some have argued that the declaration was written in the context of colonization and should not be viewed outside of that context, this declaration in conjunction with others that documents which followed set the course of the right to self-determination for all peoples, not only those in the context of colonization. While Declaration 1514 might be about

International Court of Justice (ICJ) would come to state that in its view, the "assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable," ending any remaining debate.[30] The ICJ in 2019 reaffirmed that self-determination is a "fundamental human right."[31] However, despite this, two difficult questions remain unanswered about the exercise of the right to self-determination. The first question is who possesses this right and can legally trigger its exercise. The second question is what the exercise of the right to self-determination entails.

In the UN Charter, self-determination is a right that belongs to all "peoples."[32] A 'peoples' is a distinguishable group of people, usually connected by a mutual culture, religion, language, or other characteristics that unite them.[33] The group will be different from the majority of the state's population in important ways.[34] However, understanding whether a particular group is a "peoples" can be a difficult question since a peoples can possess stark differences from the majority of the population, yet share key similarities.[35] A further difficulty arises when a particular group claims to be a "peoples" in order to assert their right of self-determination and the state refuses to acknowledge the existence of such a peoples as a distinct group from the general population. In an attempt to prevent the right to self-determination and other rights from attaching, the administrative state will refute that the group is a "peoples" at all.

Not all groups are considered a peoples.[36] The members of a political party, for example, would not be considered a peoples even though they are a clearly identifiable group with similar beliefs, nor would the inhabitants of one city or province who are not in any other significant way

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colonized people, its importance in the development of the right to self-determination cannot be overlooked).

30. Concerning East Timor (Port. v Austl.), Judgment, 1995 I.C.J. 90 ¶ 29 (June 30).

31. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 144 (Feb. 25).

32. U.N. Charter, *supra* note 28. This would also be reaffirmed in later resolutions of the UN, statements by states, and the International Court of Justice.

33. *See* JAN KLABBERS, INTERNATIONAL LAW 129-30 (2nd ed. 2018).

34. *See id.*

35. *Id.* (Klabbers shows the difficulty through Americans and Australians, who share the same language, but few would think constitute one people. At the same time, the history of the Catalans is tied closely with the Spanish, but the Catalans themselves feel strongly different from the Spanish. While Klabbers gives these examples of difficult situation, there are cases where there could not be much argument that a group of peoples constitutes a Peoples, such as the Kurds who have a distinct culture, language and identity.).

36. *See generally id.*

indistinguishable from the state's general population.[37] Thus, states can refute that a group claiming to be a peoples with the right to self-determination does not actually satisfy the requirements to have standing to exercise the rights.[38]

A group must possess some characteristics which will support their assertion that they are, in fact, a "peoples." Even though there is no specific checklist, a distinct culture, language, religion, and other similar characteristics can be a guide to determining whether a group constitutes a peoples.[39] Since this area has many subjective elements, there remains a level of uncertainty and ambiguity. This unclarity has, in turn, led to states arguing that the group in question is actually similar to the general population. On the other hand, in some cases, the existence of a peoples is much clearer. For example, no credible debate exists that the Kurds or the Sami are not a peoples.[40]

The second issue—how and when the right to self-determination can be utilized—is much more contentious. Neither the UN Charter nor other international documents of wide acceptance contain a road map of how to apply the right to self-determination. This has resulted in different theories of when the right to self-determination can be used, how it can be used, and how it is regulated or limited. It is generally accepted that there is a right to internal and external self-determination.[41] Internal self-determination is not as controversial as external self-determination.[42] A peoples can exercise their internal right to self-determination by working with the state to promote their social, cultural, and economic rights. For example, since Sweden's reversal

37. *See generally id.*

38. This has occurred even when it is clear that a group is a peoples. For example, Sweden did not recognize the Sami until 2010, after which it has tried to give them a level of self-determination internally. *See, e.g.,* James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, Human Rights Council, U.N. Doc. A/HRC/18/35/Add.2, United Nations, (June 6, 2011); *see, e.g.,* United Nations Committee on the Elimination of Racial Discrimination, concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, U.N. Doc. CERD/C/SWE/CO/19-21, (Sept. 23, 2013); *see, e.g.*, United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review-Sweden*, U.N. Doc. A/HRC/29/13, 4 (Apr. 13, 2015).

39. *See* Klabbers, *supra* note 33; *see generally* James Summers, PEOPLES AND INTERNATIONAL LAW, (2d ed. 2007).

40. *See Who are the Kurds?* BBC (Oct. 15, 2019), https://www.bbc.com/news/world-middle-east-29702440; *Sami in Sweden*, SWEDISH INST. (July 17, 2024), https://sweden.se/life/people/sami-in-sweden.

41. Vladyslav Lanovoy, *Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?* 4 CAMBRIDGE J. INT'L COMP. L. 388, 391-92 (2015).

42. *Id.* (This is not to say that internal self-determination is not rife with issues or that people fighting for internal self-determination to not face significant challenges from their governments.).

of its stance and recognition of the Sami as a peoples, an indigenous people living in parts of Sweden and other countries, they have worked with the Swedish government to form a parliament to represent their interest, including their rights to language, culture, and other aspects of importance to them.[43] While there still remain legitimate concerns about the Sami's rights in Sweden[44] and whether the Swedish government has allowed the proper exercise of their rights to self-determination in certain aspects or instances, the Sami's right to self-determination within the borders of Sweden is recognized and there are mechanisms in place to guarantee and advance them.[45] States have tried to argue that self-determination only applies in this way, through internal means. Commonly, a state's right to territorial integrity is used as the crucial point for advancing this argument. However, it is accepted that in some instances, the right to self-determination can be an external right, which would allow a group to secede from the state.[46]

External self-determination is more controversial because the states guard their territories quite jealously. The exercise of external self-determination will be an attempt by the peoples to secede from the state and, as a result, take with them territory the state perceives to belong to it.[47] While states might begrudgingly give some autonomy or special status to a minority group, no state wants to give up a scarce resource — territory on earth — and whatever other resources such territory encompasses. This very reason has driven states to declare their commitment to territorial integrity in cases where self-determination has upset state borders. However, there are examples that show states' willingness to recognize external self-determination as a viable option in some circumstances, despite it affecting internationally recognized borders of other states. The recognition of Kosovo

43. *Id.*

44. Anaya, *supra* note 38.

45. *Id.* (The same can be said of the Sami in Norway and Finland).

46. *See* Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 134 -35 (Can.) (Even the Canadian Supreme Court, which ruled that Quebec did not have a right to unilaterally declare independence under Canadian law or international law recognized that there is a legitimate argument that people whose right to internal self-determination has been frustrated might have recourse by exercising their right externally. The Canadian Supreme Court refused to consider this issue since it found that Quebec's circumstances did not even approach such a threshold.).

47. *Id.* ¶¶ 126, 134-35.

by over one hundred states,[48] Taiwan by twelve states,[49] and a more limited recognition of other states such as Abkhazia are some examples.[50]

However, that is not to say that external self-determination does not have its inherent limitations, just as many other human and states' rights do. First, the exercise in the external context is seen as a last resort, which should be utilized only if the oppression rises to such a level that the peoples have no reasonable way of exercising self-determination within the state's territory.[51] "Importantly, though, before ethnic-cleansing began, the Kosovar Albanian right to self-determination was thought to be exercisable only within the broader Yugoslav federation (concerns for territorial integrity coming to the fore)."[52]

Second, as has been discussed, this right is vested only for "peoples." There are also practical considerations that will hamper most attempts to secede, ranging from economic and geographic issues to security concerns. However, practical considerations do not affect the legal considerations.[53]

Many states[54] and scholars have argued that the exercise of self-determination is contrary to states' right to territorial integrity. Concerns for the territorial integrity of the state are always brought to the forefront when external self-determination issues arise. This has created in the minds of many an inherent clash between the rights of a peoples and the rights of the state.

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48. *List of Recognitions*, REPUBLIC OF KOS. MINISTRY OF FOREIGN AFF., https://mfa-ks.net/lista-e-njohjeve/ (Serbia and those who opposed the recognition of Kosovo used territorial integrity as one of the, if not the, primary reason. The recognition by over one hundred countries shows that states do not see the maintenance of borders as an absolute rule.).

49. *Diplomatic Allies*, CHINA (TAIWAN) MINISTRY OF FOREIGN AFF., https://en.mofa.gov.tw/AlliesIndex.aspx?n=1294&sms=1007.

50. *See The Syrian Arab Republic recognized the independence of the Republic of Abkhazia*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF ABKHAZIA (May 29, 2018), https://mfaapsny.org/en/allnews/news/othernews/siriyskaya-arabskaya-respublika-priznala-nezavisimost-respubliki-abkhaziya/?sphrase_id=102167 (As of 2018, six United Nation Member states had recognized Abkhazia. Importantly, the states which recognize Abkhazia are those who opposed the recognition of Kosovo. Their willingness to recognize Abkhazia despite Georgia's claims of territorial integrity show that the opposition to Kosovo is not based on territorial integrity but rather a political one.).

51. *See* Reference Re Secession of Quebec, *supra* note 46, para. 134 (*citing* to the Vienna Convention on the Law of Treaties, Multilateral, May 23, 1969).

52. Rodney Pails, *Self-Determination, the Use of Force and International Law: An Analytical Framework*, 20 TASMANIA L. REV. 70, 84 (2001).

53. *See generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 1 (June 21).

54. Especially those facing secessionist movements within their borders.

IV. THE ALLEGED CLASH BETWEEN SELF-DETERMINATION AND TERRITORIAL INTEGRITY

Territorial integrity and self-determination are usually invoked in the same context by opposing sides. This has created the perception that the two clash. Scholars and government officials have been arguing about the clash of these two rights for decades with numerous scholarly articles dedicated to the discussion of how to resolve the "inherent" conflict between territorial integrity and self-determination,[55] while governments usually argue for one side or the other in any given conflict based on their own interest in territorial integrity or self-determination.

The abundance of documents, statements, and resolutions that purport to support territorial integrity and self-determination at the same time do not help clear this confusion. For example, while the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States[56] declares that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter," the document also goes on to state that "[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and *freedom and independence*."[57] This same document also states that "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance* with the principle of equal rights and self-determination of peoples."[58]

Does the forgoing mean that a state, which is not in compliance with the principles of equal rights and self-determination, can have its territorial integrity or political unity dismembered, contrary to what was said a few

55. *See* Constantine Pitykakis, An Assessment of the Right to Self-Determination and Secession in Regards to International Security 21 (2018) (M.A. dissertation, University of Plymouth) (on file with University of Plymouth) (arguing that since territorial integrity and self-determination appear together and the attitude of states toward secession, then self-determination yields to territorial integrity); Lanovoy *supra* note 41, at 391 (stating that territorial integrity is a limitation on the right to territorial integrity); *see generally* Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force* 55 INT'L ORGS. 215 (2001).

56. *See* G.A. Res. 2625 (XXV), *supra* note 16.

57. *Id.* (emphasis added).

58. *Id.* at 124 (emphasis added).

sentences above it? The attempts by United Nations members to protect their territories while also heeding to human rights in resolutions and other documents has resulted in much confusion. Their actions are also contradictory. For example, NATO members and the organization supported the independence of Kosovo, citing the right to self-determination, while at the same time, NATO member states did not recognize the Republic of Artsakh, a democratic unrecognized de facto state, referring to Azerbaijan's right to territorial integrity as the reason for refraining from engaging with the officials from Artsakh.[59]

The fact that territorial integrity is continuously brought up during discussions of self-determination creates the impression of a clash. Several states even made this argument in the ICJ during the advisory opinion of Kosovo.[60] The ICJ avoided much of what many wished it would have addressed in that case.[61] However, the ICJ had no choice but to state that the arguments for territorial integrity were simply out of context and not address them further, as discussed more in depth later in this paper.[62]

The Helsinki Final Act, which attempted to reduce tensions worldwide during the Cold War, also followed this confusing trend.[63] First, the Act stated that "participating states will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."[64] This conforms to the Declaration on Friendly Relations and Co-operation Among States text, but the Helsinki Act goes a little further. The following paragraph states that under the principle of self-determination, all peoples have the right to determine their "internal *or external political status,* without external interference, and to pursue as they wish their political, economic, social and cultural development."[65] This would seem to support the idea that peoples have a right to external self-determination, despite territorial integrity being mentioned just above it. The

59. *See* Kimberley Kruijver & Visar Xhambazi, *Kosovo's NATO Future: How to Square the Circle,* NETH. INST. INT'L. REL., (Democracy for Dev., Neth.), Dec. 2020; *See* NATO Riga Summit, *Riga Summit Declaration,* ¶ 43 (Nov. 29, 2006).

60. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 1, ¶ 79-80 (July 22).

61. *See id.* at 405-06.

62. *See id.* ¶ 79-80.

63. *See id.* ¶ 80; *see generally* Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Final Act].

64. Helsinki Final Act, *supra* note 63, at 7.

65. *Id.* (emphasis added).

Helsinki Act was signed by most European states, Canada, the United States, and the Soviet Union.[66]

The argument that self-determination violates territorial integrity sounds logically consistent until one takes a closer look at the subjects of the rights. States will point out that any secessionist movement, if successful, will result in portions of the State being separated. Hence, there will be a disruption to the territoriality of the state and its recognized borders will need to be changed, which, States argue, violates the right to territorial integrity. Sounds logical. However, once the right to territorial integrity is examined closer, it becomes clear that states are twisting the right and taking it out of context in order to "legalize" their argument.

V. LEGAL DECISIONS

The ICJ has had several opportunities to hear cases regarding the right to self-determination. In these cases, while self-determination was central, the court did not take the opportunity to clarify the debates and ambiguities surrounding the rights to self-determination, especially as it relates to rights of secession.[67] The questions posed to the ICJ, and its own reading of the questions, were narrow and avoided engaging in that debate. Nevertheless, the ICJ cases regarding Namibia (South West Africa), Western Sahara, and Kosovo provide pertinent discussions, as does the widely cited to Canadian Supreme Court's decision regarding Quebec.[68]

A. Practical limitations do not affect the legal rights of peoples

In the 1970s, South Africa retained effective control over Namibia.[69] The Security Council of the United Nations had declared, several years prior, that South Africa did not have any right to "administer" the territory.[70] Despite the international pressure, South Africa had persisted in its control

66. *See id.* at 2.

67. *See* Gentian Zyberi, *Self-Determination Through the Lens of The International Court of Justice* 56 NETH. INT'L L. REV. 430, 435, 449 (2009).

68. *See generally* Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 69 (Dec. 22); *see* Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 84 (June 30); *see* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Mauritius v. U.K.), Advisory Opinion, 2019 I.C.J. (Feb. 25) (discussing the rights to self-determination and territorial integrity in this context, which falls too much outside the scope of this article).

69. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion Request, 1970 I.C.J. 1, at 9 (July 29).

70. *See* S.C. Res. 276 (Jan. 30, 1970).

over Namibia, claiming it had a right under international law to do so.[71] The Security Council requested an advisory opinion from the ICJ.[72] Since this case arose in the context of decolonization, territorial integrity was not a factor. Nevertheless, the Court's ruling here provided important guidance towards the rights of peoples as it relates to self-determination.[73]

One argument advanced by South Africa was that "limitations" needed to be considered by the Court.[74] South Africa argued that that while the people may have a right to self-determination, tribal and cultural differences could create such practical limitations that the population was "practically restricted to some kind of autonomy and local self-government within a larger arrangement."[75] In rejecting this argument, the Court noted that such an approach "in effect means a denial of self-determination as envisaged in the Charter of the United Nations."[76] South Africa had used this argument to preclude Namibia from gaining its independence. But the Court's rejection of that argument clarified that attempting to impose a lessor form of self-determination, ostensibly for the population's own good or due to practical limitations, was a de facto denial of the right. While practical considerations can pose hurdles in practice, they cannot be used as a factor to deny legal rights. Namibia gained its independence on March 21, 1990.[77]

B. Referendum is the means through which a Peoples can express their right to self-determination

The ICJ made another important decision in 1975 when it provided an advisory opinion for the conflict surrounding Western Sahara.[78] A conflict was brewing in Western Sahara involving territorial claims by both Morocco and Mauritania.[79] Spain had formerly colonized the territory but wanted to set in motion decolonization based on the self-determination of the people of the territory.[80] The ICJ was asked to determine whether Western Sahara was

71. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion Request, 1970 I.C.J. 1, at 9 (July 29).

72. *Id.* at 3.

73. *See* Zyberi, *supra* note 67, at 436.

74. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 53, at 63 (June 21).

75. *Id.*

76. *Id.*

77. Zyberi, *supra* note 67, at 436.

78. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 61 (Oct. 16).

79. *See id.* ¶ 65.

80. *See id.* ¶ 61.

at the time of colonization by Spain *terra nullius*[81] and if not, what were the legal ties with Morocco and Mauritania?[82]

The court was aware that the opinion was requested for a practical purpose—helping the General Assembly find a solution to the decolonization process.[83] The ICJ answered the first question, whether the territory was *terra nullius,* in the negative.[84] The ICJ then considered the legal ties to Morocco and Mauritania. Without delving into the factual discussions, the Court determined that while there were some territorial ties with Morocco and Mauritania, none were enough to establish territorial sovereignty by either state.[85]

The court noted that the existing legal ties did not affect the "decolonization of Western Sahara and, *in particular, of the principle of self-determination* through the free and genuine expression of the will of the peoples of the Territory."[86] The ICJ's opinion here also sets certain norms for exercising self-determination rights. Namely, the application of self-determination requires the *free* and *genuine* expression of the people's will.[87] After this opinion, it was also accepted that a referendum was the accepted means of consulting the people.[88]

C. Confines of territorial integrity are relations among states

In 2008, the assembly of Kosovo voted to declare independence from Serbia.[89] Serbia viewed the declaration as illegal under international law and sought clarification from the ICJ.[90] A request for an advisory opinion was sent to the ICJ through a United Nations General Assembly resolution.[91] The question posed to the ICJ was a narrow one: "is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[92]

81. *See id.* ¶ 79 (*Terra Nullius* means land that belongs to no one).
82. *Id.* at ¶ 1(2).
83. *Id.* ¶ 20.
84. *Id.* ¶ 82.
85. *Id.* ¶ 162.
86. *Id.* (emphasis added).
87. *Id.* ¶ 55.
88. Zyberi, *supra* note 67, at 438.
89. Kosovo Advisory Opinion, *supra* note 60, ¶ 52.
90. *See id.* ¶ 77.
91. *Id.* ¶ 1.
92. *Id.* ¶ 49.

The ICJ, in answering the question posed by the General Assembly evaded commenting on some issues which relate to self-determination but also provided key insights into the interplay between the different rights claimed in this case. The ICJ's narrow reading of the question allowed it to avoid any claims of judicial activism and protect the judiciary's credibility. Nonetheless, the decision by the ICJ was one of the most important recent developments in the field.

First, the ICJ answered the question by stating that a unilateral declaration of independence is not illegal under international law.[93] The ICJ did not attempt to answer the question regarding how this ruling affects territoriality, the inviolability of borders, or secession as a right to self-determination since this would be venturing outside of the narrow question presented to the court.[94] Moreover, the ICJ refused to opine on whether self-determination outside the colonization context had developed to the point where a right to secession existed, whether as a manifestation of the right to self-determination or as what some describe as a right to "remedial secession."[95]

However, the court did address the arguments regarding territorial integrity since several states had submitted arguments against Kosovo's position, based on a States right to territorial integrity. Those States argued that the right to territorial integrity under international law inevitably meant that a unilateral declaration of independence was illegal.[96] In dismissing these arguments as irrelevant, the court stated that "the scope of the principle of territorial integrity is confined to the sphere of relations between States."[97]

The ICJ's position was that territorial integrity does not make a declaration of independence illegal since territorial integrity simply does not apply to the situation. The court, having declared territorial integrity arguments irrelevant to the question before it, moved on without commenting

93. *Id.* ¶ 122.

94. *Id.* ¶ 83 ("The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law…To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).").

95. *Id.* at 406; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 144 (Feb. 25) (The ICJ in its most recent advisory opinion regarding self-determination hinted that a right outside of decolonization might be forming. The Court stated that "[t]he Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analyzing the right to self-determination in the context of decolonization.").

96. *See* Kosovo Advisory Opinion, *supra* note 60, ¶ 80.

97. *Id.*

further. Unfortunately, given the Court's narrow decision, arguments about the limitation of self-determination by territorial integrity rights persist.

The ICJ's decisions and advisory opinions show that self-determination is a fundamental right that is to be afforded to all peoples irrespective of practical barriers or challenges. States cannot use their perceived concerns to deny peoples a right to self-determination and must give peoples an opportunity for a free and genuine expression of their will and respect the result of such expression. Territorial integrity, while an important principle of international law in other contexts, does not play a role if there is a genuine strive for self-determination by peoples.

VI. WHY THE TWO RIGHTS DO NOT CONFLICT

Since the ICJ has not explicitly stated that territorial integrity cannot be a limitation to the right to self-determination, but rather only signaled it, this argument has persisted. As was discussed above, the international documents drafted by states usually tend to declare both their commitment to self-determination as a human right and to territorial integrity. However, while both are important rights, these rights are not as intertwined as some believe. Territorial integrity came about as a concept that was meant to prevent war between nations, and it continues to have an important role to play in that context. Yet, territorial integrity does not play a limiting role in the right to self-determination.[98]

While it might seem that states were attempting to intertwine the right to self-determination with the right to territorial integrity by including both rights together in these documents, there is a much more practical reason why these rights are discussed simultaneously. For example, let us consider the Helsinki Final Act, which, as discussed above, states that participating states will respect the right to self-determination and act at all times in conformity with the Charter of the United Nations, including those relating to territorial integrity.[99] This paragraph is aimed at the state, not people. It demands two things: 1) that a state must respect self-determination, and 2) that the state must act in conformity with international norms, including territorial integrity.[100] A state acting in conformity with this requirement must respect the right to self-determination of peoples within and outside of its territory. But, by its structure the Act precludes states from using claims of a peoples'

98. *See* Inigo Urrutia Libarona, *Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo*, S.S.R.N. 107, 110 (2012) (That is not to say that self-determination does not have any limitations, but those limitations exist internally within the right to self-determination).

99. *See* Helsinki Final Act, *supra* note 63, at 7.

100. *Id.*

right to self-determination within another States territory to annex territory or interfere with the state's internal affairs. By making it clear that in "respecting" the right to self-determination states must consider the right to territorial integrity of other states, the Act is attempting to prevent pushing peoples within the territory of another state to declare independence. However, this does not create any obligation on the part of the peoples towards the State's territorial integrity.

For example, when Iraq invaded Kuwait, that was a violation of the territorial integrity of Kuwait by another state, Iraq.[101] Territorial integrity — a right not to have its territorial integrity violated or threatened to be violated by other states — is a right that all states enjoy. A violation may be physically or through other means. However, in the context of a self-determination struggle, there is the state and the peoples of a territory, which is at the time wholly within the state. There can, of course, be outside supporters, such as NATO in Kosovo; however, their actions and repercussions will be discussed later. It is enough to say for now that third parties' actions do not jeopardize a peoples' legal rights to self-determination. As was discussed above, the states argue that since their borders will inevitably change if an external self-determination movement is carried out to its conclusion, they will at that time suffer a violation of their territorial integrity. Let us consider this argument in light of ICJ opinions.[102]

A. The right to self-determination through a practical hypothetical

To demonstrate this argument in the clearest way possible while not delving into the political and cultural issues of real-world examples, a hypothetical scenario is proposed with the following actors:

1) Group A: the indigenous peoples of a territory.
2) State 1: the state within whose broader territory Group A resides.

A group of peoples called Group A is indigenous to a specific region, which falls in the territory of State 1. Group A practices a different religion than the majority of State 1 and has a distinct culture and language. Their identity as a peoples of the territory is clear and not subject to debate. Unfortunately, Group A has no rights under the constitution of State 1, is harassed, and often killed. Members of Group A have been living under oppressive conditions for years and have no means of achieving self-

101. *See* MARC WELLER, IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW 18, 19 (Oxford Univ. Press, 2010).

102. This paper does not consider the decolonization context of self-determination as that issue has mostly been settled, at least legally, if not practically. Moreover, the argument that territorial integrity somehow limits self-determination does not often arise in the context of decolonization.

determination internally; in fact, the situation is only getting worse year by year and the members of Group A fear genocide. Group A organizes itself and decides to declare independence from State 1, claiming the territory to which they are indigenous. Group A holds a referendum in the territory, asking whether those living in the area wish to form an independent state. The results are a vote for independence, so Group A declares independence. Up to this point, Group A has followed the ICJ's opinion in holding a referendum, as long as it was a free and genuine vote of the people and declaring independence legally under international law. Some would argue that it is at this point that this paper loses its point. Surely, it appears that once Group A secedes from State 1, the state's right to territorial integrity has been violated. However, that is not so. State 1 never had a right to territorial integrity as to the people living within its borders. It only possesses that right as to other recognized states. So, the people of Group A have not violated any right of State 1 because they are incapable of violating a right that only States have the capacity to violate.

Once Group A has declared independence, State 1 has two options. State 1 can either:

1) Recognize Group A as an independent state or, and more likely,
2) Refuse to recognize Group A as an independent state.

At this point, while Group A might have de facto control over its territory, it does not have international recognition as a state. Whether or not State 1 has lost control over a certain portion of its territory, the issue continues to be an internal matter for State 1. That is not to say that international law has no role. International human rights law creates obligations for states in relation to their own people as well.[103] Additionally, it may create obligations to third party states that have their own obligations under international law. Nevertheless, if no other state is involved in the attempt by the people to secede, any grievance that State 1 has is against a peoples — not a state with an international character and the capacity to violate the states territorial integrity.[104]

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103. *See* U.N. Human Rights Office of the High Commissioner, International Human Rights Law (last visited Oct. 16, 2024), https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law (These could be *erga omnes* rights, customary international law or specific treaties which obligated State 1 to protect certain human rights laws. Whether Group A now constitutes another state or not, State 1 would still not be able to enslave people since that would be a violation of human rights, whether carried out against one's own people or another states).

104. *See* Ved P. Nanda, *Self-Determination and Succession under International Law*, 29 DENV. J. INT'L L. & POL'Y 305, 314 (2021). This presumes that Group A has a free and genuine expression of their free will without the control from a third-party state to declare independence as a means of

B. The third parties to any conflict

In the case of armed conflict, there is a debate regarding the right to rebellion. Some argue that no such right exists and that any self-determination movement must be carried out through peaceful means.[105] On the other hand, others argue that a right to struggle against oppressors is a right or a manifestation of the right to self-determination.[106] The theoretical debate about the right to rebellion is outside the scope of this article. However, to understand the practical effect of the argument presented here, we must consider the scenario where the exercise of self-determination turns to an armed conflict and third parties support one side or the other, as secession movements tend to go. In secession movements, it is common for third-party states to back such a movement. For that reason, we must consider the violation of territorial integrity which might arise through the involvement of those third-party states.

Let us consider the possible involvement of third-party states. If State 1 decides to use force to retake the territory under the control of Group A and quell the secession movement, a third-party state has a number of possible involvements with different repercussions. Let us consider each one.

If the third-party state ("State 2") decides to provide military assistance against State 1 in order to protect Group A, what are the legal repercussions? In such a scenario, State 1 might have a legitimate grievance that State 2 has violated its right to territorial integrity. The United Nations Charter applies to State 2 since it is a member state and it has a duty to refrain from the threat or use of force against State 1, unless an exception applies.[107] But these grievances are between State 1 and State 2. Despite any grievance that State 1 might have against State 2, this does not change the legal rights afforded to Group A. Group A cannot be penalized for a violation that was committed by a different entity that has different capacities, rights, and obligations, unless Group A is merely an extension of State 2's attempts to interfere in the internal affairs of the other.

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interfering in the affairs of State 1. Such actions by a third-party state would be a violation of international law and raise questions about the free and genuine nature of the exercise of self-determination rights.

105. *See* O'CONNELL, *supra* note 2, at 247-48.

106. *See id.* at 246.

107. It is possible that collective self-defense between State 2 and Group A, a Security Council Resolution, or humanitarian intervention might apply. Humanitarian intervention is a controversial topic. For a discussion on the use of force generally and a discussion on humanitarian intervention through armed force exists, *see* O'CONNELL, *supra* note 2, at 118-38. There can also be an argument that State 2 had a duty to protect Group A, since self-determination is an erga omnes right.

C. Post limited statehood

Finally, let us consider the effect the above-mentioned has if Group A becomes a state. Let us suppose it has been numerous years since the facts mentioned above. For Group A to become a state, it must meet certain minimal thresholds.[108] Group A has managed to successfully create a state which has a permanent population within the territory which they claimed as part of their declaration of independence from State 1. Moreover, Group A has managed to create a government with all the necessary agencies to carry out the duties of a state. Not only that, but Group A's efforts have gained it the recognition of most states around the world, despite the continued protestations of State 1. Does State 1 now have a claim that its territorial integrity has been violated by Group A? The answer is no. In this case, State 1 continues to view Group A as its citizens, living within its borders. So, from the perspective of State 1, this issue continues to be internal by nature. Nothing has changed from State 1's perspective because no separate state exists within the territory of Group A, which is separate from State 1. On the other hand, State 1 might have a grievance against those other states which have recognized Group A as an independent country, subject to the same arguments regarding the nature of self-determination rights, but not against the peoples of Group A. Territorial integrity does not mean that State 1 has an inalienable right to its internationally recognized borders under any and all circumstances. Territorial integrity is only meant to protect a state from other states. Its citizens, on the other hand, are not limited in the same way, giving Group A the right to external self-determination, which cannot be limited by State 1's rights against other states.

No matter what stage of the secession process, a peoples do not have the capacity to violate a state's right to territorial integrity. Only states possess such a capacity. Thus, invoking territorial integrity as an argument against the right to self-determination is misplaced. However, does this mean that as long as a peoples declares independence, there is no argument that States have to prevent them from seceding from the State? The answer to that is no; however, that argument does not rest on the right to territorial integrity but within the limitations of the right to self-determination.

108. Montevideo Convention on the Rights and Duties of the States, Multilateral, Dec. 26, 1933, art. 1 (The convention, though not signed by all states, is a good example of what is required: a permanent population, a defined territory, a government and capacity to enter into relations with the other states).

VII. INHERENT LIMITATIONS OF SELF-DETERMINATION

Exercising the right to self-determination is not an easy task because the right has internal checks. While there are concerns about attempts to abuse the right to self-determination, these concerns cannot be used as justification to limit human rights.[109] Indeed, it is notoriously difficult to exercise external self-determination and states can legitimately challenge any attempts of secession by arguing through the right of self-determination, instead of using unrelated state's rights.

The first condition to any attempt to exercise self-determination, whether internally or externally, is that there must be a people who are attempting to exercise such a right.[110] Not every, or even most, distinguishable groups in society constitute a people. This is the very first hurdle that any group must be able to surpass in order to claim a right to external self-determination. This is the first opportunity for a state to challenge any group's attempt to secede. However, if the group is clearly a people, external self-determination also has other limitations.

It is widely accepted that self-determination can take on an external or internal characteristic.[111] If a group has internal self-determination, it is difficult to argue that there is justification to secede from a state. Internal self-determination does not mean that every wish or demand of the group must be met; it means that there must be mechanisms in place for the group to have the opportunity for internal self-determination and that they be given an opportunity to exercise it.[112] In fact, arguments for a right to external self-determination usually turn into a discussion of the peoples being oppressed. External self-determination is seen as a last resort. Even if there are internal disagreements about what internal self-determination means or what falls under that right, small disagreements are not enough. A state can challenge an attempt to external self-determination by showing that the group was given rights and opportunities for internal self-determination within the territory of the state. For example, when people in Quebec attempted to

109. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion Request, 1970 I.C.J. 1, at 63 (June 29) (The ICJ pointed out that practical "limitations" could not be used to deny people their right to self-determination in the case of Namibia and it makes little sense why unproven fears would be enough. Moreover, abuse is possible in the case of state rights as well.); *see* U.N. Charter art. 51 (For example, states use UN Article 51, the right to self-defense, as a justification for military action when the required condition for self-defense has clearly not been met. Yet, it would not be prudent to say the abuse of a right to self-defense by some should lead to the abolishing of any right to self-defense).

110. Lanovoy, *supra* note 41, at 388-89, 391-92.

111. *See id.* at 391-92.

112. *See id.*

secede from Canada, the Canadian Supreme Court was quick to point out that "Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world."[113] There was no legitimate argument that the Quebecers did not have opportunities to exercise their rights to self-determination internally, so their attempt to exercise external self-determination failed at that stage. This is the second way that a state may challenge a particular group's attempt to exercise external self-determination.

Third, self-determination requires the free and genuine expression of the peoples of a territory.[114] This does not mean only the peoples who are part of the group, but all people who reside in the territory which would secede. If a referendum is held on the issue, there are two different ways that a state can challenge it. The first would be to contest the free and genuine characteristic of the vote.[115] If there are claims of serious voter harassment, corruption, or other forms of activities that the state believes show that the vote was not the free and genuine expression of the people, it can argue that the referendum is void. Second, it is possible that a portion of the population residing within the Territory is completely excluded from the vote,[116] which would disqualify the referendum since all people within the territory must be able to vote, not only the group attempting to secede.

During different stages of the process, a state has ample opportunity to argue against a secessionist movement within its borders. A state can show that the secessionists are not a peoples recognized to hold the right, that they have internal self-determination, and that a process by which they attempted to gain independence was not the free and genuine expression of the will of the people. Moreover, it is even possible that a genuine attempt to reconcile differences at an early enough stage could warrant transitioning to internal self-determination rather than an external one.

113. Re Secession of Quebec, *supra* note 46, ¶ 136.

114. Sahara Advisory Opinion, *supra* note 78, ¶ 55.

115. *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 157 (Feb. 25).

116. This is referring to a purposeful effort by the secessionists to exclude some people of the territory that is attempting to secede, not a boycott by a voluntary minority or abstention. Though this type of referendum would be expected to have a high voter turnout, there is no requirements that every resident must vote.

VIII. CONCLUSION

Self-determination is an *erga omnes* right in international law. Its development throughout history points to the struggle against oppressors, and the development of human rights strongly correlates with the right to self-determination. Exercising the right to self-determination is not an easy task, and it is not done lightly. There are examples of many peoples who continue to live within a state, as long as they have meaningful rights to internal self-determination. If people make the difficult decision to move towards external self-determination, they must be ready to overcome not only the practical difficulties which will arise but also to satisfy the legal requirements to exercise their right to self-determination.

On their part, states have often argued that territorial integrity is a limitation on the right to self-determination since exercising the right externally would change the state's territory. However, this flawed argument presupposes that a state has an absolute right to its territory vis-a-vis its people. That is not the case. States have a right to territorial integrity against attempts by other states to encroach on their land.[117] States that do not have such a claim against their own people. The government is merely the one who carries out the will of the people. If states wish to argue against the right to self-determination of a certain group within their territory, they can do so but must base that argument on the limitation of the right to self-determination.

Too often, states have made the easier argument that there will be a violation of their territorial integrity. Unfortunately for the states, territorial integrity protects it against intrusions by other states, but it cannot be a shield against the free and genuine expression of the will of the peoples of the state itself. The principle of territorial integrity operates within the sphere of interstate relations, while self-determination is a principle of a peoples right.

117. U.N. Charter art. 2, ¶ 4.

INTERNATIONAL LAW PERSPECTIVES REGARDING TERRITORIAL AND EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS IN DISPUTED TERRITORIES

Iván Levy* and María Belén Paoletta**

Abstract

This article explores the application of human rights obligations in territorial disputes, examining both legal (de jure) and factual (de facto) scenarios. Since the advent of the Universal Declaration of Human Rights in 1948, the global recognition of human rights has led to numerous treaties that, considering their territorial application, are typically confined to States' jurisdictions. However, it has become clearer with recent developments in international law that these obligations can extend beyond territorial boundaries, particularly when States exercise effective control over the areas under dispute.

Key legal principles from the Vienna Convention on the Law of Treaties are discussed, demonstrating their relevance in situations where human rights obligations persist in regions under contested control. In armed conflicts, even when effective control is uncertain, States might remain responsible for their agents' actions, regardless of where these occur.

The article concludes by underscoring the overall importance of protecting potentially affected populations to prevent them from becoming collateral victims of interstate conflicts. As human rights law and international case law continue to evolve, it is essential that international efforts—including

* Iván Levy is an international lawyer with expertise in arbitration and human rights litigation. He represents States, investors, and human rights victims. He is also a Fulbright Scholar and lectures on International Law. Levy graduated with honors from Columbia Law School wherein he obtained his LL.M.

** María Belén Paoletta is a founding Partner of the International Law Research & Practice Consortium. She advises States and organizations on international law matters. She also lectures on international law. Paoletta graduated summa cum laude from the University of Buenos Aires Law School.

not only those undertaken by States but also by international organizations, non-governmental organizations, the private sector, think tanks, and academia—remain focused on upholding the rights of innocent populations, even in the midst of ongoing broad, complex and devastating international disputes.

I. INTRODUCTION

Human rights have grown in importance over the decades since the Universal Declaration of Human Rights in 1948.[1] Numerous international treaties have since been concluded, regional courts established, and domestic and international recognition of the importance of human rights has steadily increased.[2]

In line with these developments, an ever-increasing number of States around the world have committed to the respect for human rights by negotiating and acceding to human rights treaties.[3] These treaties, by their wording, typically apply only to the jurisdiction of the state itself.[4] However, it has been progressively recognized from time to time that treaties may have effects beyond the territorial boundaries of a state party. The rules governing territoriality and extraterritoriality of treaties are all the most relevant when assessing human rights obligations in disputed territories. In the case of lands under dispute, human rights obligations may be extended beyond the territorial limits of the treaty, depending on the extent of control that a state exercises over an area of the globe.[5] In addition, the acts of state agents must also abide by human rights obligations, regardless of where they occur or produce effects.

This work aims to study the application of human rights obligations to situations of territorial disputes, whether the dispute is purely *de jure*, or whether there is a *de facto* dispute because of an armed conflict.

II. HUMAN RIGHTS OBLIGATIONS IN DISPUTED TERRITORIES

To structure the complex issues of human rights obligations in disputed territories, this section first establishes the general principle of territorial application of treaty obligations (Section A), the exception for extraterritorial application of treaty obligations (Section B), the territorial and extraterritorial

1. *See generally Universal Declaration of Human Rights: The Foundation of International Human Rights Law*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law.

2. *See id.*

3. *See id*.

4. *See, e.g.,* India-Australia Economic Cooperation and Trade Agreement, Austl.-India, art. 1.3(s) Dec. 29, 2022, https://www.dfat.gov.au/trade/agreements/in-force/australia-india-ecta/australia-india-ecta-official-text [hereinafter Ind-Aus ECTA] (stating that the treaty applies only to the jurisdictions of the States of India and Australia).

5. *See* Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. STATE L. J. 417, 420–21 (2011).

application of human rights treaties (Section C) and, finally, reviews human rights obligations in disputed areas (Section D).

A. The Principle of Territorial Application of Treaty Obligations

Under general international law rules, the obligations created by a treaty frequently extend to the entire territory of the parties, unless it is otherwise established, or a different intention is apparent in the treaty.[6] From a geographical perspective, four distinct types of regimes generally arise: *stricto sensu* territorial sovereignty, areas that are not under the sovereignty of any state but have a unique status (such as trust territories), *res nullius*, and *res communis* areas.[7]

Indeed, the principle of territoriality presupposes and implies a subjective right on the state, that is to say, the *ius excludendi alios*. As Max Huber[8] would consider, "[s]overeignty in the relations between States signifies independence" and, in turn, independence—in relation to a specific region of the globe—refers to the exclusive right of a state to exercise its functions within that area without interference from any other state.[9] Consequently, territorial sovereignty is broadly understood as a state's right to demand that the remaining States, as well as other entities, refrain from exercising state functions within its territory.[10] This exclusive right, which is enforceable *erga omnes*, stems from the effective control and authority a state holds within its borders.[11]

Before delving into the application of human rights obligations in disputed territories, it is appropriate to lay the foundations of territorial and extraterritorial application of treaties. This section explores the rule embodied in Article 29 of the Vienna Convention on the Law of Treaties (Section 1.),[12] to then venture into the scenarios of treaties which include

6. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 29 ("Unless a different intention appears from the treaty or it otherwise established, a treaty is binding upon each party in respect of its entire territory.").

7. *See* JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 191 (Oxford University Press ed., 2019).

8. Max Huber was the Arbitrator in case of Island of Palmas arbitration between the Netherlands and the United States. *See* Island of Palmas (Neth. v. U.S.), 1928 R.I.A.A. 829, 838 (Apr. 4, 1928).

9. *See id.* at 238.

10. *See id.*

11. *See* GIOVANNI DISTEFANO, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 134 (Malgosia Fitzmaurice & Sarah Singer eds., 2019).

12. *See generally* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

express provisions on territorial application (Section 2.) and, ultimately, treaties which lack express provisions on territorial application (Section 3.).

1. The Principle of Article 29 of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (Vienna Convention) formulates the principle of territorial application in its Article 29, which provides that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory"—essentially reflecting the importance of ensuring that international obligations are consistently implemented throughout States' sovereign domains.[13] From a historical perspective, Article 29 of the Vienna Convention can be traced back to Article 25 of the Draft Articles on the Law of Treaties (Draft Articles), which was adopted by the International Law Commission (ILC) in 1966, three years before the signature of the Vienna Convention.[14] This drafting effort would lay the foundational principle nowadays reflected in the notion of territorial application, which is one of the default rules in international treaty law.[15]

Article 25 of the Draft Articles exhibited a strongly similar wording to Article 29 of the Vienna Convention, displaying that "[u]nless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party" alluding, thus, to the territorial scope that treaties should possess unless the instrument in question provides an alternative interpretation.[16]

Essentially, the main difference between these two texts revolves around the idea that, while Article 29 of the Vienna Convention appears to focus on the binding force of the treaty upon each party in its entire territory, the Draft Articles seemed to focus on the application of treaties, extending it to the entire territory of each party. Even though the linguistic perspectives may differ, both texts fundamentally embody the same rule: a party to a treaty is obliged by such instrument in respect of its entire territory unless otherwise agreed or established.

In turn, the term "*entire territory of each party*" is, according to the ILC, a comprehensive notion designed to embrace all land, appurtenant territorial

13. *Id.*

14. *See Report of the International Law Commission on the Work of its 18th Session*, [1966] 2 Y.B. Int'l L. Comm'n 220, U.N. Doc. A/CN.4/SER.A/1966/Add. 1 [hereinafter Draft Articles].

15. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

16. Draft Articles, *supra* note 14, at 180.

waters, and air space which constitute the territory of the state.[17] This idea has been widely recognized by academia, understanding also that the territorial criteria is a necessary precondition to statehood.[18] Additionally, it has been correctly asserted that, unless a different intention is evident from the treaty, territorial references do not encompass the continental shelf, the exclusive economic zone, or other fishery zones, over which States merely hold particular sovereign rights in line with international law of the sea stipulations.[19]

The principle embodied in Article 29 of the Vienna Convention is also based on a long-standing state practice. The ILC found that the content of Article 25 of the Draft Articles was rooted in state practices, the jurisprudence of international tribunals, and the writings of jurists, which appeared to support the view that a treaty is to be presumed to apply to all the territory of each party unless it is otherwise implied by the source in question.[20] The ILC also noted that the territorial scope of treaties depends on the intention of the parties first; a general rule is only necessary in the absence of a specific provision in the treaty as to its territorial application.[21]

Therefore, consent is the guiding principle to establish a treaty's territorial application. Following that, in case consent cannot be revealed explicitly or implicitly, the default rule in Article 29 of the Vienna Convention mandates that the treaty will apply to the entire territory of the state party.[22] This means that the international agreement will be applicable

17. *See* Draft Articles, *supra* note 14, at 213.

18. *See, e.g.,* JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 21 (Irwin Law ed., 2008); ADDISON WESLEY LONGMAN LTD., OPPENHEIM'S INTERNATIONAL LAW 563 (Robert Jennings & Arthur Watts eds., 2008) ("State territory is that defined portion of the globe which is subjected to the sovereignty of a state."); GIDEON BOAS, THE PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 163 (Edward Elgar Publishing Ltd. ed., 2023) ("Exclusive control of territory remains a fundamental prerequisite for the competence and authority required by any state to administer and exercise its state functions both in fact and in law.").

19. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 178 (Cambridge University Press ed., 2013).

20. *See* Draft Articles, *supra* note 14, at 213 (first citing Treaty Section of the Office of Legal Affairs, *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*, ¶¶ 102–03, U.N. Doc. ST/LEG/7/Rev.1 (1994); and then citing *Succession of States in Relation to General Multilateral Treaties of Which the Secretary-General is Depositary*, [1962] Y.B. Int'l L. Comm'n 115, 123, U.N. Doc. A/CN.4/SER.A/1962/Add.1).

21. *Id.*

22. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

to all land, appurtenant territorial waters, and air space that constitute the territory of the state, following the caveats mentioned beforehand.[23]

2. Treaties Containing Express Provisions on Territorial Application

As States' consent is the initial guiding criterion to determine the territorial application of treaties, ensuring that these written obligations only apply to the territories specifically agreed upon by the parties involved, legal provisions on the matter are of utmost relevance.[24] A significant number of treaties include stipulations governing their territorial application, and illustrations where the boundaries of legal obligations are clearly defined can be found, among many others, in international trade agreements,[25] investment agreements,[26] regional human rights treaties,[27] and international criminal law instruments.[28]

A vast number of these instruments, in consistency with the rule embodied in Article 29 of the Vienna Convention, contain precise exclusions for the application of the treaty to specific territories.[29] An example of this

23. *See Report of the International Law Commission on the Work of its 18th Session*, [1966] Y.B. Int'l Comm'n 213, U.N. Doc. A/CN.4/SER.A/1966/Add.1; *see generally* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

24. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 338 (discussing consent to be bound by the treaty).

25. *See, e.g.,* Agreement Between the United States of America, the United Mexican States, and Canada, ch. 1, sec. C, July 1, 2020, Off. of the U.S. Trade Rep., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Nov. 29, 2024) (containing specific provisions for each state party as to the meaning of "territory" to be assigned to them by the treaty); Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Serbia, China-Serb., art. 2, Oct. 18, 2023, MINISTRY OF COM. OF CHINA, http://fta.mofcom.gov.cn/serbia/xieyi/sewy_xdzw_en.pdf (establishing the territorial application of the agreement for both parties to the treaty); Ind-Aus ECTA, *supra* note 4, ch. 1, art. 1.3(s), Dec. 29, 2022 (establishing the territorial application of the agreement for both parties to the treaty with special limitations on the application to Australia "excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory").

26. *See, e.g.,* Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, Mex.-Spain, ch. 1, art. 1(6), Oct. 10, 2006, 2553 U.N.T.S. 295.

27. *See, e.g.,* European Convention on Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter European Convention on Human Rights].

28. *See, e.g.,* Rome Statute of the International Criminal Court, art. 4(2), July 1, 2002, 2187 U.N.T.S. 92 (stating that "[t]he Court may exercise its powers, in this Statute on the territory of any State party and by special agreement, on the territory of any other State" without further specification) [hereinafter Rome Statute].

29. *See, e.g.,* Ind-Aus ECTA, *supra* note 4, ch.1, art. 1.3(s).

can be seen in the Australia-India Economic Cooperation and Trade Agreement:—under Article 1.3(s) of this agreement, Australia expressly limits the application of the treaty by "excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory" reflecting the unambiguous intent of the State to omit the application of the treaty to the carved-out territories.[30]

Considering multilateral human rights treaties, territorial application rules can determine that States may extend the obligations derived from the application of these instruments to territories for which they are responsible, notifying it either at the time of ratification or at any later time.[31] This is the case for the European Convention on Human Rights in its Article 56, which suggests that "[a]ny State may at the time of its ratification or at any time thereafter declare by […] that the present Convention shall […] extend to all or any of the territories for whose international relations it is responsible" essentially outlining that the territorial boundaries identified at the time of the notification are the ones where the treaty's obligations will extend to.[32]

Interestingly, some treaties that regulate their territorial application contain provisions which may expressly mirror the default rule in Article 29 of the Vienna Convention on the Law of Treaties. An example of this can also be found in the previously examined Australia-India Economic Cooperation and Trade Agreement: while Australia expressly provided some territorial exclusions, India defined its territory as to include "its land territory, its territorial waters, and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, and/or exclusive jurisdiction" in accordance with its laws and regulations in force, and international law.[33]

These types of provisions confirm the existence of the default rule embodied in Article 29 of the Vienna Convention, rather than cast doubt over it. The Permanent Court of International Justice has ruled in a comparable way regarding the temporal application of treaties in the *Mavrommatis*

30. *See id.*

31. *See* European Convention on Human Rights, *supra* note 27, at 250.

32. *Id.*

33. *See, e.g.,* Ind-Aus ECTA, *supra* note 4, art. 1.3(s)(ii).

Palestine Concessions Judgment.[34] In this case, the Permanent Court of International Justice ruled that when in doubt, jurisdiction based on an international agreement is considered to embrace all disputes referred to it after its establishment.[35] Noting that several jurisdictional agreements, especially regarding arbitration, explicitly excluded jurisdiction for pre-existing disputes, the ruling majority determined that such a reservation seemed to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule.[36] This conclusion, transposed to territorial application matters, means that clauses that are consistent with Article 29 of the Vienna Convention prove the validity of the rule.

Naturally, explicit provisions governing the territorial application of a treaty will be enforced as the intention of the parties. For instance, in the case of *Naftogaz and others v. Russia*, the claimants argued that their investment—made in Crimea before the events in 2014—constituted a foreign investment in Russia in the terms of the Encouragement and Mutual Protection of Investments Agreement (Russia/Ukraine BIT)—between the Russian government and the Cabinet of Ministers of Ukraine.[37] The claimants needed to prove their status as foreign investors in the Russian territory to be able to access the benefits of the treaty in question, and the term "territory" was defined in the Russia/Ukraine BIT in broad terms as: "the territory of the Russian Federation or the territory of Ukraine and also their respective exclusive economic zone and the continental shelf" all these as defined in conformity with international law.[38]

The majority of the tribunal, first took explicit note of Article 29 of the Vienna Convention.[39] Then, an interpretation was performed based on the ordinary meaning to be given to the terms, and it was concluded that it should not cut down or dilute the agreed-upon definition of "territory" by importing other terms or definitions of the treaty.[40] The ruling majority, thus, decided that where the parties had chosen to resort to the word "territory" without any

34. *See* Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.I.C.J. (ser. A) No. 2 (Aug. 30).

35. *Id.* at 35.

36. *Id.*

37. *See* Notice of Arbitration ¶¶ 2–5, NJSC Naftogaz of Ukraine v. The Russian Federation, Case No. 2017-16, (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/151/.

38. Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on Encouragement and Mutual Protection of Investments, Russia-Ukr., art. 1(4), Nov. 27, 1998, UN TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2233/download.

39. *See* NJSC Naftogaz of Ukraine v. The Russian Federation, Judgment of the Hague Court of Appeal, *supra* note 37, para. 5.4.1 (Perm. Ct. Arb. 2019).

40. *See id.*

such limitation, such choice should be respected.[41] On this basis, it was concluded that the investors were entitled to invoke the protections of the Russia/Ukraine BIT as their investment granted them a foreign character.[42] Cases such as *Naftogaz and others v. Russia* provide a compelling testimony of the relevance of party autonomy as the governing principle in territorial application; where the parties have agreed on the territorial application of the treaty under certain terms, that choice is to be respected. Undoubtedly, the burden of proof regarding both the existence as well as the precise content of such a particular intention will rest, in case of a dispute, on the state invoking it, as this claim would seek to deviate from the established general rule.[43]

In any event, the default rule in Article 29 of the Vienna Convention plays a crucial role in addressing cases where no voluntary choice has been made in explicit or implicit terms, acting as a safeguard to guarantee that treaties that lack territorial provisions are not left in a legal vacuum.

3. Treaties that Remain Silent on their Territorial Application

While some treaties contain express provisions which either reflect the default rule of Article 29 of the Vienna Convention on the Law of Treaties or provide exclusions consistent with such rule, other treaties do not expressly convey their territorial application under any particular provision. Examples of treaties which are silent on this matter and require a comprehensive review of other articles that may be indicative of the intention of the parties can also be found across different branches of international law.[44]

For instance, the American Convention on Human Rights stresses in its Article 75, that it "shall be subject to reservations only in conformity with the provisions of the Vienna Convention" while remaining silent on nuclear issues of territorial application.[45]

This omission implies that the default rules set forth by the Vienna Convention govern the territorial scope of the American Convention on Human Rights, suggesting that, unless explicitly stated otherwise, the treaty's

41. *See id.*

42. *See id.* para. 5.9.3.

43. DISTEFANO, *supra* note 11, at 450.

44. *See, e.g.,* Agreement concerning the Encouragement and Reciprocal Protection of Investments, China-Laos, Jan. 31, 1993, 1849 U.N.T.S. 109; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Dec. 8, 1949, 75 U.N.T.S. 31; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

45. American Convention on Human Rights, *supra* note 44, at 161.

obligations are understood to apply uniformly across all territories of the pertaining States.[46] Nevertheless, the territorial application of treaties, particularly those concerning human rights obligations, is often inferred from provisions related to jurisdictional matters, as illustrated by Article 1(1) of the American Convention on Human Rights, which will be further explored in Section III of this article.[47]

In turn, international case law regarding the territorial application of treaties confirms that, in scenarios in which treaties are silent, the default rule embodied in Article 29 of the Vienna Convention is applicable. For instance, in the case of *Sanum Investments v. Laos (I)*, an entity incorporated in the Macao Special Administrative Region of the People's Republic of China brought an investment claim against the State of Laos.[48] To qualify as a protected entity in accordance with the treaty, the entity needed to be deemed as a Chinese investor.[49] In this regard, the entity argued that it met the criteria to be considered as a Chinese investor under the Encouragement and Reciprocal Protection of Investments Agreement (the PRC/Laos BIT) between the governments of the People's Republic of China, and of the Lao People's Democratic Republic.[50] In order to meet the requirements as an investor, the claimant had to prove that the treaty, which was silent regarding its territorial application, applied to the Macao Special Administrative Region.[51]

The tribunal in *Sanum Investments v. Laos (I)* noted that "the PRC/Laos BIT does not contain an express provision stating that it applies to the Macao Special Administrative Region" but that the existence of this clause was not necessary as the principle of territorial extension of the state's legal order embodied in Article 29 of the Vienna Convention applied unless otherwise indicated.[52] The tribunal further noted that the treaty did not contain any express exclusion of the Macao Special Administrative Region, unlike other agreements that were presented as evidence.[53] Eventually, the tribunal

46. *See id.*

47. *See id.* at 145.

48. Sanum Invs. Ltd. v. Laos (China v. Laos), Case No. 2013-13, Award on Jurisdiction, (Perm. Ct. Arb. Dec. 13, 2013), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/489/sanum-investments-v-laos-i-.

49. *See id.* ¶ 43 (stating that the Preamble to the Treaty aims to "protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State").

50. *See id.* ¶ 218.

51. *See id.* ¶ 205.

52. *Id.* ¶ 270.

53. *See id.* ¶ 271 (citing Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of

concluded that the PRC/Laos BIT did apply to the Macao Special Administrative Region, thereby enforcing the default rule embodied in Article 29 of the Vienna Convention.[54] The case of *Sanum Investments v. Laos (I)* indicates the relevance of Article 29 of the Vienna Convention's default rule. Certainly, in the case where the treaty is silent regarding its territorial application, the States should expect that the default rule will make the agreement applicable to the entire territory of the state.[55]

B. The Exception to Territorial Application of Treaties

Having explored the application of treaties within the territories of States and their exceptions, this section evaluates the extraterritorial effects of treaties. Initially, the drafting history of the Vienna Convention is examined to note the lack of treaty provisions regarding the extraterritorial application of these sources (Section 1) to then review the extraterritorial application of treaties in practice (Section 2).

1. The Lack of Treaty Provisions on the Extraterritorial Application of Treaties

As has been established, the premise articulated in Article 29 of the Vienna Convention provides that treaties are, as a rule, applicable to the entire territory of the state involved.[56] At first glance, this might imply that treaties are restricted to their territorial boundaries, suggesting that the legal effects do not extend beyond the geographical limits of the state: if a treaty applies to the entire territory of a state, then, *a contrario sensu*, it is not applicable outside of the territory of said entity. In other words, if treaties are inherently tied to the territory of a state, they are therefore inapplicable outside those boundaries. This interpretation, however, could be subject to scrutiny, particularly in light of the commentaries on Article 25 of the Draft Articles, which seem to challenge this interpretation.[57]

Investments, Nov. 9, 2006, https://investmentpolicy.unctad.org/international-investment agreements/treaty-files/774/download).

54. *See id.* ¶ 300.

55. *See* Draft Articles, *supra* note 14, at 213 ("The Commission considered that the territorial scope of a treaty depends on the intention of the parties and that it is only necessary in the present article to formulate the general rule which should apply in the absence of any specific provision or indication in the treaty as to its territorial application.").

56. *See* Vienna Convention on the Law of Treaties, *supra* note 6 ("[T]reaty is binding upon each party in respect of its entire territory.").

57. *See* Draft Articles, *supra* note 14, at 213.

During the formulation of Article 25 of the Draft Articles, several States expressed in their observations that this clause was defective, as the provision's wording could be misinterpreted to mean that the application of a treaty was necessarily or exclusively confined to the territory of the parties.[58] These States feared that such narrow interpretation would ignore the complexities of international relations, where treaties often have implications that extend beyond national borders.[59]

As a result, proposals were made to address the issue of extraterritorial application within the text of Article 25 of the Draft Articles.[60] However, these proposals were not considered satisfactory and were eventually set aside.[61] The ILC then expressed the view that attempting to deal with all the delicate problems of extraterritorial competence within the framework of Article 25 of the Draft Articles would be inappropriate and inadvisable.[62] This is why, from a drafting history perspective, the previously mentioned wording and, consequently, Article 29 of the Vienna Convention, do not regulate the extraterritorial effects of treaties.[63] As it has been unveiled, this omission was not an oversight, but a deliberate decision rooted in the understanding that the scope of extraterritorial application could vary significantly depending both on the nature of the treaty and the intentions of the parties.[64]

By not explicitly addressing extraterritorial application, the Vienna Convention leaves room for interpretation and flexibility. This, in turn, allows States to negotiate the extent of a treaty's reach on a case-by-case basis, without being bound by an overarching rule.

2. The Extraterritorial Application of Treaties in Practice

By not governing the extraterritorial application of treaties, the Vienna Convention essentially left the matter to evolve under rules of customary international law. The lack of consensus around Article 25 of the Draft Articles reflected the fact that at least a subset of States recognized that treaties could have extraterritorial effects to some extent, albeit disagreements on how to regulate them.[65]

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58. *Id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 214.
63. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339; *see id.* at 213-14.
64. *See* Draft Articles, *supra* note 14, at 213–14.
65. *See id.*

In this line, the International Court of Justice (ICJ) has noted that state jurisdiction is primarily exercised in its own territory. However, the ICJ has also recognized that state jurisdiction may be exercised outside of the state's boundaries and that, at least in some of such cases, it would seem natural that state parties to specific treaties should be bound to comply with their provisions.[66] This observation will later come into play as an exceptionally pertinent criterion when analyzing the territorial and extraterritorial application of human rights treaties in Section III of this article.

International case law is, naturally, of significant guidance in determining the evolution of customary law and, specifically, in identifying the conditions under which treaties may be applicable outside the territory of a state. For instance, in the case of *Military and Paramilitary Activities in and against Nicaragua*, the ICJ was presented with the allegation that the United States had committed acts considered to be contrary to human rights and humanitarian law in Nicaraguan territory.[67]

The ICJ ruled in this regard that, for the United States conduct to give rise to legal responsibility, it would have to be proved that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[68]

Thus, the ruling majority conceded that human rights and humanitarian law obligations could be enforced against conduct taking place outside of the territory of the state, so long as the breaching state had effective control of such conduct.[69] In doing so, the ICJ developed the notion that some *de facto* control could trigger state responsibility in respect of treaty obligations which were traditionally reserved to the boundaries of the state.

This conclusion is consistent with the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the ICJ considered that obligations emerging from the International Covenant on Civil and Political Rights were applicable to cases where a state exercised its jurisdiction on foreign territory.[70] This lead to the belief that, in the presence of effective control over actions taking place outside of the territory of a state, a window for the extraterritorial application of treaty obligations can be opened.

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66. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 109 (July 9).

67. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 15 (June 27).

68. *Id.* ¶ 115.

69. *See id.* ¶ 116.

70. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *supra* note 66, ¶ 108–109.

C. Territorial and Extraterritorial Application of Human Rights Treaties

Based on the above general rules of territorial and extraterritorial application of treaties, this section explores the specific circumstances of human rights treaties. Initially, the territorial application of human rights treaties is addressed (Section 1), and then the extraterritorial application of human rights treaties is examined in light of relevant international case laws (Section 2).

1. Territorial Application of Human Rights Treaties

Typically, human rights treaties contain stipulations regarding the territorial application of the obligations contained therein.[71] As it has been mentioned, the European Convention on Human Rights contains an explicit provision determining that States may extend the obligations derived from the treaty to territories for which they are responsible,[72] to which it adds that States shall secure to everyone within their jurisdiction the rights and freedoms defined in said instrument.[73] Similarly, while the American Convention on Human Rights does not include a clause on territorial application comparable to Article 59 of the European Convention on Human Rights, it does underline that States ought to ensure that all persons subject to their jurisdiction have free and full exercise of rights and freedoms without discrimination for any reason.[74] Notably, the African Charter on Human and Peoples' Rights does not contain any clause governing its territorial application.[75]

Human Rights treaties' territorial application provisions, like those presented above, are drafted in broad terms and contain no explicit limitations. In the absence of a specific provision, as it has been hereby argued, the rule in Article 29 of the Vienna Convention would make human rights treaties applicable to the entire territory of State parties, excepting an agreement on the contrary, which is why human rights obligations are

71. *See* EDWARD ELGAR PUBLISHING, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS, *in* ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS 180, para. 7 (Christina Binder et al. eds., 2022).

72. *See* European Convention on Human Rights, *supra* note 27, at 250 ("Any State may at the time of its ratification or at any time thereafter declare by notification . . . that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.").

73. *Id.* at 224 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

74. American Convention on Human Rights, *supra* note 44, at 145.

75. *See generally* African Charter on Human and Peoples' Rights, *supra* note 44.

typically enforceable in the territory in which the contracting States hold jurisdictional power.

2. Extraterritorial Application of Human Rights Treaties

Most international human rights disputes concern alleged violations that took place within the territory of a state. However, several cases have dealt with state acts that had allegedly occurred outside the territorial boundaries of the entity in question.[76] For instance, in the case of *Al-Skeini and others v. United Kingdom*, the European Court of Human Rights (ECtHR) was presented with alleged violations of the European Convention on Human Rights by the United Kingdom which had taken place in Iraq.[77] The ECtHR began recalling that a state's jurisdictional competence under Article 1 of the European Convention on Human Rights is primarily territorial.[78] However, the ruling majority also recognized that, in exceptional cases, state acts performed or producing effects outside of their territory may fall within the jurisdiction of such treaty.[79] The ECtHR then developed on the exceptional circumstances that would cause the obligations under the European Convention on Human Rights to have effect beyond the territory of the state party.[80]

First, the ECtHR referred to the case of state agents, their authority, and control.[81] Under this category, obligations arising from the European Convention on Human Rights were deemed applicable to acts of diplomatic and consular agents who are present in a foreign country;[82] acts of state agents that would amount to public powers of another state, which are exercised through the consent, invitation, or acquiescence of the state of that territory;[83] and the use of force by a state's agents operating outside its

76. *See, e.g.,* Al-Skeini v. United Kingdom, App. No. 55721/07, ¶ 79 (July 7, 2021), https://hudoc.echr.coe.int/fre?i=001-105606.

77. *See id.* ¶ 10.

78. *Id.* ¶ 109.

79. *Id.* ¶ 131 (citing Bankovic v. Belgium, App. No. 52207/99 (Dec. 12, 2001), https://hudoc.echr.coe.int/?i=001-22099).

80. *Id.* ¶ 133 (collecting cases).

81. *See id.* ¶ 137 ("It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.'").

82. *See id.* ¶ 134 ("[I]t is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others." (collecting cases)).

83. *See id.* ¶ 135 (collecting cases).

territory.[84] The ruling majority concluded, under this category, that whenever a state exercises control and authority through its agents, it is the state's duty to secure the rights and freedoms derived from the European Convention on Human Rights.[85]

Secondly, the ECtHR found an exception to the principle of territoriality where a state exercised effective control of an area outside that national territory because of lawful or unlawful military action.[86] The obligation to secure, in such context—the rights and freedoms set out in the European Convention on Human Rights—derives from said control, whether exercised directly, through the contracting state's armed forces, or through a subordinate local administration.[87] In this case, the ECtHR concluded that, because the United Kingdom had assumed authority and responsibility for the maintenance of security in south-east Iraq during the time in which the events in question took place, the obligations of the European Convention of Human Rights were applicable to the United Kingdom.[88]

Following this line of thought, the ECtHR consistently underscored that the European Convention on Human Rights is a dynamic instrument which requires readings that reflect modern-day realities.[89] This interpretative approach extends not only to the substantive rights safeguarded by the treaty but also to the provisions that dictate the functioning of the treaty's enforcement mechanisms.[90] Accordingly, this tribunal has underscored that the responsibility of a state may thus arise when it exercises effective control or "effective overall control" of an area outside its national territory, regardless of the lawfulness of such control, whether conducted by the state's agents or by the acts of a subordinate local administration.[91]

In sum, it appears evident that human rights obligations may apply outside of the territory of a state party when that state is in effective control of another territory or to the extent that the state has control over a person or situation, even if it does not have control over the territory where the conduct

84. *Id.* ¶ 136.

85. *Id.* ¶ 137 ("It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention . . . .").

86. *See id.* ¶ 138.

87. Loizidou v. Turkey, App. No. 15318/89, ¶ 52 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007.

88. *See* Al-Skeini, App. No. 55721/07, ¶ 149.

89. *See id.* ¶ 128 (quoting Bankovic, App. No. 52207/99).

90. *See* Loizidou, App. No. 15318/89, ¶ 43.

91. Cyprus v. Turkey, App. No. 25781/94, ¶ 77 (May 10, 2001), https://hudoc.echr.coe.int/eng?i=001-59454.

takes place.[92] Nevertheless, it should still be taken into consideration that the ECtHR has stated that the recognition of the exercise of extraterritorial jurisdiction by a state is exceptional and that the European Convention on Human Rights's notion of jurisdiction is—as previously elaborated—essentially territorial.[93]

D. Human Rights Obligations in Disputed Territories

In principle, territorial sovereignty belongs always to one or, in exceptional circumstances, to several States and to the exclusion of all others.[94] However, in some circumstances, disputes may emerge as to which state can exercise sovereignty over a certain territory. This section will aspire to apply the rules developed above to two different situations regarding disputed territories: the application of human rights obligations regarding a purely *de jure* dispute over a territory (Section 1), and the application of human rights obligations regarding a *de facto* dispute over a territory (Section 2).

1. Application of Human Rights Obligations in *de Jure* Disputed Territories

Several territories in international law's history have been disputed by one state in a purely *de jure* manner while another state was effectively occupying the territory in question.[95] This has been the case, for instance, in the region of Crimea and eastern Ukraine after the 2014 incidents: Ukraine claimed sovereignty over the territory (*de jure*), but the region was effectively occupied by the Russian Federation.[96]

In such situations, the state effectively occupying the territory is inherently bound by its human rights obligations in the occupied territory. In this line, the ECtHR has ruled that, when the territory of one state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the European Convention on Human Rights for breaches of human rights within the occupied territory because, to hold otherwise, would be to deprive the population of that territory of the rights

92. *See* Hathaway et al., *supra* note 5, at 417 (quoting Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251 (2010)).

93. *See* Bankovic, App. No. 52207/99, 2001, ¶ 61 (citing COUNCIL OF EUROPE, *Extraterritorial Criminal Jurisdiction,* 3 CRIM. L. F. 441 (1992)).

94. Island of Palmas (Neth. V. U.S.), 1928 R.I.A.A. 829, 838 (Apr. 4, 1928).

95. *See, e.g., id.* at 846.

96. *See* U.S. DEPT. OF STATE, UKRAINE: CRIMEA REPORT (last visited Nov. 30, 2024), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ukraine/crimea/.

and freedoms enjoyed and would result in a vacuum of protection.[97] According to the ECtHR, the obligation to secure—in the effectively controlled area—the rights and freedoms set out in the human rights treaty under question, openly derives from the fact of such control—whether it be exercised directly, through its armed forces, or through a subordinate local administration.[98]

The case of *Ukraine v. Russia (Re Crimea)* is an example of a pure *de jure* dispute. Ukraine presented the ECtHR with several claims from events that took place from February 2014 onwards.[99] The ruling majority considered that, starting from February 27, 2014, the Russian Federation had exercised extraterritorial jurisdiction over Crimea in the form of effective control over an area.[100] Under this understanding, the ECtHR rejected the jurisdictional objection raised by the Russian Federation on grounds of extraterritoriality and proceeded to assess the facts under dispute.[101]

In addition to the Crimea region, the ECtHR also considered that the Russian Federation exercised effective control over some areas of eastern Ukraine: "[…] Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities"— in effect implying that those areas had been, since May 11, 2014, and subsequently, under the effective control of the Russian Federation.[102] Following this premise, the ECtHR also rejected jurisdictional objections over facts occurring in eastern Ukraine in the relevant period, thus maintaining that the Russian Federation was bound by its human rights obligations also in areas of eastern Ukraine.[103] This dispute arises as a clear example of the interplay that can exist between human rights obligations and *de jure* disputed territories: while Ukraine claimed that the Crimea and eastern Ukraine regions were *de jure* Ukrainian, the Russian

97. Al-Skeini, App. No. 55721/07, ¶ 142 (first citing Cyprus, App. No. 25781/94, ¶ 23; and then citing Bankovic, App. No. 52207/99, ¶ 61).

98. *See* Loizidou v. Turkey, App. No. 15318/89, ¶ 52 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007 ("The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.") (quoting Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, ¶ 62 (Mar. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57920)).

99. *See* Ukraine v. Russia (Re Crimea), App. Nos. 20958/14, 38334/18, ¶¶ 5, 34, (June 25, 2024), https://hudoc.echr.coe.int/eng?i=002-14347.

100. *See id.* ¶ 869, 1267.

101. *See id.* ¶ 873.

102. *See id.* ¶ 875.

103. *See id.*

Federation became bound to respect its own human rights obligations from the time in which it exercised effective control.[104] At the time of the facts examined, there was no big-scale armed conflict in the region.

2. Application of Human Rights Obligations in *de Facto* Disputed Territories

In other scenarios, however, territorial disputes are not simply *de jure*, but also *de facto*. This is particularly evident in ongoing armed conflicts, in which forces of two or more States are actively disputing a territory. While this is an extremely factually dependent scenario, it should not come as a surprise that the notion of effective control might fall short of usefulness in conflicts in which, for certain intervals or cycles, a "controlling state" cannot be easily identified, as no party may successfully or altogether maintain continuous or at least stable control over the disputed area.

In these cases, first and foremost, the rules of extraterritorial application regarding state agents remain applicable. The ECtHR's rule regarding the notion that the responsibility of a state can be triggered by acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their territory, becomes pivotal.[105]

For instance, in the case of *Ukraine v. Russia (Re Crimea)*, the ECtHR was presented with a count of an individual of Ukrainian nationality who was allegedly detained by Russian agents in Gomel, Belarus, and later transferred to the Russian Federation.[106] The ECtHR noted in this regard that a state may be held accountable for violations of the European Convention of Human Rights' rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating, whether lawfully or unlawfully, in the latter state.[107] Undoubtedly, this dispute stands out as a critical example of how the ECtHR applies the concept of effective control in assessing jurisdiction, reinforcing the idea that States cannot evade their human rights obligations by operating outside their borders.

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104. *See id.* ¶ 869.

105. Drozd v. France, App. 12747/87, ¶ 91 (June 26, 1992), https://hudoc.echr.coe.int/eng?i=001-57774 (first citing X v. Fed. Republic of Germany, App. No. 1611/62, (Sept. 25, 1965), https://hudoc.echr.coe.int/?i=001-82912; then citing Hess v. United Kingdom, App. No. 6231/73, (May 28, 1975), https://hudoc.echr.coe.int/?i=001-73854; then citing Cyprus v. Turkey, App. Nos. 6780/74, 6950/75 (May 26, 1975), https://hudoc.echr.coe.int/?i=001-74811; X v. Switzerland, App. No. 7289/75, 7349/76 (July 14, 1977), https://hudoc.echr.coe.int/?i=001-74512; and then citing W v. United Kingdom, App. No. 9348/81 (Feb. 28, 1983), https://hudoc.echr.coe.int/?i=001-74066).

106. *See* Ukraine, App. Nos. 20958/14, 38334/18, ¶ 880.

107. *See id.* ¶ 883.

Thus, cases of *de facto* disputes, particularly in the context of ongoing armed conflicts, present complex challenges for the application of human rights obligations. In such scenarios, the traditional notion of "effective control" by a state over a territory or population may become blurred or even entirely absent, making it difficult to ascertain which state, if any, holds jurisdiction and responsibility. However, both international law as well as the evolution of case law on the matter suggest that States are still bound by their human rights obligations, even in these contested spaces, based on the actions of their agents.

III. CONCLUSION

Human rights obligations, following one of the core elements of general treaty obligations under international law, are primarily understood to be territorial in nature.[108] This means that the commitments made by States under human rights treaties are generally expected to apply within their own sovereign borders. Typically, human rights treaties define the territorial scope of these obligations, establishing boundaries for where the treaties' provisions should be implemented. These treaties do not often include carve-outs, reinforcing the idea that a state's responsibility to uphold human rights is geographically confined to its boundaries.

However, this territorial principle is not absolute. Particularly, acts of state agents in other territories and situations in which a state is in effective control of another territory, can trigger human rights obligations and make them applicable to those situations and territories.[109] Still, some degree of control needs to be proven.

These notions guide the application of human rights treaties to disputed territories. In cases in which a territorial dispute is purely *de jure*, the state which is effectively controlling the territory might remain bound to respect its human rights obligations in such area. The case of *de facto* disputes, especially in the context of armed conflicts, is even more challenging. While factually dependent, if a situation of effective control cannot be proven, States remain bound to respect their human rights obligations in *de facto* disputed territories by the acts of their agents.[110] The control that a state has over its agents can trigger human rights liability regardless of where the facts took place and where the effects were caused.[111]

108. *See, e.g., id.* ¶ 866.
109. *See, e.g., id.* ¶ 883.
110. *See, e.g., id.*
111. *See id.*

All these situations, despite their variations, are unified by a common guiding principle: it is crucial to uphold obligations that protect the potentially affected population whenever possible, ensuring that civilians do not become collateral victims of inter-state disputes. The focus must be, thus, on maintaining the dignity and safety of individuals, even in the most strenuous circumstances. While there are still significant factual and legal hurdles to navigate, the field of human rights law as well as the understandings of international human rights tribunals continue to evolve, striving to extend the greatest possible protection to those who bear the least responsibility for the conflicts and disputes that endanger them. There needs to be a continuous development that reflects the global commitment to prioritizing human rights and humanitarian principles, even in complex international disputes. This effort should involve not just state actions but also contributions from international organizations, non-governmental organizations, civil society groups, and the private sector. Academia and think tanks are also essential to research and advocate for human rights, while social media plays a prominent role in raising awareness. Ultimately, the aim must be to safeguard vulnerable populations during conflicts, prioritizing their rights and ensuring their safety.

NATIONAL JURISDICTIONS' MECHANISMS FOR ENFORCING FUNDAMENTAL RIGHTS

Irene Victoria Massimino* and Karnig Kerkonian**

Abstract

As a consequence of the two World Wars and the Holocaust, the international community established a new international legal order to prevent the atrocities and crimes that occurred during these events. This new international legal order was not only made up of norms, but also of common values aimed at protecting human dignity through the recognition of fundamental human rights. In this context, and under this regime, States are obliged to protect, guarantee and promote human rights within their territories and, under certain circumstances, also extraterritorially.

However, the international legal system suffers a crucial gap when it comes to the protection and guarantee of the rights of those people who, for different reasons and under different foundations, fight for their self-determination and recognition of their statehood. That is to say, the moment in which such people exercise the right to self-determination, yet without the express or tacit recognition of their state subjectivity, their subject rights are not afforded clear protection under international regulations. Those who fight for their autonomy and their organization as a State

* Irene Victoria Massimino is a lawyer specializing in international criminal law and human rights law. Ms. Massimino is a graduate of the Faculty of Legal and Social Sciences of the National University of La Plata, in Argentina; has a Master of Laws from Robert H. McKinney School of Law at Indiana University, in the United States, where she is currently pursuing an SJD, and teaching international law, comparative law and genocide and the law as an Adjunct Professor. She also holds a Master of Arts and Humanities in Human Rights from the School of Advanced Studies of the University of London, in the United Kingdom.

** Karnig Kerkonian is a lawyer specializing in public and private international law. Mr. Kerkonian holds an A.B. magna cum laude in government and international legal theory from Harvard University, two law degrees—a J.D. from the University of Chicago, where he served on the Law Review, and a post-graduate Diploma in International Law from Cambridge University, England, where he studied under James R. Crawford, former Judge of the International Court of Justice. He also holds an Honorary Doctorate from Artsakh State University where he has served as an Adjunct Professor of International Law.

independent of the one in which they arguably find themselves, do not, in general terms, have protection of their rights.

While one could posit that the State in which such people are presumably located is the one that is obliged to comply with international obligations, this is not the case in actual practice. The case of the Armenians of Artsakh (also known as Nagorno-Karabakh) is a glaring case in point, as they were recently expelled from their indigenous territory after decades of targeting and persecution by Azerbaijan, which only deepened and turned abjectly violent in the last few years.

Nevertheless, there are tools within domestic jurisdictions that would allow the protection of certain rights or, at least, sanction their violation. Among these possibilities are the exercise of Universal Criminal Jurisdiction (UCJ) for international crimes and, in the civil context, national legislation such as the U.S. Torture Victims Protection Act, providing compensation to victims. This work aims to analyze these possibilities and their applicability to all such situations in which groups demanding statehood recognition and autonomy see their rights violated by the State in whose jurisdiction they are arguably located. The objective will also be to delve on the use of these tools and their effectiveness in practice.

I. INTRODUCTION

The search for justice for international crimes in the contemporary international legal system continues to be a constant struggle. But it is a struggle which the international community has continued to pursue. From the Constantinople trials for the crimes that occurred under the Ottoman Empire, through the notorious Nuremberg trials, to the signing of the Rome Statute for the International Criminal Court (ICC), the international

community has demonstrated its concern for the investigation of international crimes and for the identification and punishment of perpetrators.[1]

States, independently or as members of the international community, have sought to elaborate on the criminal and civil responsibility of individuals involved in the most atrocious crimes. Consequently, domestic and international legal systems have developed temporary or permanent tools to respond to what are commonly known as international crimes. However, despite those efforts, enhanced during the twenty-first century with the ratification of the Rome Statute, not all international crimes are investigated and not are all perpetrators identified, prosecuted and punished.[2] On the contrary, most international crimes remain uninvestigated and unpunished.[3]

Impunity is due to many reasons. By default, the investigation and punishment of crimes must be carried out in the domestic jurisdiction in which the crimes have occurred.[4] The State in whose territory violations of human rights or international crimes have taken place, has the duty to investigate, punish the responsible individuals, and provide reparations and redress to victims.[5] However, many domestic jurisdictions are unable to fulfill such obligations *inter alia* due to lack of capacity, disintegration of primary institutions, lack of financial and human resources, and internal political, social and economic instability.[6] In other cases, domestic jurisdictions are simply unwilling to pursue any efforts to investigate and hold perpetrators accountable.[7]

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1. INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, at 9 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

2. *See* Irene Victoria Massimino, *The ICC and in-absentia Proceedings – Finding a Response to the Difficulties of Executing Arrest Warrants*, 13 ESIL REFLECTIONS, at 4, (May 21, 2024), https://esil-sedi.eu/esil-reflection-the-icc-and-in-absentia-proceedings-finding-a-response-to-the-difficulties-of-executing-arrest-warrants/.

3. *See id.* at 4.

4. *See generally* Rome Statute of the International Criminal Court Treaty, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] ("An International Criminal Court . . . .shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.").

5. *See id.* at 91.

6. Examples of such impossibilities are Rwanda and Cambodia, where the level of destruction of society and institutions limited—if not impeded—the possibility of a justice process. See generally, e.g., S.C. Res. 955 (Nov. 8, 1994) (providing information on the foundational reason to establish International Criminal Tribunal for Rwanda).

7. Cleo Meinicke, *Domestic Prosecution of International Crimes-Introduction*, PUBLIC INTERNATIONAL LAW AND POLICY GROUP (Mar. 7, 2019), https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2019/3/7/domestic-prosecution-of-international-crimes-introduction-of-series.

The latter scenario is the focus of this work: where States discriminate and persecute a group and, consequently, do not provide sufficient redress or any redress at all to victims.

Faced with this impossibility or unwillingness of a State to investigate and prosecute suspects within its jurisdiction, the international community has created special ad-hoc international or hybrid courts on several occasions, finally agreeing to the establishment of a permanent international criminal court.[8] The sanctioning of the Rome Statute attempted to obviate the need to create special courts, precisely to avoid the complexities and criticisms that often arose in when establishing special courts.[9]

Notably, the efforts of the ICC have also proven insufficient in many regards, and, in the face of current conflicts, the Court has been unable to respond to victims' demands for justice, for truth and, importantly, for reparation.[10] The investigation and prosecution of international crimes continues to face monumental challenges, one of the most poignant being the voluntary nature of international law and the resulting lack of acceptance of the Court's jurisdiction and orders.[11]

Therefore, an exploration into the alternative furnished in different international jurisdictions for criminal and civil redress for victims, and this requires delving into certain tangible options that exist within domestic legal systems. For this reason, this work focuses on the possibility of using universal jurisdiction (UJ) mechanisms that are currently accepted in a few countries.[12] On the one hand, the first part of the paper will focus on the use of UCJ in Argentina, while the second part of this work will focus on the analysis of the Torture Victims Protection Act (TPVA), from the United States. We will examine how these tools have become alternatives to justice in the face of, and to combat, the futility and impracticality in triggering international mechanisms of accountability.

These justice options at the domestic level are relevant in circumstances in which the use of international jurisdictions becomes impossible. They are especially useful in those cases where the victim group is unprotected and discriminated by the State it inhabits,[13] or when the victims' group has an

8. *See* Rome Statute, *supra* note 4, art. I.

9. Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L REV.1 (2014).

10. *See* Massimino, *supra* note 2.

11. *Id.*

12. *Universal Jurisdiction Annual Review 2024*, TRIAL INT'L, https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (last visited Oct. 18, 2024).

13. A most clear example of such scenario is the persecution and genocide against the Rohingya in Myanmar (Burma). *See* U.S. DEP'T OF STATE, DOCUMENTATION OF ATROCITIES IN

autonomous and self-governed territory but is not recognized as a State within the international community, thus preventing the group from exercising its fundamental rights itself.

II. UNIVERSAL JURISDICTION FOR CRIMINAL CASES

A. Concept and Normative Reception

Despite being a principle that has existed for almost a hundred years, no uniform definition for universal criminal jurisdiction is accepted in international regulations.[14] Consequently, many States have chosen to incorporate a definition into their domestic legal systems, either in their constitutions[15] or criminal codes.[16] In general terms, universal criminal jurisdiction is the jurisdiction exercised by a state's domestic courts over criminal acts committed outside its territory, without requiring any nationality connection or other type of link between the perpetrators and victims, and the state whose courts are exercising jurisdiction.[17]

The foundation of universal criminal jurisdiction lies in the nature of the crimes that fall under its jurisdiction.[18] The crimes are by definition contrary to the interests and principles of the international community, to the point of considering their perpetrators as *hostis humani generis*,[19] enemies of humanity. The critical aspect of this jurisdiction lies in the fact that no territorial connection is required either with the facts or with the passive (victim) or active (perpetrator) personalities.[20] Thus, any State can, and must, activate its jurisdiction. Moreover, universal criminal jurisdiction also

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NORTHERN RAKHINE STATE 5 (2018), https://www.state.gov/wp-content/uploads/2019/01/Documentation-of-Atrocities-in-Northern-Rakhine-State.pdf.

14. Xavier Phillipe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?* 88 INT'L REV. OF THE RED CROSS 375 (June 2006).

15. *See* Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

16. Código Orgánico Integral Penal de Ecuador [Comprehensive Organic Criminal Code of Ecuador], art. 401 (Ecuador) (stating using an official translation of Irene Victoria Massimino: "Universal jurisdiction. Crimes against humanity may be investigated and tried in the Republic of Ecuador, provided that they have not been tried in another State or by international criminal courts, in accordance with the provisions of this Code and the international treaties signed and ratified.").

17. Diccionario panhispanico del Español juridico [Pan-Hispanic Dictionary of Legal Spanish], https://dpej.rae.es/lema/jurisdicción-universal (defining "jurisdicción universal").

18. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L. L. 81, 96 (2001).

19. *Id.*

20. *See* Philippe, *supra* note 14.

responds to the obligation *aut dedere aut judicare*, that is to extradite or to prosecute,[21] a duty originating from several multilateral conventions.[22]

The concept of universal jurisdiction may be traced back to the writings of prominent early scholars like Hugo Grotius,[23] as well as to the understanding that certain crimes, such as piracy and slave trafficking,[24] are universally condemned and, therefore, contrary to the *jus gentium*. Nevertheless, *jus in bello* agreements[25] also included specific instructions concerning these concepts which, over time and practice of states, became the foundation of the principle currently employed.

The four Geneva Conventions of 1949, which constitute the contemporary cornerstone of international humanitarian law, include a common provision and are paramount in the explicit incorporation of universal criminal jurisdiction.[26] The text common to the four instruments establishes:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[27]

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21. Principle "to extradite or prosecute," as established by Hugo Grotius "[w]hen appealed to [a State] should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal." *The Obligation to Extradite or Prosecute* (aut dedere aut judicare), [2014] 2 Y.B. Int'l L. Comm'n 91, U.N Doc. A/CN.4/SER.A/2014/Add.1 (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [On the Law of War and Peace Three Books] 527 (Francis W. Kelsey trans., Oxford: Clarendon Press ed., 1925) (second alteration in original)).

22. *Id.*

23. *See* Philippe, *supra* note 14, at 378.

24. *See* Veer Mayank, *Juvenile Pirates at the High Seas: Is Universal Jurisdiction the Answer?* 59 J. INDIAN L. INST. 414 (2017).

25. *The Principle and Practice of Universal Jurisdiction: PCHR's Work in the occupied Palestinian territory*, PALESTINIAN CENTRE FOR HUMAN RIGHTS (Jan. 10, 2010).

26. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 49, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 50, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the protection of civilian persons in time of war art. 146, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287.

27. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, *supra* note 26, 75 U.N.T.S 31, art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *supra* note 26, 75 U.N.T.S 85, art. 50; Geneva Convention Relative to the Treatment

Likewise, the customary international law that prevailed until 1996 established the above-mentioned principle *"aut dedere aut judicare"*[28] and the related principle of universal criminal jurisdiction, which were subsequently reflected in Articles 8[29] and 9[30] of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission of the United Nations General Assembly.

These principles were confirmed shortly thereafter when the Rome Statute for the ICC was adopted.[31] Thus, the principle of universal criminal jurisdiction, understood as a universal duty to fight against impunity in the perpetration of certain crimes, is reflected in paragraph six of its Preamble, which states "[i]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[32]

These principles are enshrined also in the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*[33] which obliges State parties:

> [t]o adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.[34]

Similarly, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—in acknowledging and carving out the *jus cogens* norm—establishes in Article 5, subsection 3 that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."[35]

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of Prisoners of War, *supra* note 26, 75 U.N.T.S 135, art. 129; Geneva Convention Relative to the protection of civilian persons in time of war, *supra* note 26, 75 U.N.T.S 287, art. 146.

28. *See generally The Obligation to Extradite or Prosecute* (aut dedere aut judicare), *supra* note 21.

29. "Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 16, 17, and 18. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court." *See* 1 Y.B. Int'l L. Comm'n 32, Draft Code of Crimes Against the Peace and Security of Mankind, art. 7, U.N. Doc. A/CN.4/L.522 + Corr.1.

30. "The State Party in the territory of which an individual alleged to have committed a crime set out in article 16, 17, or 18 is found shall extradite or prosecute that individual." *See id.* at art. 8.

31. *See* Rome Statute, *supra* note 4 (stating the quoted text in Preamble).

32. *Id.*

33. *See* G.A. Res. 3068 (XXVIII), art. IV(b) (Nov. 30, 1973).

34. *Id.* art. IV(b).

35. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(3), adopted Dec. 9, 1975, 1465 U.N.T.S. 113.

International jurisprudence has also addressed the issue with due consideration. In 1927, the Permanent Court of International Justice, in the *Lotus* Case, established that:

> Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[36]

This seminal *Lotus* decision established the precedent on extraterritorial jurisdiction of criminal law, as a general form of extraterritorial criminal jurisdiction.[37]

In contrast, the contemporary concept of universal criminal jurisdiction is restricted to crimes of an international nature, with its basis and requirements intrinsically linked to violations of international law.[38] This distinction arises from the evolution of the notion of universal criminal jurisdiction in both regulations and jurisprudence, as well as in legal doctrine. For example, in the *Tadić* case the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, ruled that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."[39]

International human rights law and jurisprudence also provide relevant elements in the development of the principle of universal criminal jurisdiction, through its association with the right to access justice, both nationally and internationally.[40] Indeed, the right to access justice is a right recognized in all the main international human rights instruments,[41] and it has contributed to developing the principle of universal jurisdiction.

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36. The Case of the S.S. "Lotus" (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7).

37. *See id.* at 20.

38. *Cf. id.* at 7 ("[A] State is not entitled . . . to extend the criminal jurisdiction of its courts to include a crime or offense committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence.").

39. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

40. *See generally* Inter-Am. Comm'n H.R., The Right to Truth in the Americas, OEA/Ser.L/V/II.152 Doc. 2 (2014).

41. For example, article 14 of the International Covenant on Civil and Political Rights and article 8 of the Universal Declaration of Human Rights. *See* International Covenant on Civil and Political Rights art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing

In fact, the right to access justice has expanded in scope, encompassing not only the obligations of the State and the rights of the accused, but also the rights of crime victims to seek justice.[42] Indeed, in many jurisdictions, crime victims now have the ability to initiate legal actions independently, even without the intervention of the Public Ministry.[43] This is, of course, not the case of the ICC which acknowledges the possibility of victim participation in proceedings, as per article 68(a) of the Rome Statute, but does not include a right for victims themselves to file a criminal complaint.[44]

Likewise, the various decisions and opinions issued by the bodies of the Inter-American Human Rights System (IAHRS), which are mandatory in many domestic legal systems in Latin American countries, have highlighted the importance of the exercise of universal criminal jurisdiction and have recommended that States apply it. For example, Resolution No. 1/03 of the Inter-American Commission on Human Rights (IACHR) urges "states to adopt the legislative and other measures needed to ensure punishment for international crimes such as genocide, crimes against humanity and war crimes," and "to combat impunity in the case of international crimes by invoking and exercising their jurisdiction over such crimes on the basis of the different types of existing jurisdiction."[45]

In the IAHRS, universal jurisdiction is linked to the right to truth and the obligation that countries have assumed to investigate, punish and report human rights violations. The right to truth emerged as a response to the lack of clarification, investigation, prosecution and punishment of cases of serious violations of human rights, and infractions of International Humanitarian

by a competent, independent and impartial tribunal established by law."); G.A. Res., art. 8 (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

42. *See* G.A. Res., 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); *see also* Gerardo Bernales Rojas, *El acceso a la justicia en el sistema interamericano de protección de los derechos humanos* [Access to Justice in the Inter-American System Protection of Human Rights], 25 IUS ET PRAXIS 277, 290 (2019), https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122019000300277.

43. This is the case of Argentina, where the Supreme Court's doctrine established in the case "Santillán" (Gabriel Egisto Santillán v. Argentina, Case 12.159, Inter-Am. Comm'n H.R., Report No. 72/03 (2003), https://www.cidh.org/annualrep/2003eng/Argentina.12159.htm) and "Quiroga" (Edgar Quiroga v. Colombia, Case 319-01, Inter-Am. Comm'n H.R., Report No. 72/07 (2007), https://cidh.oas.org/annualrep/2007eng/Colombia319.01eng.htm), among others, clearly indicates that, even when the Prosecutor does not exercise accusation, the complainant (querellante) is fully empowered to do so alone. *See* Int'l Laws. Project, *Victims of Corruption: National Legal Frameworks Database 2022* 2–3 (2022), https://uncaccoalition.org/united-states-of-america-victims-of-corruption-national-legal-frameworks/).

44. *See* Rome Statute, s*upra* note 4, at art. 68.

45. *See* On Trial for International Crimes, Inter-Am. Comm'n of H.R., Resolution 1/03, ¶¶ 1–2 (2003), https://cidh.oas.org/resolutions/1.03.int.crimes.resolution.htm.

Law.[46] Currently, it constitutes one of the pillars of transitional justice mechanisms.[47] The purpose was clear: in order to combat impunity, the bodies of the Inter-American System developed regional standards to give substance to the right to truth.[48]

Although the right to truth is not explicitly included in the Inter-American human rights instruments, both the IACHR and the jurisprudence of the Inter-American Court of Human Rights (IACtHR) have delineated its substance and determined the resulting obligations of States;[49] they have done so through the comprehensive analysis of a series of rights established in the American Declaration on the Rights and Duties of Man and in the American Convention on Human Rights.[50] Therefore, this right has been consolidated as a guarantee established in these instruments, and others.

More specifically, the IACHR and the Court have maintained that the right to truth is directly linked to the rights to judicial guarantees and judicial protection, established in Articles 18 and 24 of the American Declaration and in Articles 8 and 25 of the American Convention.[51] The right to the truth is likewise related to the right of access to information, contemplated in Article 4 of the American Declaration and 13 of the American Convention.[52]

Under these provisions, the right to truth comprises a double dimension. On the one hand, the right to truth recognizes the right of victims and their families to know the truth regarding the events that gave rise to serious violations of human rights, as well as the right to know the identity of those who perpetrated the crimes.[53] On the other hand, the right is understood as corresponding not only to the victims and their families, but also to society as a whole.[54] In this regard, "[t]he Commission has maintained that greater society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future."[55] In this light, the right to truth entails the obligation of States to clarify, investigate, prosecute and punish those responsible for cases of serious violations of human rights and infractions of International Humanitarian Law.

46. *See* Inter-Am. Comm'n H.R., The Right to Truth in the Americas, *supra* note 40, at 7.
47. *Id.*
48. *Id.*
49. *Id.* at 8.
50. *Id.*
51. *Id.* at 10.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

In conclusion, according to international norms and principles and the overwhelming international jurisprudence, States may very well be obligated to incorporate universal jurisdiction into their domestic law. Many countries have expressly incorporated provisions accepting the principle of universal criminal jurisdiction into their domestic legislation or implicitly authorized its use when requested either by national or foreign individuals or organizations. One of those countries is Argentina.[56]

B. Experiences of UCJ Worldwide: The Case of Argentina

Despite the many international provisions where universal criminal jurisdiction is mentioned, it was not until the 1990s that this tool became a relatively common practice in the search for justice.[57] In fact, for many Latin American countries, universal criminal jurisdiction became the only available tool to respond to the many gross human rights violations committed under military dictatorships in the region.[58] After the recovery of democracy around the mid and late 80's, victims, and relatives of victims of countries such as Chile, Argentina, and Guatemala, searched for justice abroad due to the prevailing impunity in their national jurisdictions that too often characterized the democratic governments following the dictatorial ones. [59]

Consequently, at that time, Spain became the country receiving many of the requests to investigate gross violations of human rights that in the majority of cases constituted crimes against humanity and, in some others, amounted to the crime of genocide.[60] Universal criminal jurisdiction thus began to have relevance in the absence of an international criminal court and in a continent where there were no proposals of special courts.

Since then, the situation has changed drastically. Currently, many countries authorize the use of its domestic criminal courts for atrocity crimes committed outside the territory of their jurisdiction and by and against

56. Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

57. *See* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, REFWORLD GLOB. L. & POL'Y DATABASE (Jan. 1, 2006), https://www.refworld.org/reference/countryrep/hrw/2006/en/31672; *see, e.g.,* José Burneo Labrín, JURISDICCION UNIVERSAL Y EX JEFES DE ESTADO. EL CASO PINOCHET [Universal Jurisdiction and Former Heads of State. The Pinochet Case] (Pontificia Universidad Católica del Perú ed., 2009).

58. *See* SEBASTIAN BRETT, EL EFECTO PINOCHET: A DIEZ AÑOS DE LONDRES 1998 (Cath Collins ed., 1998), https://www.corteidh.or.cr/tablas/r25600.pdf.

59. *See* Sabina Puig Cartes, *Reclaiming Universal Jurisdiction*, INT'L CATALAN INST. FOR PEACE, (Apr. 25, 2022), https://www.icip.cat/en/opinion/reclaiming-universal-jurisdiction/.

60. *See Argentina. Scilingo Case,* Baltazar Garzón, https://baltasargarzon.org/en/universal-jurisdiction/argentina-scilingo-case/ (last visited Jan. 11, 2025).

foreign nationals.[61] According to the Universal Jurisdiction Annual Review 2023 drafted by Trial International, twelve countries in the world now have cases under investigation or pending via the principle of universal jurisdiction.[62]

Ironically, a country that for some two decades forced victims to seek justice elsewhere, today has become a beacon of universal criminal jurisdiction in the Latin American region and worldwide. The human rights tradition of Argentina, born as a consequence of the country's last dictatorial experience, allows its justice system to be considered a fundamental tool in the protection of human rights through the principle of universal criminal jurisdiction.

Article 118 *in fine* of Argentina's National Constitution establishes the attribution of jurisdiction for the Argentine criminal courts to know the facts, investigate and, where appropriate, judge those responsible for international crimes (crimes against humanity, crime of genocide, war crimes and/or crime of aggression) committed outside the national territory by stipulating that:

> The proceedings of these [ordinary criminal] trials will be carried out in the same province where the crime was committed. But when this is committed outside the limits of the Nation, against the law of nations, the Congress will determine by a special law the place in which the trial is to be held.[63]

The courts authorized by law for such cases are the Federal Criminal Courts,[64] where there are currently several precedents.[65] The case of the alleged persecution and perpetration of crimes against humanity committed

61. *See Universal Jurisdiction Annual Review 2024,* https://www.ecchr.eu/fileadmin/user_upload/UJAR_2024_digital.pdf ("In 2023, the number of investigations and prosecutions of international crimes opened before domestic jurisdictions under extraterritorial and universal jurisdiction continued to rise.").

62. *See Universal Jurisdiction Annual Review 2023,* https://www.ecchr.eu/fileadmin/user_upload/01_TRIAL_UJAR_2023_DIGITAL_27_03.pdf.

63. Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

64. *See* Law No. 26200, Jan. 4, 2007 (Arg.) ("Jurisdiction for the commission of crimes provided for in the Rome Statute and in this law corresponds to the Federal Courts with criminal jurisdiction.").

65. Since 2005, "96 complaints have been filed against people in different cases under the principle of universal jurisdiction, which have had different luck and run without any oral trial to date" according to Julieta Mira. Julieta Mira, *El principio de la jurisdicción universal en la Argentina: el juzgamiento penal de los crímenes del franquismo y la persecución al pueblo Rohingya* [The principle of universal jurisdiction in Argentina: the criminal prosecution of the crimes of Franco's regime and the persecution of the Rohingya people], 13 SOCIO. CAREER MAG. 336, 348 (2023) (citing Johns et al., *Migration and the Demand for Transnational Justice*, 116 AM. POL. SCI. REV. 1184, 1188 (2022)).

against the Falun Gong spiritual group in China is particularly noteworthy.[66] In that case, arrest warrants and subpoenas were issued for defendants Luo Gan and Jiang Zemin in December 2009 by an Argentine Federal Judge after four years of investigating charges of torture and genocide against the members of the group.[67]

Likewise, in 2010, the victims of crimes committed in Spain during Franco's authoritarian regime filed charges in Argentina through universal jurisdiction.[68] The latter case was admitted, and in 2014, the Argentine Federal Judge ordered the arrest of twenty defendants, entrusting Interpol with their preventive arrest for extradition purposes.[69]

Just four years later, in September 2014, twelve Argentinian citizens filed charges in a Federal Court of the Province of Córdoba against five Israeli officials for crimes against humanity and genocide committed in the Gaza Strip, between July 8 and August 26, 2014.[70] A few years later, the Aché indigenous community of Paraguay accused Alfredo Stroessner dictatorial regime of the crime of genocide.[71] Former Spanish Judge Baltazar Garzón, promoter of the doctrine of universal justice, accompanied the indigenous community in their complaint in the Argentinian Courts.[72]

The utilization of Argentine courts for prosecution of crimes under international criminal jurisdiction has continued in recent times, with a number of notable cases. In 2019, a complaint was filed before the Federal Courts of the City of Buenos Aires for the genocide committed in Myanmar against the Rohingya ethnic group, most of whom are currently taking refuge

66. Luis Andres Henao, *Argentine Judge Asks China for Arrests Over Falun Gong*, REUTERS, (Dec. 23, 2009, 4:19 PM), https://www.reuters.com/article/world/argentine-judge-asks-china-arrests-over-falun-gong-idUSTRE5BM02B/.

67. *Id.*

68. *See Universal Jurisdiction Annual Review 2023*, *supra* note 62.

69. *See* Juzgado Nacional Criminal y Correccional Federal 1 [Juzg. Fed.] [Federal Criminal and Correctional Court 1], 30/10/2014, "Galvan Abascal Celso; Aguilar Dolls; Giralte González, José Ignacio…and others" (Arg.).

70. *See* Ana Delicado, *Ciudadanos argentinos presentan la primera querella contra Israel por "genocidio" en Gaza* [Argentine citizens file the First Complaint Against Israel for "Genocide" in Gaza], PUBLICO, (June 9, 2014, 12:43 PM), https://www.publico.es/internacional/ciudadanos-argentinos-presentan-primera-querella.html.

71. *See* BBC, *Paraguayan Indigenous People Denounce Genocide During Military Government*, (Apr. 8, 2014), https://www.bbc.com/mundo/ultimas_noticias/2014/04/140408_ultnot_paraguay_ache_indigenas_justicia_irm.

72. Former Judge Baltazar Garzón was the one who in the 1990s promoted and pushed for universal jurisdiction cases for crimes committed in many Latin American countries. The most famous case was that of Chilean dictator Augusto Pinochet. *See* Baltazar Garzon, *El arresto de Pinochet* [The Arrest of Pinochet], https://baltasargarzon.org/jurisdiccion-universal/pinochet/ (last visited Jan. 11, 2024).

in the neighboring country of Bangladesh.[73] An investigation opened in 2022, and witnesses traveled to Argentina in 2023 to provide oral testimony.[74] In June 2024, the Federal Prosecutor in charge of the investigation requested Interpol to issue arrest warrants against Myanmar's former president and twenty-four other high-rank officials under the charges of genocide and crimes against humanity.[75]

An important aspect of the Myanmar case is that the case in Argentina is proceeding while ongoing investigations in both the International Criminal Court (same criminal nature as universal jurisdiction) and in the International Court of Justice, where The Gambia filed a complaint against Myanmar for violations of the Genocide Convention.[76]

In another highly publicized case – and despite on-going events, international investigations and reports – the Clooney Foundation for Justice filed a complaint under universal jurisdiction in 2023 against the President of Venezuela, Nicolas Maduro, and other senior officials in the Federal Courts of the City of Buenos Aires.[77] The criminal complaint presented by the Clooney Foundation is founded on the policy of repression[78] instituted and executed by Maduro's government since 2014 and on the rights of

73. *Cf.* CTR. FOR THE STUDY OF GENOCIDE AND JUST., LIBERATION WAR MUSEUM, THE ROHINGYA GENOCIDE: COMPILATION AND ANALYSIS OF SURVIVORS' TESTIMONIES COLLECTED BY THE CSGJ RSCH. TEAM (Mofidul Hoque et al. eds., 2018).

74. *See Testigos rohingyas declaran en Argentina sobre presuntos crímenes de guerra en Myanmar* [Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar], PAGINA 12, (June 9, 2023, 12:01 AM), https://www.pagina12.com.ar/556633-testigos-rohingyas-declaran-en-argentina-sobre-presuntos-cri [hereinafter Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar].

75. *See* Andrew Klipphan, *Un fiscal argentino pidió la detención del ex presidente de Myanmar y 24 militares por genocidio y delitos de lesa humanidad* [An Argentine Prosecutor has Requested the Arrest of the Former President of Myanmar and 24 Soldiers for Genocide and Crimes Against Humanity], INFOBAE (last updated July 1, 2024, 9:39 AM), https://www.infobae.com/politica/2024/06/28/un-fiscal-argentino-pidio-la-detencion-del-ex-presidente-de-myanmar-y-24-militares-por-genocidio-y-delitos-de-lesa-humanidad/.

76. Although it is of a different jurisdictional nature (i.e. State against State), the ICJ case also considers Myanmar's non-compliance with the Convention on the Prevention and Punishment of the Crime of Genocide. *See* Press Release by the Int'l Ct. of Just., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), (July 3, 2024), https://www.icj-cij.org/sites/default/files/case-related/178/178-20241224-pre-01-00-en.pdf.

77. According to the criminal complaint, the policy of repression still in force includes but it is not limited to extrajudicial executions, torture and other ill-treatment, arbitrary detentions, excessive use of force, and politically motivated persecution which may constitute crimes under international law. *See Argentina: Amnesty International Makes Submission to Argentine Criminal Court's Investigation into Crimes Against Humanity in Venezuela,* AMNESTY INT'L (Feb. 27, 2024), https://www.amnesty.org/en/latest/press-release/2024/02/amicus-curiae-argentina-venezuela-crimes-against-humanity-universal-jurisdiction-human-rights/.

78. *See id.*

victims of serious human rights violations to truth, justice, and reparations.[79] And again, as in the case of Myanmar, there is an ongoing investigation in the ICC.[80] On November 3, 2021, the ICC Prosecutor announced that the preliminary investigation in the case of Venezuela concluded with the decision to continue with further investigations.[81]

In all the aforementioned cases, universal jurisdiction has evidently played a fundamental role in the protection of human rights by facilitating the investigation of alleged atrocity crimes and, therefore, attempting to fulfill the victims' rights to access to justice, truth and reparations. Although the International Criminal Court also asserted its jurisdiction in a few of these instances, the reality is that, at the domestic level, the States in question were either unwilling or unable to conduct such investigations. In this context, universal jurisdiction in Argentina has emerged as a crucial tool for the protection of vulnerable groups, ensuring that perpetrators of serious crimes are held accountable regardless of where the crimes occurred.

While the exercise of criminal jurisdiction takes place after the commission of the alleged crimes, the resulting judicial processes serve multiple significant functions. Firstly, they ensure the protection of fundamental rights by delivering justice and redress to victims, thereby acknowledging and addressing their suffering. Secondly, these judicial proceedings play a preventive role, deterring future crimes of a similar nature by sending a clear message that impunity will not be tolerated.

Finally, by holding individuals accountable through universal jurisdiction, the international community reinforces the norms and standards of human rights and international humanitarian law, thereby contributing to a broader culture of accountability and respect for human dignity. The utilization of universal jurisdiction helps to fill the gaps left by national jurisdictions that may be unwilling or unable to prosecute such crimes and, by leveraging the tools of international jurisdiction, to reinforce the global commitment to justice and the rule of law.

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79. *See Venezuela: Argentine courts must investigate crimes against humanity committed by Venezuelan authorities*, AMNESTY INT'L (June 14, 2023), https://www.amnesty.org/en/latest/news/2023/06/venezuela-argentina-must-investigate-crimes-against-humanity/.

80. *See* Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Nov. 14, 2019), ¶ 111 (stating that at that time in 2019, the ICC issued an opinion on the investigation in the case).

81. *See* Venezuela I: Situation in the Bolivarian Republic of Venezuela I ICC-02/18, INT'L CRIM. CT., https://www.icc-cpi.int/venezuela-i.

C. UJ as a Tool for Protecting Fundamental Rights

Empirical studies by non-governmental organizations affirm that universal jurisdiction has become a valid and legitimate answer for justice to victims of human rights violations, especially when those victims have no State representation, are being persecuted by the government of the State of their citizenship or belong to an unrecognized State.[82]

Argentina's experience with universal criminal jurisdiction, applied to both regional and international cases, serves as a compelling example of the effective application of this legal principle. As previously stated, Federal Courts in Argentina have initiated investigations into crimes committed in various locations around the world, including Spain, Myanmar, and Venezuela, spanning different historical periods.[83] These investigations not only demonstrate Argentina's commitment to addressing serious human rights violations regardless of where they occurred, but they also highlight the relevance of addressing historical injustices that have had lasting impacts on victims and their families. These contemporary and historical cases underscore the ongoing relevance of universal jurisdiction in responding to current atrocities and safeguarding human rights globally.

Universal criminal jurisdiction has inherent versatility as well: not only can it serve as the only available avenue toward justice and accountability in some cases, but it can also act as a complement to proceedings in other jurisdictions. As explained, several of the cases and investigations in Argentina, also have complementary investigations in international jurisdictions. Even if international tribunals are able to act, the nature and complexity of the crimes under consideration often needs the cooperation of more than one jurisdiction. Therefore, universal criminal jurisdiction remains relevant even when either the ICC or another domestic court, or both have opened cases on the subject matter in their jurisdictions.

The sheer seriousness and complexity of the factual underpinnings often presented in universal jurisdiction cases even invites the complementarity of domestic courts, given that it is often difficult, if not impossible, for the burden of investigative and prosecutorial work to be shouldered exclusively by one jurisdiction. Justice for mass atrocities, in a broad sense, depends on the joint efforts of jurisdictions whose collective capacity allows for a full, fair, and comprehensive investigation. Without a doubt, Argentina has

82. *See generally Universal Jurisdiction Annual Review 2023, supra* note 62.

83. *See generally* Mira, *supra* note 65 (describing actions regarding crimes in Spain); Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar, *supra* note 74; AMNESTY INT'L, *supra* note 79 (describing instruction to investigate crimes in Venezuela by authorities in Argentina).

become a beacon of justice in the world and a living voice for the thousands of victims otherwise silenced by these crimes.

When criminal jurisdictions complement each other, respecting the principle of *ne bis in idem*, the protection of human rights is expanded. The nature of international crimes makes it difficult for a single jurisdiction to deliver on the rights of victims to truth, justice and reparation. Likewise, the message against impunity and the impact on the prevention of future crimes are strengthened when more than one jurisdiction is actively involved in investigating a case.

Moreover, universal jurisdiction provides an opportunity for greater neutrality than international jurisdiction does, particularly when considering the political context in which many such cases arise. The ICC has often been criticized for being a modern colonialist institution, with a disproportionate focus on individuals from African countries.[84] This criticism suggests that the ICC's actions might be influenced by geopolitical considerations, potentially undermining its perceived impartiality.

However, in the case of Argentina, such criticism would be unfounded. Argentina has demonstrated a commitment to applying universal jurisdiction in a politically neutral manner. It has initiated investigations against individuals from countries with which it has historically maintained very close historical ties and diplomatic relations, such as Spain and Venezuela, as well as against individuals from key commercial partners like China.[85]

Even if just apparent, political neutrality also allows for greater protection of the human rights of victims of serious violations. Indeed, this should be the goal. When a State exercises universal criminal jurisdiction without bias, it ensures that justice is pursued based solely on the merits of the case and the severity of the crimes committed. This impartial stance is crucial for upholding the rule of law and delivering justice to victims who might otherwise be denied recourse due to political considerations.

Another relevant aspect to highlight regarding the relationship between universal criminal jurisdiction and the protection of fundamental rights is related to procedure. Universal criminal jurisdiction, like special courts and the ICC, faces significant procedural challenges. These challenges often hinder the effectiveness and efficiency of legal proceedings, irrespective of the jurisdictional framework in place and, therefore, impact on the protection of human rights.

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84. *See* Fatou Bensouda, *Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, ONLINE J. AND FORUM INT'L CRIM. L. DEBATES (Mar. 2013), https://iccforum.com/africa (last visited Jan. 12, 2025).

85. *See* Mira, *supra* note 65 (Spain); AMNESTY INT'L, *supra* note 79 (Venezuela); Henao, supra note 66 (China).

One of the primary challenges is often the physical distance between the court and the location where the crimes were committed. This distance complicates the collection of evidence, the gathering of witness testimonies, and the overall investigation process. Investigators and prosecutors may face logistical difficulties in accessing crime scenes, especially in conflict or post-conflict areas. However, this issue is equally relevant for special courts and the ICC, as they also operate at an international level and often deal with crimes committed far from where such courts sit.

The physical distance affects the ability of witnesses and survivors to travel and testify. However, this is not unique to universal criminal jurisdiction: this challenge is prevalent in both international courts and universal jurisdiction cases. Testimonies from witnesses and survivors are crucial for establishing the facts and ensuring a fair trial. However, logistical and financial barriers often prevent them from participating in proceedings. Many rely on donations from non-governmental organizations to cover travel expenses, but these organizations also face funding limitations. As a result, important testimonies may be missed, affecting the thoroughness and fairness of the trials. Of course, the integration of technological advancements such as video conferencing in certain courts may provide an alternative, although not ideal, remedy for some of these logistical obstacles in the years to come.

Another significant challenge is the difficulty in apprehending the accused. International jurisdictions, including those exercising universal criminal jurisdiction, rely on the cooperation of States to execute arrest warrants and extradite suspects.[86] However, political considerations, diplomatic relations, and state sovereignty can impede this process. States may be unwilling or unable to apprehend individuals within their territories, leading to delays or, in some cases, the complete stagnation of the justice process. The ICC and special courts face these obstacles more acutely perhaps, as they do not have their own police forces and must depend on member states to enforce arrest warrants.

The lack of human and economic resources is also a common challenge across universal jurisdictions, special courts, and the ICC. Conducting comprehensive investigations and prosecutions of international crimes requires substantial funding and skilled personnel. However, these resources are often limited, leading to prolonged investigations, delayed trials, and even the inability to pursue certain cases. Resource constraints can affect the quality of investigations and the overall effectiveness of the judicial process. In some jurisdictions, such as in Argentina, this could be particularly pressing given the economic instability the country often faces.

86. *See* Massimino, *supra* note 2, at 5.

Finally, universal criminal jurisdiction can contribute to the professional development of the judiciary. Judges and legal practitioners involved in these cases often gain exposure to international standards, enhancing their expertise and understanding of complex legal issues. This exposure can lead to improvements in the national judiciary, promoting the right to access justice not only in specific cases but more broadly within the judicial system. By adhering to international standards, courts exercising universal jurisdiction help reinforce the rule of law and contribute to the global fight against impunity for serious crimes, thereby also enhancing fundamental rights protection.

In conclusion, universal criminal jurisdiction offers a means to overcome the challenges often faced by international jurisdictions. It is a crucial tool, an indispensable one, in the fight against impunity, thereby enhancing the protection of human rights. Moreover, in some cases, it may become the only available tool for vulnerable groups to find some accountability. Despite economic difficulties, Argentina has emerged as a leading advocate of universal jurisdiction in the region. Countries like Ecuador, which incorporates this principle into its penal code,[87] may soon emulate Argentina's example. By doing so, the region can leverage this important tool of universal criminal jurisdiction to aid in the protection of vulnerable groups and enhance the global reach of the rule of law.

III. U.S. TORTURE VICTIMS PROTECTION ACT:[88] UNIVERSAL JURISDICTION OF A CIVIL NATURE

In the fight for the imposition of accountability measures against perpetrators of atrocity crimes, an emerging front is developing with promise in the civil context as well. Increasingly, human rights activists and crime victims are turning to civil statutes within certain jurisdictions to impose financial liability against perpetrators. While the target is perpetrator pocketbooks rather than imprisonment, certain civil legislation provides a meaningful alternative to victim groups who are unable to otherwise hold violators of their fundamental human rights accountable.

87. *See* Código Orgánico Integral Penal de Ecuador [Comprehensive Organic Criminal Code of Ecuador], 2014 art. 401 (Ecuador) (stating using an unofficial translation of Irene Victoria Massimino: "Universal jurisdiction. Crimes against humanity may be investigated and tried in the Republic of Ecuador, provided that they have not been tried in another State or by international criminal courts, in accordance with the provisions of this Code and the international treaties signed and ratified").

88. *See* Torture Victims Protection Act of 1991, 28 U.S.C. § 1350.

A. Concept and Philosophical Legal Foundation (how is it used, who can use it and why was it passed)

The U.S. Torture Victims Protection Act (TVPA) is a case in point. It is a unique and increasingly effective mechanism for the imposition of accountability measures against perpetrators of human rights violations in the civil context. While it is tailored specifically to two types of acts, namely torture and extrajudicial killing, its jurisdictional reach and the ability of U.S. courts to effectively attach physical and financial assets through banking systems and otherwise render it a formidable tool in human rights litigation.[89]

The TVPA provides victims a valuable alternative to remedies in the criminal context and victims themselves can initiate litigation without the need to convince government prosecutors. It offers an access to justice for certain conduct that is not muddled by political considerations which may sometimes plague the decisions to initiate criminal prosecution.

At its core, the TVPA is a U.S. law that allows victims to initiate civil suits in the United States against foreign individuals who have committed extrajudicial killing and torture under "color of law" or acting in an official capacity for a foreign nation.[90] Understanding the history of its enactment is crucial to appreciating its purpose and its enduring scope. The TVPA was born of the increased activism by human rights organizations.[91] In the 1990s, these organizations lobbied the U.S. Congress extensively for a legal framework that would allow redress for victims of torture and extrajudicial killing in countries where leaders committing gross human rights violations with impunity and the national systems in such countries offered victims no recourse, or at least no meaningful recourse.[92]

The legislation was unabashedly aimed at communicating a message to dictators in Latin America, Asia and Africa. Then U.S. Congressman Tom Lantos was part of the legislative muscle behind the TVPA, and his efforts in crafting the intentionally reaching law was in direct response to reports and stories of brutal oppression and torture in these regions.[93] The law was specifically intended to manifest the U.S. government's drive to ensure the

89. *See id.* Sec. 2 (a)(1)–(2).

90. *Id.*

91. *See* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, Jan. 1, 2006, https://www.refworld.org/reference/countryrep/hrw/2006/en/31672 [accessed Jan. 14, 2025] (discussing the work of Amnesty International and Human Rights Watch in shaping the TVPA based on cases out of Argentina).

92. *See id.*

93. *See* Beth Van Shaack, *Tom Lantos Commission: Enhancing U.S. Ability to Pursue Accountability for Atrocities*, JUST SECURITY (June 17, 2019), https://www.justsecurity.org/64579/tom-lantos-commission-enhancing-u-s-ability-to-pursue-accountability-for-atrocities/.

spread of rule of law initiatives outside of its territorial borders and foster an environment of genuine accountability for human rights violations, particularly against the deposed despots of dictatorial regimes in the global south. Signed into law by President George H.W. Bush in 1991, the TVPA promised that perpetrators of certain serious human rights violations would not find safe haven even after fleeing their own states.[94]

To a substantial extent, the TVPA has served its unique purpose. Perhaps the most notable use of the TVPA was a class action case filed in the U.S. against Ferdinand Marcos, the former Philippines President, alleging mass torture, extrajudicial killing and forced disappearances during his rule until he was deposed in 1986.[95] After losing power, Marcos had fled from the Philippines to the United States, after which a class of victims filed action against Marcos in U.S. federal district court in Hawaii.[96]

The case was initially brought under the Alien Tort Claims Act, but plaintiffs' counsel added claims under the TVPA upon its enactment into law 5 years later.[97] Having determined local remedies in the Philippines inadequate, the U.S. federal court awarded the plaintiff class significant damages, including punitive damages, for the abuses perpetrated against the Philippine victims.[98]

The case was significant for three crucial reasons. First, it demonstrated the willingness of U.S. courts to implement the extraterritorial reach of the law, immediately upon enactment, against a high-profile dictator accused of gross human rights violations committed outside of the United States. Second, the award of punitive damages in addition to compensatory damages allowed for an acknowledgement of the severity of the human rights abuses, the need for accountability, and the role of financial deterrence. Finally, the case was an admonition to would-be violators that they could not escape accountability by fleeing their home countries and that the reach of U.S. courts in such human rights matters would be global, deliberate, and exercised.

94. *See* Statement on Signing the Torture Victim Protection Act of 1991, 1 PUB. PAPERS 437 (Mar. 12, 1992).

95. *See* In re Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460, 1462-63 (D. Haw. 1995).

96. *See id.* at 1463.

97. *See id.* at 1469 ("[P]laintiffs in this are citizens of Philippines who are complaining of human rights abuse which occurs in that country, [therefore] this case arises under two statutes—the Alien Tort Statute, 28 U.S.C. § 1350, and the newly enacted Tort Victim Protection Act ("TVPA") of 1991 . . . .").

98. *See id.*

B. Use of the TVPA (Experiences/History)

Recent uses of the TVPA demonstrate not only its endurance and vitality but also its substantive breadth for addressing gross human rights abuses. The TVPA has been applied by U.S. courts expansively as to torture and extrajudicial killing, which has allowed for case law encompassing various forms of torturous conduct and even attempted extrajudicial killing.[99] Moreover, through the application of aiding and abetting liability, U.S. courts have extended liability under the Act to non-primary actors, including corporate players.

First, the definition of torture under the TVPA has been interpreted comprehensively. The TVPA defines torture as:

> Any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . is intentionally inflicted on that individual for such purposes . . . punishing that individual . . . intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.[100]

The "infliction of starvation, unsanitary conditions, severe pain, and threats of execution—are severe enough to qualify as torture under the TVPA."[101]

But the TVPA has encompassed much more into the definition of torture. Torture includes "an all-encompassing environment of physical and mental torture" as well as "threats of death, intense fear, deprivation of medical care and exacerbation of injuries, starvation, severe sleep deprivation, imposition of squalid surroundings, intense cold, . . . isolation from contact with family members, fear for family members, and constant attempts to humiliate."[102] with torture including even "unsanitary conditions, inadequate food and medical care . . . amounts to torture,"[103] and "squalid living conditions, . . . malnutrition, physical ailments, and tenth-rate medical care").[104]

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99. *See* Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 99 (D.D.C. 2017); *see also* Force v. Islamic Republic of Iran, 464 F. Supp. 3d 323, 360 (D.D.C. 2020).

100. Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1045 (D.C. Cir. 2014) (citing 28 U.S.C. § 1350 (3)(b)(1)) (first and third alteration in original).

101. *S*otloff v. Syrian Arab Republic, 525 F. Supp. 3d 121, 137 (D.D.C. 2021).

102. Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 218 (D.D.C. 2003), *vacated*, 370 F.3d 41 (D.C. Cir. 2004).

103. Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136, 152 (D.D.C. 2010).

104. Kar v. Islamic Republic of Iran, No. CV 19-2070 (JDB), 2022 WL 4598671, at *10 (D.D.C. Sept. 30, 2022).

Second, extra-judicial killing has been interpreted to include even *attempted* extrajudicial killing is also an underlying violation of the TVPA.[105] In *Gill v. Islamic Republic of Iran*, the D.C. District Court held that "the Torture Victim Protection Act's definition of extrajudicial killing allows plaintiffs to assert liability for a defendant's attempted extrajudicial killing, even if no one died as a result of that attempt."[106] Starvation, for example, is sufficient to show extrajudicial killing under the TVPA.[107] The U.S. Supreme Court has determined that starvation is a method of killing.[108]

Furthermore, the courts' application of the TVPA in the aiding and abetting context has expanded liability beyond merely primary actors to those who aid and abet primary actors in the commission of torture or extrajudicial killing, or both.[109] In fact, the line of cases confirming that the TVPA allows liability for aiding and abetting is long.[110]

The *Cisco* decision is instructive in this context, particularly with respect to the expansion of the legal regime to corporate entities and even their executives.[111] In a recent opinion, the Ninth Circuit allowed aiding and abetting claims for violations of the TVPA to proceed against the Cisco

105. Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 96 (D.D.C. 2017).

106. *Id.* (first citing Warfaa v. Ali, 33 F. Supp. 33 653, 666 (E.D. Va. 2014), aff'd, 811 F.3d 653 (4th Cir. 2016); and then citing Jane Doe I v. Constant, No.10108cv04, 2006 WL 3490503 (S.D.N.Y. Oct. 24, 2006)); *see also* Force v. Islamic Republic of Iran, 464 F. Supp. 3d 323, 360 (D.D.C. 2020); Karcher v. Islamic Republic of Iran, 396 F. Supp. 3d 12, 58 (D.D.C. 2019).

107. Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1050-51 (D.C. Cir. 2014) (stating that evidence of "'untimely death' due to starvation . . . [is] sufficient evidence to 'satisf[y] the court' that the North Korean government killed [victim] outside the formal legal process").

108. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 297 (1990) (Scalia, A., concurring) (referencing "prosecution of a parent for the starvation death of her infant").

109. *See* Gonzalez-Vera v. Kissinger, No. CIVA 02-02240 (HHK), 2004 WL 5584378, at *8 n.17 (D.D.C. Sept. 17, 2004) ("The legislative history of the TVPA indicates, and courts have held, that the TVPA provides a cause of action for aider and abettor liability."), *aff'd*, 449 F.3d 1260 (D.C. Cir. 2006); *see also* Doe I v. Cisco Sys., Inc., 73 F.4th 700, 744 (9th Cir. 2023) ("[B]ased on the text and Convention Against Torture background of the TVPA, we conclude that the TVPA encompasses claims against those who aid and abet torture or extrajudicial killing.").

110. *See*, *e.g.*, Barrueto v. Larios, 205 F. Supp. 2d 1325, 1332–33 (S.D. Fla. 2002) (denying the motion to dismiss of a former Chilean military officer who allegedly aided and abetted acts of torture committed by other Chilean officials); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002) (holding a former Bosnian Serb soldier liable for aiding and abetting torture); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *15 (S.D.N.Y. Feb. 28, 2002) (aiding and abetting torture actionable under TVPA because it "provides for liability for an individual who 'subjects' another to torture or extrajudicial killing"). Indeed, the legislative history of the TVPA demonstrates the intent to permit suits against persons who "ordered, abetted, or assisted in torture." *Gonzalez-Vera*, 2004 WL 5584378, at *8 n.17 (quoting S. REP. NO. 102-249, at 8 (1991)). *See also Cisco Sys.*, 73 F.4that 741 ("[A]iding and abetting torture is actionable under the TVPA.").

111. *See Cisco Sys.*, 73 F.4th at 709.

corporate executives who had contacts with Chinese authorities and had worked on developing a surveillance technology platform called Golden Shield.[112] Chinese authorities later used the technology to target and repress Falun Gong adherents in China.[113]

The Ninth Circuit concluded that given the "widespread external reporting about the human rights abuses" and statements by defendants included in the complaint, "Plaintiffs have adequately pleaded that [the corporate executive defendants] provided their assistance with awareness that international law violations, including torture, were substantially likely. These allegations, taken as true, also state a plausible claim that [defendants] 'supported' and 'benefitted' from the use of the Golden Shield."[114]

In reversing and remanding the lower court, the Ninth Circuit held that the dismissal of the TVPA claim was in error because Plaintiff adequately pled an aiding and abetting claim and the TVPA permits individual accomplice liability.[115] The impact of this line of cases cannot be underestimated in that it opens the window of accountability for the victim plaintiff to those who participated and assisted in the torture of extrajudicial killing. The increase in scope multiplies a victim's targets in achieving just outcomes.

C. TVPA as a Tool for Protecting Fundamental Rights (Civil Jurisdiction)

Properly strategized, the TVPA can be a powerful tool for protecting fundamental human rights for three primary reasons.

First, the TVPA allows access to justice for the victims of certain grave human rights abuses without the procedural, and even political, obstacles that often plague the initiation of criminal prosecution. Victims can bring cases individually or in a class without having to convince a government prosecutor to initiate an investigation and then a prosecution. Second, evidentiary facilities, such as a victim plaintiff who can take advantage of civil burdens of proof rather than the heightened criminal burdens, which may be advantageous as access to evidence is often limited for plaintiffs or destroyed by governments and primary actors, or both. Finally, civil proceedings attack perpetrators and those that aid and abet them in a manner that impacts them and their progeny financially, which for human rights violators may be a more important concern than the rights of the human beings whose lives their conduct destroys or even their own freedom.

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112. *See id.* at 708-11.

113. *See id.* at 711.

114. *Id.* at 745 (citing Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1024–25 (9th Cir. 2014)).

115. *See id.*

Victims of human rights abuses traditionally depend on government prosecutors to initiate an investigation, a charge, and a prosecution of the perpetrators of human rights violations. This can be fraught with numerous obstacles, not in the least of which is convincing government prosecutors of the value of bringing such cases. These prosecutorial decisions are often laden with political considerations, particularly in the context of human rights abuses in the international context. At the very least, there are diplomatic and political consequences to a state body initiating actions against foreign leaders or their underlings for human rights abuses.

The TVPA, however, allows victims an avenue to seek justice outside of this politically charged environment. Using the TVPA, victims can seek redress directly against their perpetrators and/or those aiding and abetting them with relative autonomy. This means that cases filed can proceed to the evidentiary phases and even merit adjudications without the obstacles of political or diplomatic considerations. This is a significant access to justice presented by the TVPA, particularly for those who seek legal redress from perpetrators with enduring ties and influence in important political and diplomatic circles.

Moreover, there are evidentiary advantages in civil litigation where victims can benefit from lower burdens of proof. In criminal prosecutions where the burdens are heightened significantly, the evidentiary threshold is a material obstacle, especially where victims may not have access to the evidence often in the hands of perpetrator or their governments, and the political and juridical mechanisms by which international prosecutions can obtain that information are complicated and, often, neither heeded nor complied with. It is not uncommon that primary perpetrators and government organs under their control deliberately destroy evidence or withhold the same, rendering the evidentiary process by which to meet heightened criminal burdens of proof quite difficult, if not at times, impossible.

The civil action for human rights abuses offers victims some reprieve. Of course, the burden of proof, often by a preponderance of the evidence rather than by beyond a reasonable doubt, is certainly more surmountable. But that is only a surface benefit. Victims often have great difficulty collecting conclusive evidence, in the first place.

In the civil context, not only is the evidentiary burden more attainable, but there are often procedural sanctions for destroying or withholding evidence, or both. These can be implemented against perpetrators, allowing the courts to assume evidentiary facts against the perpetrator where there have been discovery abuses by the perpetrator or those under the perpetrator’s control. Several due process considerations could limit such presumptions against the perpetrator in the criminal context. Civil actions for

human rights abuses not only lower the bar, but they often allow litigation benefits through presumption sanctions to a victim whose perpetrator is withholding crucial evidence.

Finally, human rights violators are often individuals who have a complete disregard for the rights and welfare of human beings yet are quite often deeply committed to the financial benefits they can gain from systematic human rights abuses. The example of Philippine's ex-president Marcos is a case point.[116] The sad reality is that human rights violations are often underpinned by other personal motives, often corruption and amassing wealth, that perniciously trump the welfare of actual human beings.[117] This is not a novel realization, but it is one that practitioners should appreciate before discounting the role of civil human rights litigation. The perpetrator often cares more about the wealth he has amassed than the lives he has destroyed in the process.

Civil litigation aimed at human rights abuses target this vulnerability directly. Not only do they provide a means to hold perpetrators accountable where it hurts them the most (perpetrators do not care about human rights abuses), but civil actions seeking damages also undercut the intergenerational wealth such perpetrators have accumulated for their families and progeny.

In one sense, material civil penalties strike a bit broader than targeted criminal prosecution, impacting the perpetrator not only with shame but subjecting his financial framework to vulnerability that will affect the lives and lifestyles of those around him as well—just as his human rights violations have impacted more than merely the victim, but also his family and his social station. In the case of aiding and abetting by corporate entities and executives, the value of civil actions and resulting damages—which have included significant punitive damages[118]—the impact is even more palpable.

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116. *See* In re Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom*., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Circ. 1996).

117. *See id.* at 1462-63.

118. *See* Tachiona v. Mugabe, 234 F. Supp. 2d 401, 442 (S.D.N.Y. 2002) ("Judgment be entered in favor of Plaintiffs and against defendant ZANU–PF in a total amount of $71,250,453.00 representing compensatory damages of $20,250,453.00 and punitive damages of $51,000,000.00"); Abebe–Jira v. Negewo, 72 F.3d 844, 846–48 (11th Circ. 1996) (affirming punitive damages award of $300,000 to each of three plaintiffs for torture and cruel, inhuman, or degrading treatment); Hilao, 103 F.3d at 779–82 (affirming class award of $1.2 billion in exemplary damages for torture, summary execution, and disappearances); Paul v. Avril, 901 F.Supp. 330, 335–36 (S.D. Fla. 1994) (awarding $4 million to each of six plaintiffs for arbitrary detention, torture, and cruel, inhuman or degrading treatment); Xuncax v. Gramajo, 886 F.Supp. 162, 197–98 (Mass. Dist. Ct. 1995) (awarding punitive damages of $500,000—$5 million for summary execution, torture, arbitrary detention, and cruel, inhuman and degrading treatment); Filartiga v. Pena-Irala, 577 F.Supp. 860, 864–67 (D. N.Y. 1984) (awarding $5 million in punitive damages to each of two relatives of victim of torture and extrajudicial killing).

Such financial considerations are easily understandable by corporate entities and can serve as meaningful economic deterrents for enterprises to monitor their dealings in a global marketplace where the tools for human rights abuses are increasingly sourced from multinationals. The *Cisco* case where the executives of a global software solutions firm stand within the crosshairs of the TVPA for aiding and abetting human rights violations is a telling case in point.[119]

IV. CONCLUSION

Justice outcomes for international crimes remain plagued by significant jurisdictional and procedural shortcomings, even with the growth of notable international mechanisms like the ICC and specialized courts. These realities are often complicated for crime victims by endemic resource constraints, political obstacles, and often, the unwillingness for national authorities to prosecute and hold perpetrators accountable for their crimes. This is particularly difficult in matters where political leaders are themselves the perpetrators of atrocity crimes.

Measures outside of traditional international jurisdiction should be considered and employed by international lawyers and practitioners in delivering justice outcomes to victims of such crimes. Argentina's application of universal criminal jurisdiction illustrates one such alternative avenue and underlines how domestic legal systems can play a formidable role in delivering justice to crime victims by entangling perpetrators who would otherwise escape criminal prosecution and process. The Argentine courts' readiness to exercise universal criminal jurisdiction has demonstrated the potential impact that domestic legal systems can have on the global search for justice and the strengthening of the rule of law.

The use of domestic civil statutes to increase accessibility to justice is another crucial avenue. The TVPA illustrates how domestic legal systems with unique reach can provide a venue for victims to seek truth an accountability through legal processes which may allow for a greater reach of perpetrators and those that aid and abet them, in addition to lower burdens of proof and freedom from many political influence barriers.

Taken together, these examples provide increasingly accessible mechanisms for victims to seek address for human rights abuses. This is particularly crucial for marginalized or unrecognized groups who are often structurally barred from access to international justice mechanisms traditionally available or specially created. By employing universal jurisdiction and targeted domestic statutory frameworks, crime victims can

119. *Cisco Sys.*, 73 F.4th at 708.

find a forum where atrocity crimes and serious violations of human rights law may be heard, regardless of where they occur. The establishment of the rule of law, particularly when it comes to fundamental human rights, depends on precisely this type of creativity.

CHILDREN AT RISK: INTRAFAMILIAL CHILD SEXUAL ABUSE - INCEST IN JAMAICA

Sha-Shana Crichton*

Content Advisory

This article contains explicit and graphic descriptions related to sexual violence, including rape, which some readers may find distressing. These details are included to support the scholarly analysis of legal and social issues and are presented with the utmost sensitivity to their context. Reader discretion is advised.

Abstract

Child sexual abuse is a widespread problem in Jamaica It is without question that child sexual abuse ranks as one of the most severe violations of children's rights. High on the list of abusers are family members, related by blood, affinity, or cohabitation. Child sexual abuse by family members, intrafamilial child sexual abuse, is largely facilitated by access to the child and is arguably the most destructive form of child sexual abuse because of the perpetrator's position of trust and power over the child. Today, in many jurisdictions, intrafamilial child sexual abuse by blood and non-blood relatives including adoptive parents, and stepfathers or stepmothers is known as incest. Incest is universally tabooed. The incest taboo sends a

* Assistant Professor of Lawyering Skills, Howard University School of Law. I dedicate this Article to the men, women, boys, and girls who are living with trauma caused by incest and for whom justice is beyond their reach and dreams. I thank Ms. Janet Silvera of the Jamaica Gleaner who fearlessly sheds light on the problem of incest and whose work provided an important base for this Article. I also thank Mrs. Nadine Chaffat-Allen, Mrs. Karen Gordon, Dr. Ramona Biholar, Prof. April Christine, Prof. Anibal Rosario Lebrón, Prof. Maureen Johnson, Prof. Sherri Keene, Prof. Nantiya Ruan, and the participants of W.A.R (2022, 2023) for their helpful advice and feedback. I am deeply grateful to my former research assistant Ashley Grey whose stellar research skills, insightful comments, and dedication helped to move this Article from a thought to a draft. I am also grateful to my current research assistants Breanna Madison and Zaneika McNeil for their continuous excellent feedback. I am equally grateful for the enthusiastic support of the editors of the Southwestern Journal of International Law, especially Ernesto Bustinza. Finally, my deep gratitude to Howard University School of Law for summer research stipend and support for this Article.

clear message that incest is repugnant which causes some people to refrain from engaging in incestuous relations with children.

The incest provision of Jamaica's Sexual Offences of Act 2009 continues to define incest solely based on blood relations. This definition ignores the fact that Jamaica's primary family structure is a single female-headed household which typically includes people related not solely by blood, but also by affinity, or cohabitation such as the mother's or female guardian's boyfriend, or husband who is responsible for, and has direct power and control over the children but are not related to them by blood. It is also common for the female head of household to engage in serial partnering with temporary partners, which increases the children's risk of intrafamilial child sexual abuse. This Article argues that to better protect a child's right to be safe from sexual abuse in their home, the incest provision of the Sexual Offences Act should be revised to include persons related by affinity and cohabitation including adoptive parents, stepparents, and step-grandparents.

I. INTRODUCTION

She was referred to in the cases as the "virtual complainant."[1] We know the power of words to humanize, so, instead of virtual complainant, let's call her Maria.[2] Maria was eleven or at most twelve years old when her mother sent her to live with her paternal grandmother.[3] Maria's father lived in another parish, but visited his mother and Maria most weekends.[4] On some weekends, the family gathered for family night when her father visited.[5] Maria, her siblings, and her cousins would put their mattresses on the roof and sleep under the stars.[6] Maria's father often took her to sleep in his arms.[7] To Maria, family nights were a sign that her often-whispered prayers for a loving and caring family were answered.[8]

Maria's father started to fondle her when she turned thirteen years old.[9] She remembered that he first fondled her breast during a family night gathering.[10] Maria looked at him in shock, but he apologized, claiming that he believed she was his wife, Maria's stepmother.[11] Later that night, he fondled her breast again and then her vagina.[12] This time he did not

1. *See* Chung v. Att'y Gen. of Jam., [2019] JMFC Full 3, ¶ 5 (Jam.) ("The virtual complainant is the Claimant's daughter."); *see generally* Jamaica's Sexual Offences Act stipulates that the complaint in a sexual abuse case should not be identified by name. *See* Sexual Offences Act, § 28 (2009) ("[A]fter an allegation has been made that a person has been the victim of rape or any other sexual offence under this Act—(a) no report of the proceedings in relation to the offence shall reveal the name or address, or include any particulars calculated to lead to the identification of the complainant either as being the person against or in respect of whom the proceedings are taken or as being a witness therein") (Jam.).

2. *See* Olympia Duhart, *Social Distancing as a Privilege: Assessing the Impact of Structural Disparities on the COVID-19 Crisis in the Black Community*, 37 GA. ST. U. L. REV. 1305, 1310 n.2 (2021) (stating that the author employed "a narrative technique in an effort to humanize the disparate outcomes that 'neutral' policies can have on people in different communities") (first citing Terence Flynn, *How Narratives Can Reduce Resistance and Change Attitudes: Insights from Behavioral Science Can Enhance Public Relations Research and Practice*, 2 RSCH. J. INST. FOR PUB. RELS. 1, 11 (2015); then citing Olympia Duhart & Steven I. Friedland, *Advancing Technology and the Changing Conception of Human Rights*, 55 GONZ. J. INT'L L. 331, 344–45 (2020)).

3. Chung, [2019] JMSC Full 3, ¶ 5 (Jam.).

4. *Id.*

5. *Id.* ¶ 6.

6. *Id.*

7. *Id.*

8. *See id.* ¶ 5.

9. *Id.* ¶ 6.

10. *Id.*

11. *Id.*

12. *Id.*

apologize.[13] Maria did not tell anyone that her father had fondled her.[14] She kept silent because she was afraid.[15] For one, Maria feared her grandmother, whom Maria claimed cursed and punched her staff.[16] Maria also feared that her father would make true on his threats to send her back to her mother if she rejected his sexual advances.[17] Maria did not want to go back to live with her mother.[18] Most importantly, Maria yearned for her father's attention, and she feared that her father would not love her if she protested so she acquiesced to his sexual touches.[19] After that night, Maria's father continued to fondle her whenever they were alone.[20] He created opportunities for him and Maria to be at home alone.[21] In fact, he opted out of some family outings claiming that he had to take her to visit her mother but would instead stay home and fondle her.[22]

The summer before her fifteenth birthday, he took her virginity by inserting his penis into her vagina.[23] After that, he had regular sexual intercourse with her.[24] Maria finished high school and went abroad to study.[25] When her father came to visit, they had sex.[26] They continued to have sex when she returned to live at her grandmother's house in Jamaica after finishing school.[27] Although Maria had her own room, her grandmother complained if Maria locked her room door.[28] Even as an adult, Maria still feared her grandmother.[29] The open door provided unbridled access that made it easier for Maria's father to come to her room or for her to go to his room for sex.[30]

Maria got pregnant with her father's child, but she had an abortion.[31]Maria claimed that her father "was the only man [she] was having

13. *See id.*
14. *Id.* ¶ 7.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.* ¶ 8.
21. *Id.*
22. *Id.*
23. *Id.* ¶ 9.
24. *Id.*
25. *Id.* ¶ 10.
26. *Id.*
27. *Id.*
28. *Id.*
29. *See id.* ¶ 58.
30. *Id.* ¶ 10.
31. *Id.* ¶ 12.

sexual intercourse with."[32] When Maria was in her early twenties, she and her co-workers discussed "a newspaper article concerning incest."[33] Her co-workers were critical of incest.[34] Maria knew then that having sex with her father was not right.[35] That night, when Maria's father came to her room for sex, she started to sob and asked him to stop.[36] She told him about her co-workers' criticism of incest.[37] That was the last time Maria and her father had sex.[38]

It took Maria decades to report the sexual abuse to the police.[39] Maria said "she felt ashamed about what had happened to her," and she feared no one would believe her.[40] She tried to forget the years of abuse and forge on with her life, but memories of the abuse refused to fade.[41] As Maria observed her father interacting with her younger sisters, his two younger daughters, she became concerned and suspicious that he may also sexually abuse them.[42] She discussed her suspicions with her husband, who encouraged her to report her abuse.[43] Maria said she initially refused to report her sexual abuse to the police because her father was "an influential businessman."[44] However, she reported her abuse to the police in 2011, when her sisters were seventeen and eleven years old, respectively.[45] In January 2012, Maria's father was charged with eleven counts of sexual assault.[46] The prosecution abandoned four of the charges.[47] Trial proceeded on four counts of indecent assault and three counts of incest.[48] In August of that same year, a clinical psychologist

32. *Id.* ¶ 10.

33. *Id.* ¶ 13.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Maria testified that after she asked her father to stop having sex with her, he started to treat her badly. For example, he evicted her from the apartment where she was living. *Id.*

39. *See id.* ¶ 6, 62 (stating that Claimant started abusing virtual complainant around 1976 and virtual complainant did not report abuse until 2011).

40. *Id.* ¶ 58.

41. *See id.* ¶ 15.

42. *Id.* ¶ 61.

43. *Id.*

44. *Id.* ¶ 15.

45. *Id.* ¶ 16.

46. *See id.* ¶ 3, 54; *see also* Nickoy Wilson, *MoBay Businessman Freed of Incest Charges*, THE GLEANER (Oct. 29, 2019, 12:11 AM), http://jamaica-gleaner.com/article/lead-stories/20191029/mobay-businessman-freed-incest-charges. Maria's father denied all allegations of incest and sexual abuse. Instead, he claimed that Maria's allegations of incest and sexual assault were her way of retaliating against him for firing her for dishonesty. *See id.* ¶ 17, 54.

47. Wilson, *supra* note 46.

48. *Id.*

diagnosed Maria with Post Traumatic Stress Disorder brought on by childhood sexual abuse.[49] The case lagged in the court system for several years.[50] During that time, vital records and other evidence were destroyed, and witnesses became unavailable.[51] In 2019, Maria's father, the defendant, was acquitted of all charges.[52] The court noted that the prosecution failed to produce evidence to prove sexual assault resulting in an acquittal on those charges.[53] Maria's father was also acquitted of the incest charges.[54] In Jamaica, incest is based on sexual intercourse with statutorily defined blood relatives.[55] Although Maria believed the defendant was her father and he represented himself as Maria's father, exercised parental control over her, and provided for her as his daughter, DNA evidence later presented at trial proved that he was not her biological father.[56]

If this were an episode of Law and Order Special Victims Unit, you would have shook your head in disbelief; you would have wondered why the law on incest is so outdated that it still strictly follows consanguineal lines in a society that has long abandoned the traditional nuclear family as its normative family structure; you would have been frustrated at the delays and slow court process that in the end paralyzed the hands of justice; you would have been angry at Assistant District Attorney Carisi[57] for not making the

49. *See* Chung, [2019] JMSC Full 3, ¶ 18.

50. *See id.* ¶ 32-33.

51. *See id.* ¶ 21 (stating that witnesses and Claimant's ex-wife had remarried and was now living abroad; vital documents, such as the psychologist's notes of Maria's "visits" were destroyed seven years after she was treated in compliance with Florida's practice, and certain buildings including the apartment above the supermarket, were destroyed or remodeled).

52. *See* Wilson, *supra* note 46.

53. *See id.*

54. *See id.*

55. *See id.* (stating that "DNA test revealed that Claimant was not the biological father of the woman"); Incest in Jamaica is defined as sexual intercourse between closely related blood relatives. *See* Incest (Punishment) Act, § 2 (1948) ("(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour . . . ."") (Jam.); Sexual Offences Act, § 7 (2009) ("The offence of incest is committed by a male person who willingly has sexual intercourse with another person knowing that the other person is his grandmother, mother, sister, daughter, aunt, niece or granddaughter . . . . relationship between the person charged with an offence under any of those subsections and the person against whom the offence is alleged to have been committed includes a relationship determined by reference to the whole blood or half blood . . . .") (Jam.).

56. *See* Wilson, *supra* note 46; Chung, [2019] JMSC Full 3, ¶ 5 (referring to Maria as the Claimant's daughter).

57. Dominick Carisi is the Assistant District Attorney on the long-running TV Series Law & Order: Special Victims Unit (SVU). *See* Anne Easton, *Law & Order: SVU's' Peter Scanavino Details His Transition Out of The Squad Room And Into The Courtroom as the Series New Assistant District Attorney,* FORBES (Oct. 3, 2019, 1:29 PM), https://www.forbes.com/sites/anneeaston/2019/10/03/law--order-svus-peter-scanavino-details-his-

court see that while the defendant was not Maria's biological father, he raised her, exercised power and control over her, and provided for her. Therefore, he is her father in every way that counted, and the incest charges should stand; you would have been furious by the seemingly lack of priority given to this child sexual abuse case and prayed that this was an unfortunate anomaly. You would have been even more furious because consciously or subconsciously, the incest taboos would have triggered your amygdala into action sending you into flight, fight, or freeze mode. In the end, you would have walked away from your television set or streaming device still seething, but comforted that what you just saw was fiction.

Sadly, Maria's situation is not fiction, nor is it unique. As Maria's situation revealed, Jamaica's incest law is narrowly defined to include only heterosexual sexual intercourse with a close blood relative.[58] Put another way, incest as defined by the Jamaican legislature, past[59] and present,[60] narrowly proscribes sexual intercourse between close consanguineous relationships, therefore perpetrators who sexually abused someone living in the same household who they believe to be their child or for whom they assume or have assumed a parental role cannot be charged with incest. What is more, a parent or blood-relative who sexually abuses a child of the same sex cannot be charged with incest, whereas it would have been incest if the parent or blood-relative were of the opposite sex.[61] To explain, if a man sexually abuses his eleven-year-old son, he cannot be charged with incest even where DNA confirms that he is the child's biological father because same-sex intrafamilial sexual abuse, albeit with a close blood relative, does not qualify as incest under Jamaica's incest law.[62] That man, however, could be charged with incest if he had sexually abused his eleven-year-old

transition-out-of-the-squad-room-and-into-the-courtroom-as-the-series-new-assistant-district-attorney/?sh=d7fe7395c6b2.

58. *See* Incest (Punishment) Act, §§ 2-4; Sexual Offences Act, § 7 ("The offence of incest is committed by a male person who willingly has sexual intercourse with another person knowing that the other person is his grandmother, mother, sister, daughter, aunt, niece or granddaughter . . . . relationship between the person charged with an offence under any of those subsections and the person against whom the offence is alleged to have been committed includes a relationship determined by reference to the whole blood or half blood . . . .").

59. *See* Incest (Punishment) Act, §§ 2-4.

60. *See* Sexual Offences Act, § 7.

61. *See id.* ("The offence of is committed by a male person . . . with another person knowing that the other person is his grandmother, mother, sister, daughter, aunt, niece or granddaughter. The offence of incest is committed by a female person . . . with another person knowing that the other person is her grandfather, brother, son, uncle, nephew or grandson.").

62. *See id.*

daughter.[63] This Article argues that incest, as defined under Jamaica's Sexual Offences Act, is too narrow and does not serve three of the critical purposes of incest laws, to (1) protect vulnerable children from intrafamilial sexual abuse at the hands of non-blood "relatives" residing in the same household including their parent's or guardian's transient partners especially if they act as a parent to the child;[64] (2) protect the integrity of the family;[65] and (3) serve as a deterrent to the persons who live or frequent the home and who act in *loco parentis* to the child.[66]

Part I looks at child sexual abuse as a global, Caribbean, and Jamaican problem. As global statistics indicate and scholarship confirm, children are most likely to be sexually abused within the home and at the hands of relatives.[67] This Part looks at intrafamilial child sexual abuse, also known as incest in many jurisdictions, the incest taboo, and the expansion of the definition of incest in contemporary society based on the diversifying of the modern family structure.

Part II shows that child sexual abuse at the hands of family members related by blood, persons living in the same household, and transient parental or guardian partners is a significant problem in Jamaica. This Part suggests that Jamaica's family structure and cultural beliefs must be considered in evaluating the state of intrafamilial child sexual abuse. To illustrate, the contemporary predominant Jamaican family structure is a single female-

63. *See id.* at §§ 2,7. Sexual intercourse as included in the incest provision means penile penetration of the vagina. *See id.* at § 4. The incest provision of the Sexual Offences Act only proscribes sexual intercourse. *See generally id.*

64. *See* Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family"*, 119 HARV. L. REV. 2464, 2482 (2006).

65. *See* George P. Smith, II, *Incest and Intrafamilial Child Abuse: Fatal Attractions or Forced and Dangerous Liaisons?* 29 J. FAM. L. 833, 836 (1990-1991).

66. *See* Phyllis Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 MO. L. REV. 251, 269 (1984) ("Criminal incest laws are designed to punish incestuous behavior and deter any such conduct in the future."); Jonathan Todres, *Confronting Child Trafficking*, 18 IND. HEALTH L. REV. 95, 99 (2021) (listing deterrence and punishing the perpetrator as criminal law's core goal).

67. *See* UNICEF, ACTION TO END CHILD SEXUAL ABUSE AND EXPLOITATION: A REVIEW OF THE EVIDENCE 11 (2020) (citing KNOW VIOLENCE IN CHILDHOOD: A GLOBAL LEARNING INITIATIVE, GLOBAL REPORT ENDING VIOLENCE IN CHILDHOOD 46-47 (2017)); *see also* Delores E. Smith et al., *A Discussion on Sexual Violence Against Girls and Women in Jamaica*, 26 J. SEXUAL AGGRESSION 5, (2019) (citing UNICEF JAMAICA, SITUATION ANALYSIS OF JAMAICAN CHILDREN 26 (2018)); Cynthia Grant Bowman & Elizabeth Brundige, *Child Sex Abuse Within the Family in Sub-Saharan Africa: Challenges and Change in Current Legal and Mental Health Responses*, 47 CORNELL INT'L L.J. 233, 248 (2014) ("[I]ncest and other forms of sexual violence are related to the 'disempowerment and emasculation' of African men that results from unemployment and also from a heritage of colonialism and apartheid." (citing Carol Bower, *The Relationship Between Child Abuse and Poverty*, 56 AGENDA 84, 85 (2003))).

parent-headed household.[68] Children are at an increased risk of sexual abuse by persons living within their household because Jamaica's family structure has evolved over the years from a largely nuclear family structure to a predominantly single female-parent-headed household which allows for more transient partners, thus increasing the child's exposure to multiple partners who are brought into the home by a parent or guardian and treated as "an integral member of the family." .[69] The risk to the child remains high even where the parent's or guardian's partner does not live in the household but has access to the child. This increased exposure is problematic given documented evidence that "in some Jamaican households, male breadwinners believe they are entitled to sexual relations with all females in the house," including female children ages sixteen and under.[70] Studies show that child sexual abuse by transient parental partners, including those who do not reside in the same household, can be "functionally similar to incest in the nuclear family."[71] This Part then looks at the harm intrafamilial child sexual abuse causes to the child, family, and society and argues that available statistics fail to capture the magnitude of the problem because child sexual abuse at the hands of family members, persons living in the same household, and transient parental or guardian partners is typically silenced and consequently underreported.[72]

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68. *See* Theophilinie Bose-Duker et al., *Children's Resource Shares: Male Versus Female-Headed Households*, 42 J. FAM. & ECON. ISSUES 573, 574 (2020) (noting that "45.6% of all households in Jamaica are female-headed" (first citing Joycelin Massiah, *Female-Headed Households and Employment in the Caribbean*, 2 WOMEN'S STUD. INT'L 7, 7 (1982); and then citing Sudhanshu Handa, *The Determinants of Female Headship in Jamaica: Results from a Structural Model*, ECON. DEV. & CULTURAL CHANGE 793, 795 (1996))); *see also* GOV'T OF JAM., NATIONAL PLAN OF ACTION FOR AN INTEGRATED RESPONSE TO CHILDREN AND VIOLENCE (NPACV) 2018–2023 25 (2018).

69. *See* Eloise Dunlap et al., *Transient Male-Female Relationships and the Violence They Bring to Girls in the Inner City*, 7 J. AFR. AM. STUD. 19, 20 (2003) (citing M. BELINDA TUCKER & CLAUDIA MITCHELL-KERNAN, THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS (Russell Sage Found. ed., 1995)).

70. Valeta Wilson-James, The Influences of Cultural Norms on Child Sexual Abuse Prevention of Female Adolescents in Jamaica 15, 146–47 (2021) (Ph.D. dissertation, Walden University) (on file with Walden Dissertations and Doctoral Studies Collection); *see also* Ena Trotman Jemmott & Priya E. Maharaj, *Gendered Sexual Relations and Sexualized Gender Relations*, *in* UNDERSTANDING CHILD SEXUAL ABUSE: PERSPECTIVES FROM THE CARIBBEAN, 46 (Adele D. Jones ed. 2013) (detailing a study on the normalization of sex between secondary school girls and men, the authors noted that young girls were "having to engage in sexual activities with males in the household, that is mothers' boyfriends, who are the main breadwinner; and with other men outside of the home for economic and other material gain").

71. *See* DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 94 (The Free Press, a Div. of Macmillian Publ'g Co., Inc. & Collier Macmillian Publishers eds., 1981).

72. *See* Wilson-James, *supra* note 70, at 22 ("[V]ictims are unable to report the sexual abuse because of their perpetrator's position in the family.").

Part III looks at Jamaica's incest laws, past and present, and focuses on the current incest provisions of the Sexual Offences Act. This Part also looks at the limitations of the incest provision and argues that current incest protections fall short of international standards. In doing so, this section looks at protections against intrafamilial child sexual abuse under international law.

Part IV suggests that Jamaica's incest laws could be better to protect children who are vulnerable to intrafamilial child sexual abuse. This Part looks at what scholars have said and what approaches other countries have taken to improve their incest regulations.

Part V argues for a new framework moving forward. This Part argues that effective laws typically change to meet societal needs and address societal changes.[73] Consequently, this Part argues that the time is ripe for Jamaica to change its incest law, based solely on consanguineous relationships, to acknowledge Jamaica's long departure from the traditional nuclear family to the existing transient family structure. On that point, this Article asks the legislature to look to other progressive jurisdictions, including England, that have sought to protect their children and the integrity of a changing family structure by adding affinity and cohabitating relationships to their incest laws. This Part posits that, at a minimum, Jamaica should add affinity and cohabiting relationships such as stepparents, guardians, custodial parents, common-law parents, de facto custodians, and adoptive parents to the current incest laws. This change is necessary also because Jamaica has a high rate of misattributed paternity, which allows men to escape an incest charge even where they believed the child victim to be their biological child, and represented themselves as the child's biological father, but DNA evidence at trial proves otherwise. This was the situation in Maria's case.[74] If the incest laws had included de facto custodian, custodial parent, or guardian, Maria would have had a fighting chance to have the incest charges stand in court.

Now, as with most criminal laws, the main goal of incest laws is deterrence.[75] However, as Professor Jonathan Todres mentioned of human

73. *See* William A. Bogart, *Introduction: Defining an Identity*, 27 WINDSOR REV. LEGAL & SOC. ISSUES 1, 1 (2009) (commenting on a range of legal reforms such as "how law should change to meet societal needs and how a changing society should alter legal institutions").

74. *See Chung v. Att'y Gen. of Jam.*, [2019] JMFC Full 3, ¶ 139 (Jam.) ("[Claimant] denied being the virtual complainant's father . . . .").

75. *See* Todres, supra note 66, at 99. *See also Father Jailed for Having Sex with Daughter in Barbados*, JAM. OBSERVER (July 21, 2023), https://www.jamaicaobserver.com/2023/07/21/father-jailed-for-having-sex-with-daughter-in-barbados (statement of Judge Randall Worrell of the High Court in Barbados) (containing Justices' statement that "[i]ncest is considered a detestable offense which desecrates the sanctity of the home and must attract a custodial sentence as a general deterrent to others").

trafficking, we cannot prosecute our way out of an incest crisis, and we cannot rely on prosecution to be an "exclusive means of solving the problem."[76] This is particularly true given the longstanding problems of delays in the overburdened judicial system and the prevailing culture of patriarchy that minimizes, ignores, and generally dismisses violence against women and children.[77] Consequently, this Article concludes by positing that acknowledging that the current family structure incorporates people related by blood, affinity, and cohabitation, and calling sexual abuse at their hands incest is likely to invoke the incest taboo which may also serve as a deterrent.

II. CHILD SEXUAL ABUSE AND INTRAFAMILIAL CHILD SEXUAL ABUSE (INCEST)

A. Child Sexual Abuse Global and Caribbean Problem

Child sexual abuse (CSA) is a significant and *growing* global problem that harms millions of children annually.[78] Girls and boys of all ages,

76. *See* Todres, *supra* note 66, at 99.

77. *See also* RAMONA BIHOLAR, TRANSFORMING DISCRIMINATORY SEX ROLES AND GENDER STEREOTYPING: THE IMPLEMENTATION OF ARTICLE 5(A) CEDAW FOR THE REALIZATION OF WOMEN'S RIGHT TO BE FREE FROM GENDER-BASED VIOLENCE IN JAMAICA 141 (2013) ("The [interviewee] made clear that [women-deserve-beatings]-type of thinking cuts across and transcends economic groups and class structures, supporting the manifestation of gender-based violence against women as a generally accepted dynamic of male/female relations, to the extent of justifying violent behaviour."); *see generally* Camille Gibson et al., *Sexual Abuse of Minors in Jamaica: Understanding Predator, Prey, and Citizenry*, 5 J. ETHNICITY CRIM. JUST. 109, 116 (2007) ("Enforcement of the existing laws remains problematic partly because those in the legal system have their own biases which often include antiquated tendencies to blame victims for their own victimization.").

78. *See* Rana Flowers, *Child Sexual Abuse: Time for Action*, UNICEF CHINA: STORIES (Feb. 27, 2018), https://www.unicef.cn/en/stories/child-sexual-abuse (stating that child sexual abuse is a global problem); *see also* Susan Alexa Pusch et al., *The Environment of Intrafamilial Offenders – A Systematic Review of Dynamics in Incestuous Families*, 16 SEXUAL OFFENDING: THEORY, RSCH, PREVENTION 1, 2 (2021) ("Child sexual abuse is a widespread phenomenon with lasting social and health consequences."); Jude Mary Cénat et al., *Lifetime and Child Sexual Violence, Risk Factors and Mental Health Correlates Among a Nationally Representative Sample of Adolescents and Young Adults in Haiti: A Public Health Emergency*, 38 J. INTERPERSONAL VIOLENCE 2778, 2779 (2023) ("Sexual violence is a global human rights and public health concern . . . .") (first citing Brett Bowman et al., *The Impact of Violence on Development in Low- to Middle-Income Countries*, 15 INT'L J. INJ. CONTROL AND SAFETY 209 (2008); then citing Harold Dubowitz, *Child Sexual Abuse and Exploitation—A Global Glimpse*, CHILD ABUSE AND NEGLECT, Feb. 23, 2017; then citing David Finkelhor, *The International Epidemiology of Child Sexual Abuse*, 18 CHILD ABUSE AND NEGLECT 409 (1994) [hereinafter Finkelhor, *Child Sexual Abuse*]; then citing WHO, WORLD REPORT ON VIOLENCE AND HEALTH (Etienne G. Krug et al. eds., 2002); then citing Marije Stoltenborgh et al., *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*, 16 CHILD MALTREATMENT 79 (2011); and then citing CLAUDIA GARCIA-MORENO ET AL., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN:

including infants, are at risk for child sexual abuse.[79] Global data shows, however, that girls, in particular adolescent girls, are more likely to be victims of child sexual abuse.[80] In underscoring the prevalence of the problem, "child sexual abuse occurs in all countries and across all racial, ethnic, religious and socio-economic groups."[81] Horrifying but true, men and women of all ages, social class, educational background, and professional status sexually abuse children.[82] However, reported data indicates that child sexual abusers are most often adult heterosexual and homosexual men.[83]

Existing data fails to capture the true extent of the global child sexual abuse problem in large part because child sexual abuse often occurs in silence, is shrouded in secrecy,[84] and often remains unreported or underreported.[85] Another factor that aids in masking the true extent of the problem is the lack of global and sometimes national consensus on what

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PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE (WHO et al. eds., 2013)); ADELE D. JONES & ENA TROTMAN JEMMOTT, CHILD SEXUAL ABUSE IN THE EASTERN CARIBBEAN: THE REPORT OF A STUDY CARRIED OUT ACROSS THE EASTERN CARIBBEAN DURING THE PERIOD OCTOBER 2008 TO JUNE 2009 55-56 (2009) [hereinafter JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY] ("Sexual activity between an adult and a child or between a young person and a younger child involves a violation of the rights and personhood of the child, often with severe and long-lasting psychosocial consequences, and that the coercion and betrayal of trust involved in most acts of child sexual abuse is deeply destructive to both child and family.").

79. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 55 (noting that child sexual abuse "is far more common than previously thought and affects children of all ages, including infants").

80. *See id.* at 224 ("Both boys and girls are sexually abused although girls are more at risk."); Pusch et al., *supra* note 78, at 2; *cf.* David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE CHILD. 31, 48 (1994) [hereinafter Finkelhor, *Nature of Child Sexual Abuse*] ("[B]oys are much more frequently abused than the ratio of reported cases would suggest.").

81. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 55.

82. *See id.* at 238; ADELE D. JONES & ENA TROTMAN JEMMOTT, CHILD SEXUAL ABUSE IN THE EASTERN CARIBBEAN: ISSUES FOR BARBADOS 11 (2009) [hereinafter JONES & JEMMOTT, ISSUES FOR BARBADOS] (detailing findings of a study that confirmed other studies indicating that "most child sexual abuse is committed by adult men (both heterosexual and homosexual) of all ages and across all levels of social class, educational background and professional status"); Sheron C. Burns, *The Ontology and Social Construction of Childhood in the Caribbean, in* UNDERSTANDING CHILD SEXUAL ABUSE: PERSPECTIVES FROM THE CARIBBEAN, *supra* note 70, at 34 (acknowledging that "[a]n abuser may be a man or woman").

83. JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 11.

84. *See id.* at 125.

85. UNICEF OFF. FOR BARB. AND E. CARIBBEAN, CHILD SEXUAL ABUSE IN THE EASTERN CARIBBEAN: PERCEPTIONS OF, ATTITUDES TO, AND OPINIONS ON CHILD SEXUAL ABUSE IN THE EASTERN CARIBBEAN 10 (2010) [hereinafter CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS]; *id.* at 125-26 (noting that intrafamilial child sexual abuse is most likely to go under or unreported); JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 148.

constitutes child sexual abuse.[86] Although studies show that child sexual abuse is a significant and growing global problem, the definition of what constitutes child sexual abuse varies across countries and jurisdictions.[87] Countries sometimes look to the World Health Organization's (WHO) definition of CSA for guidance. The United Nations Convention on the Rights of the Child, to which Jamaica is a signatory,[88] and the World Health Organization define a child as a person under 18 years of age.[89] The WHO defines child sexual abuse as "the involvement of a child in sexual activity that [they] do[] not fully comprehend, are unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws of social taboos of society."[90] To explain, "[c]hild sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust of power, the activity being intended to gratify the needs of the other person."[91] Put more concretely, CSA may include any inappropriate contact or non-contact sexual interaction or behavior between an adult and a child.[92] For example, contact with the child victim, such as fondling, asking the child to touch their or an adult's genitalia; intimate kissing; and oral, anal, or vaginal intercourse typically qualifies as child sexual abuse.[93] CSA may also include "non-contact activities," such as involving the child in watching sexual activities, encouraging the child to behave in sexually explicit ways, and exposing the child to inappropriate

86. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 77; Jeffrey J. Haugaard, *The Challenge of Defining Child Sexual Abuse*, 55 AM. PSYCH. 1036, 1036 (2000) (noting that there is no commonly accepted definition of child sexual abuse and this lack inhibits "research, treatment, and advocacy efforts").

87. *See* Haugaard, *supra* note 86, at 1036.

88. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (signed and ratified by Jamaica on May 14, 1991).

89. *Id.* art.1; World Health Org., Guidelines for Medico-Legal Care for Victims of Sexual Violence, 5 (2003).

90. World Health Org., *supra* note 89, at 75.

91. *Id.*

92. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 55; Adele D. Jones & Ena Trotman Jemmott, *A Culturally Contexted Study of Perceptions, Attitudes and Opinions on Child Sexual Abuse, in* UNDERSTANDING CHILD SEXUAL ABUSE: PERSPECTIVES FROM THE CARIBBEAN, *supra* note 70, at 180 [hereinafter Jones & Jemmott, *Opinions on Child Sexual Abuse*].

93. *See* CHRISTINE FRAY ET AL., POLICY BRIEF: CHILD SEXUAL ABUSE IN JAMAICA 4 (2020), https://research.tees.ac.uk/ws/portalfiles/portal/47290326/Jamaica_Policy_Brief_Screen_View.pdf ("CSA involved physically touching the child's sexual regions or forcing the child to touch the perpetrator's sexual regions. . . .").

sexual materials such as videos and pictures.[94] Forcing or encouraging a child to become involved in prostitution or pornography also qualifies as child sexual abuse.[95]

CSA is a significant and growing problem in Jamaica and other Caribbean nations.[96] A landmark study, the first to examine attitudes toward child sexual abuse in Eastern Caribbean countries, confirmed that CSA is an escalating and widespread problem in the Caribbean.[97] The study, commissioned by UNICEF and the Governments of the Eastern Caribbean, confirmed that sexual abuse of children is in large part facilitated by increased access to the child and is often "carried out by someone well known to the child, including relatives and family friends."[98] To this end, the study unsurprisingly revealed that the main perpetrators of child sexual abuse are the partners of the children's mother or guardian, typically the husbands or boyfriends.[99]

It remains true that an overwhelming number of victims of child sexual abuse are girls, but the study also confirmed that boys in the Caribbean are sexually abused by men and women.[100] The study indicated that inherent gender inequality typically caused sexually abused boys to be neglected despite the fact that they suffer "the same harmful effects as their female counterparts."[101] Equally poignant, the social stigmatization of

94. *See* JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 9; Jennifer A. Piazza & Paula K. Lunderberg-Love, *Adult Survivors of Incest: Psychological Sequelae and Treatment*, *in* VICTIMS OF SEXUAL ASSAULT AND ABUSE: RESOURCES AND RESPONSES FOR INDIVIDUALS AND FAMILIES 157, 158 (Michele A. Paludi & Florence L. Denmark eds., 2010).

95. *See* JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 9; Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 180.

96. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 9; *see generally* Paul Miller, *Children at Risk: A Review of Sexual Abuse in Incidents and Child Protection Issues in Jamaica*, 1 OPEN REV. EDUC. RSCH. (2014).

97. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 7, 9 (noting that the countries selected: Anguilla, Barbados, Dominica, Grenada, Montserrat, St. Kitts and Nevis, are "collectively considered representative of the region").

98. Burns, *supra* note 82, at 34 (citing NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, PROTECTING CHILDREN FROM SEXUAL ABUSE: A GUIDE FOR PARENTS AND CARERS, https://learning.nspcc.org.uk/child-abuse-and-neglect/child-sexual-abuse (Oct. 31, 2024)).

99. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12 (noting that international studies "show that stepfather abuse is significantly higher than abuse by biological fathers" and finding that the presence of several stepfathers may increase risk for intrafamilial child sexual abuse); *id.* at 186 (noting that "[i]n every single interview, [incest] was cited as the most prevalent issue, with step-fathers being regarded as the main perpetrators.").

100. *See id.* at 10.

101. *See id.* at 140.

homosexuality typically guarantees that homosexual abuse of boys and girls is kept secret, causing the victims to suffer in silence.[102]

The study documented a passive acceptance of child sexual abuse among the respondents.[103] Some respondents in the study expressed alarm at the magnitude of the CSA problem, while other respondents made comments that suggested "almost an acceptance of child sexual abuse as normal and inevitable."[104] The expressed normalization of child sexual abuse explains why persons are willing to look the other way and turn a blind eye to the sexual abuse.[105] Overall, the study cautioned that CSA has "increasingly severe consequences for Caribbean societies"[106] because of "adults who carry out harmful sexual practices with children [and because of] non-abusing adults through complicity, silence, denial and failure to take appropriate action."[107]

Jamaica has one of the highest CSA rates in the Caribbean.[108] In 2019, UNICEF reported that "[s]exual violence is one of the most unsettling violations of children's rights, and one of the most rampant forms of violence against children in Jamaica."[109] High incidences of child sexual abuse across

102. *See id.* at 162.

103. *See id.* at 21.

104. *Id.*

105. *See id.* at 9.

106. *Id.*

107. *Id.*

108. Wilson-James, *supra* note 70, at 6 ("Of all the Caribbean nations, Jamaica reportedly has one of the highest CSA rates. . . .") (first citing CARIBBEAN POL'Y RSCH. INST., SITUATION ANALYSIS OF JAMAICAN CHILDREN 19–20 (2018), www.unicef.org/jamaica/sites/unicef.org.jamaica/files/2019-10/UNICEF_20180618_SituationAnalysis_web.pdf; and then citing Julie Meeks Gardner et al., *Violence Against Children in the Caribbean in* PROMOTING CHILD RIGHTS THROUGH RESEARCH: PROCEEDINGS OF THE CARIBBEAN CHILD RESEARCH CONFERENCE 2006 3 (Aldrie Henry-Lee & Julie Meeks-Gardner eds., 2008), https://www.researchgate.net/publication/300078841_Violence_against_Children_in_the_Caribbean_A_Desk_Review)); TATYANA KARPENKO-SECCOMBE ET AL., REPRESENTATIONS OF CHILD SEXUAL ABUSE IN JAMAICA: A CORPUS-ASSISTED DISCOURSE STUDY OF POPULAR NEWS MEDIA 4 (MDPI ed., 2022) ("Child sexual abuse has been a public health concern in Jamaica for several decades." (citing HENRY KEMPE, *The 1977 C. Anderson Aldrich Lecture in* C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 179 (Richard D. Krugman & Jill E. Korbin eds., 1978)); *see also* CARIBBEAN POLICY RESEARCH INSTITUTE (CAPRI), STRESS TEST: THE IMPACT OF THE PANDEMIC ON DOMESTIC AND COMMUNITY VIOLENCE 32 (2021), https://www.capricaribbean.org/sites/default/files/documents/stresstesttheimpactofthepandemicondomesticandcommunityviolence.pdf ("A 2013 survey by the Office of the Children's Registry (now the National Children's Registry), found that 90 percent of known cases of child sexual abuse remain unreported by adults who were aware of the abuse taking place." (citation omitted)).

109. UNICEF, CHILDHOOD IN JAMAICA: STAINED BY VIOLENCE 8 (2019) [hereinafter UNICEF, STAINED BY VIOLENCE].

the island's fourteen parishes[110] cement its place as a national crisis.[111] Further research also documented that child sexual abuse is one of the fastest growing crimes adversely affecting Jamaican communities, and the second most common cause of injury among females."[112] This finding may come as no surprise to national and international observers as Jamaica continues to experience one of the highest rates of sexual abuse against females, averaging more than three times the global average."[113] Consistent with the global trend, boys and girls are victims of sexual abuse[114] but reported data shows that girls are at a heightened risk.[115] Available data and media reports offered as proof of the state of child sexual violence in Jamaica suggest that female adolescents are particularly targeted.[116] In fact, "Jamaican female adolescents are eight times more likely to be sexually abused than any other group."[117] Of this group, early and middle adolescents are particularly vulnerable.[118]

110. *See* Wilson-James, *supra* note 70, at 6 ("CSA is a nationwide problem affecting female adolescents from all 14 parishes." (first citing Paul Miller, *Children at Risk: a Review of Sexual Abuse Incidents and Child Protection Issues in Jamaica*, 1 OPEN REV. EDUC. RSCH. 171, 177 (2014); and then citing U.S. Dept. of State, *Child Protection Compact Partnerships–Jamaica*, U.S. DEPT. OF STATE: CHILD PROTECTION COMPACT PARTNERSHIPS, https://www.state.gov/child-protection-compact-partnerships-jamaica/ (last visited Oct. 19, 2024))).

111. *See* Kimika M. Samms & Blaire E. Cholewa, *Exploring the Context of Child Sexual Abuse in Jamaica: Addressing the Deficits*, 23 J. CHILD SEXUAL ABUSE 115, 116 (2014) ("[S]tatistics available on child abuse in Jamaica reveal that sexual abuse is the third most prevalent reason for children seeking medical attention." (citation omitted)); Wilson-James, *supra* note 70, at 139.

112. *See* Wilson-James, *supra* note 70, at 27 (citing Smith et al., *supra* note 67, at 3); Kimberley Hibbert, *Those Incest 'Hot Spot' Parishes,* JAM. OBSERVER (June 28, 2020) [hereinafter Hibbert, *Incest 'Hot Spot'*] ("[T]he data from the Jamaica Injury Surveillance System, which shows that over the 2014 to 2017 period, 20 per cent of all child visits to public hospitals were due to sexual assault. The [National Plan of Action for an Integrated Response to Children and Violence 2018-2023] added that females are overrepresented as victims of sexual assaults as 40 per cent of all female child visits were because of a sexual assault.").

113. *See* Wilson-James, *supra* note 70, at 27 (citing Smith et al., *supra* note 67).

114. *See* AMNESTY INT'L, JAMAICA: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN JAMAICA: "JUST A LITTLE SEX" 3 (2006).

115. *See* UNICEF, STAINED BY VIOLENCE, *supra* note 109, at 8 ("[G]irls are generally at heightened risk.").

116. *See* GOV'T OF JAM., NATIONAL PLAN OF ACTION FOR AN INTEGRATED RESPONSE TO CHILDREN AND VIOLENCE (NPACV) 2018-2023 6 (2018) [hereinafter NATIONAL PLAN OF ACTION] (noting that girls are "over-represented as victims of sexual assault"); Wilson-James, *supra* note 70, at 9 (citing Murat Yuce et al., *The Psychiatric Consequences of Child and Adolescent Sexual Abuse*, 52 NORO PSIKIYATR ARS. 393, 393–94 (2015)).

117. *See* Wilson-James, *supra* note 70, at 8 (first citing David AN et al., *Child Sexual Abuse: A Hidden Epidemic*, 7 NIGERIAN J. CLINICAL & BIOMEDICAL RSCH. 6 (2016); then citing Miller, *supra* note 110, and then citing Samms & Cholewa*, supra* note 111).

118. *See* Carlene Davis, *Despite Taboo, Incest Alive in Jamaica*, THE GLEANER (Nov. 3, 2019, 12:00 AM), http://jamaica-gleaner.com/article/lead-stories/20191103/despite-taboo-incest-alive-jamaica [hereinafter *Incest Alive in Jamaica*].

Jamaica-based researcher and clinical social worker Dr. Claudette Crawford-Brown noted that "young girls at 10 -14 age are very, very high risk."[119]

Commenters have attributed the prevalence of child sexual abuse in Jamaica in part to an existing rape culture, normalized pedophilia,[120] and archaic patriarchal beliefs among men and women alike that male breadwinners are entitled to have sexual relations with all females in the household.[121] To illustrate the problem of normalized pedophilia, men of all ages and on all sides of the economic and social strata are having sexual relationships with adolescent girls, and the behavior is "normalized."[122] What is more, culturally entrenched beliefs that reaching puberty signifies the end of childhood are often used to sanction this behavior.[123] As a result, albeit still considered children under the law, early and middle adolescent girls are considered legitimate sexual targets by some men, including men who maintain a parent-child relationship with the child.[124]

Patriarchal beliefs that men are entitled to sexual relations with females within their household is another entrenched cultural norm that increases the risks of child sexual abuse in Jamaica, particularly among female adolescents.[125] Researcher Dr. Valeta Wilson-James argues that "[i]n Jamaica, violence against females is deep[ly]-rooted in patriarchal beliefs of male dominance and female subordination."[126] These patriarchal beliefs

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119. *Id.*

120. *See* Yasmine Peru, *Nadine Sutherland Blasts 'Rape Culture'; Praises Young Creatives*, THE GLEANER (Oct. 9, 2021, 12:09 AM), https://jamaica-gleaner.com/article/entertainment/20211009/nadine-sutherland-blasts-rape-culture-praises-young-creatives.

121. *See* Wilson-James, *supra* note 70, at 147; *see also* Lucy M. Candib, *Incest and Other Harms to Daughters Across Cultures: Maternal Complicity and Patriarchal Power*, 22 WOMEN'S STUD. INT'L F. 185, 197 (1999) ("[P]atriarchal domination characterizes the incest family and perpetuates sexual abuse across the generations.").

122. *See* Peru, *supra* note 120 ("Men – both uptown and downtown – were having relationships with 13-year-old girls, and it was normalized."); *see also* CAPRI, *supra* note 108, at 2 ("The widespread acceptance and approval of girls 12-and-up engaging in sexual relationships where it appears the girl has 'given her consent,' is problematic . . . .").

123. *See* CAPRI, *supra* note 108, at 37 (stating that young girls from 12 years old can become a source of income for their family through transactional sex); Jones and Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 179-80 ("[T]here were a significant number of people who believe that childhood ends once a child begins puberty. This partially explains why children were considered by some men to be legitimate sexual targets once they were thought to have made the biological transition to adolescence.").

124. *See* CAPRI, *supra* note 108, at 36-37.

125. *See* Samms & Cholewa, *supra* note 111, at 116; Wilson-James, *supra* note 70, at 20 (citing *id.*).

126. *See* Wilson-James, *supra* note 70, at 26 (first citing Dolores E. Smith, *Prevalence of Intimate Partner Violence in Jamaica: Implications for Prevention and Intervention*, 7 INT'L J. CHILD, YOUTH & FAM. STUD. 343, 353 (2016); then citing Tania Lucia Gaona et al., *Crime and*

encourage male sexual entitlement and trivialize inappropriate male behavior towards females in Jamaica.[127] Dr. Wilson-James further argues that these patriarchal beliefs flow from longstanding cultural norms "that there is a hierarchical power structure" and that males are inherently superior to females.[128] Dr. Wilson-James surmises that these cultural norms are problematic and should be addressed because "culture establishes normative behavior," which, in turn, normalizes harmful behaviors, such as widespread violence against women and children, and causes these harmful behaviors to become ingrained as a part of the fabric of society.[129] As an example, patriarchal beliefs and normalized pedophilia contribute to causing adult males and females in Jamaica to "willfully disregard" Jamaica's Sexual Offences Act, legislation that makes sexual relations between an adult and a person under sixteen years old illegal.[130]

The three most prevalent forms of CSA in Jamaica are intrafamilial abuse, non-family abuse, and transactional sexual abuse.[131] Intrafamilial child sexual abuse most often occurs within the privacy of the home and typically at the hands of family members, including fathers, stepfathers, mother's boyfriends, grandfathers, uncles, and older brothers.[132] Intrafamilial sexual abuse is arguably the worst and most destructive form of child sexual abuse because of the perpetrator's position of trust and power over the child,[133] yet the least likely to be reported for several reasons,

Violence in the Caribbean 4 (2015), https://www.academia.edu/13807308/CRIME_AND_VIOLENCE_IN_THE_CARIBBEAN; then citing E. Yoon et al., *Interrelations of Patriarchal Beliefs, Gender, Collectivism/Individualism, and Mental Health*, 33 COUNSELING PSYCH. Q. 199 (2020); and then citing Smith et al., *supra* note 67, at 7); *see generally* Nesha Z. Haniff*, Male Violence Against Men and Women in the Caribbean: The Case of Jamaica*, 29 J. COMPAR. FAM. STUD. 361, 361-62 (1998) (sharing Tula's story, she is a woman in Kingston Jamaica who was raped and victimized by a man whose advances she rejected and was never prosecuted so she constantly lives in fear.).

127. *See* Wilson-James, *supra* note 70, at 26.

128. *See id.* (citing Preeti S. Rawat, *Patriarchal Beliefs, Women's Empowerment, and General Well-Being* 39 VIKALPA 43, 44, https://doi.org/10.1177/0256090920140206; then citing Eunju Yoon et al., *Interrelations of Patriarchal Beliefs, Gender, Collectivism/Individualism, and Mental Health*, COUNSELLING PSYCH. Q. 1, 1 (2018), https://doi.org/10.1080/09515070.2018.1511520).

129. *See id.* at 20 (quoting Lorna Grant, *Violence in Jamaica's High Schools*, 10 AFR. J. CRIMINOLOGY & JUST. STUD. 39, 40–41 (2017)).

130. *See id.* at 26.

131. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 188.

132. *See id.* at 190.

133. Abigail Gill, *Updating the Criminal Law on Child Neglect: Protecting Children from Severe Emotional Abuse*, 2 IALS STUDENT L. REV. 41, 42 (2014) (citing JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD (Jossey-Bass ed., 1986)); *see* James A. Roffee, *Incest in Scots Law: Missed Opportunities in the Scottish Law Commission Review*, 10 CONTEMP. ISSUES L. 168, 175 (2010) ("Incest is a violation of a position of trust, power, and protection." (quoting MIKE LEW, VICTIMS NO LONGER 29 (Nevraumont Publishing Co. ed., 2004))).

including the strong culture of silence that accompanies child sexual abuse[134] and the "deep reluctance to believe that children may be sexually abused in their own homes."[135] In many societies, intrafamilial child sexual abuse is synonymous with incest and carries the incest taboo. The second form, extrafamilial child sexual abuse, is perpetrated by individuals unrelated to the child victim by blood or affinity and typically occurs outside of the home.[136] Extrafamilial child sexual abuse is more likely to be reported than intrafamilial child sexual abuse.[137]

The third form of child sexual abuse is transactional child sexual abuse which is sexual relations or interactions with a male or female child exchanged for money, goods, and favors.[138] Transactional child sexual abuse primarily involves older men and teenage girls, and "increasingly adolescent boys."[139] Children involved in transactional sex are not viewed as victims.[140] Instead, transactional child sexual abuse in Jamaica is normalized and viewed as any other quid pro quo transaction.[141] Inconsiderate to the psychological and emotional harm of early sexualization on children, the male offenders often haughtily conclude that they are merely helping poor families when they engage in transactional sexual relations with the underage girls, and boys, some of whom are under the age of twelve years old.[142] Parents, communities, and officials are often aware of incidences of transactional child sexual abuse and either condone it or turn a blind eye, following a pattern of nonchalance, "a no nothing," and acceptance.[143] Consequently,

134. See UNICEF, STAINED BY VIOLENCE, *supra* note 109, at 8 ("Widespread inter-generational and transactional sex, harmful social norms and a culture of silence . . . . The perception that some forms of violence are an ordinary part of growing up can make child victims less likely to report or think of themselves as in need of help.").

135. J. S. La Fontaine, *Child Sexual Abuse and the Incest Taboo: Practical Problems and Theoretical Issues*, 23 MAN J. ROYAL ANTHROPOLOGICAL INST. 1, 10 (1988).

136. *See* Hibbert, *Incest 'Hot Spot'*, *supra* note 112 (stating details from a study by Jamaica's National Plan of Action for an Integrated Response to Children and Violence 2018 – 2023 which revealed that "a majority of the sexual abuse cases reported, the perpetrator was known by the victim –a relative, friend, acquaintance, or intimate partner – while the minority of cases were perpetrated by a stranger").

137. *See* La Fontaine, *supra* note 135, at 10.

138. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 191.

139. *See id.* ("[Transactional sexual abuse] is committed primarily by men (although cases involving women were also reported) at all levels of society, including politicians and senior professionals.").

140. *See* CAPRI, *supra* note 108, at 36.

141. *See id.*

142. *See id.*

143. *See id.* at 36-37.

transactional child sexual abuse often goes unpunished, denying the child the basic human right to be free from sexual abuse.[144]

This Article focuses on intrafamilial sexual abuse, which reports indicate is on the rise in Jamaica.[145] A 2021 study by Caribbean Policy Research Institute documented an increase in intrafamilial child sexual abuse in Jamaica, particularly at the hands of stepfathers, and a mother's or a guardian's boyfriends.[146]

B. Intrafamilial Child Sexual Abuse, Incest, and the Incest Taboo

Intrafamilial child sexual abuse is known as incest in many societies.[147] The word "incest" comes from the "Latin word *incestum* and refers to sexual union with a near relative."[148] Who is considered a near relative varies among societies and is based on how the society defines family.[149] Pre-modern Western societies defined family based solely on consanguineal bonds.[150] This means that only blood relatives could be considered family. During pre-modern times, societies were organized around kinship, sexuality, and strict lines of inheritance.[151] Only blood relatives were considered legitimate

144. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 191.

145. See Albert Ferguson, *Incest rampant in Trelawny – police,* THE GLEANER (June 30, 2023, 12:42 AM), https://jamaica-gleaner.com/article/news/20230630/incest-rampant-trelawny-police.

146. *See* CAPRI, *supra* note 108, at 33; *St. Mary Police Report Disturbing Trend of Child Sexual Offences*, THE GLEANER (Jan. 15, 2021, 6:09 PM), https://jamaica-gleaner.com/article/news/20210115/st-mary-police-report-disturbing-trend-child-sexual-offences (featuring statement of Superintendent Bobette Morgan-Simpson about "sexual crimes especially those involving children being abused by their stepfathers while their mothers remain silent" with Morgan-Simpson stating that "[s]ome of these cases are not reported until a long time after and it is only some time when these children can't take it any longer; they have had enough, cup over-full that is when they decide to talk").

147. *See* Nahia Idoiaga Mondragon et al., *The Breaking of Secrecy: Analysis of the Hashtag #MeTooInceste Regarding Testimonies of Sexual Incest Abuse in Childhood*, 123 CHILD ABUSE & NEGLECT 1, 2 (2022) (equating incest abuse to intrafamilial sexual abuse) (first citing DOROTHEE DUSSY, LE BERCEAU DES DOMINATIONS [The Cradle of Domination] (2013); and then citing Donald E. Greydanus & Joav Merrick, *Incest: Child Sexual Abuse Within the* Family, 10 INT'L J. CHILD & ADOLESCENT HEALTH 295, 297 (2017)); Nancy L. Fischer, *Oedipus Wrecked? The Moral Boundaries of Incest*, 17 GENDER & SOC'Y 92, 97 (2003).

148. JONATHAN H. TURNER & ALEXANDRA MARYANSKI, INCEST: ORIGINS OF THE TABOO 1 (Routledge ed., 2016).

149. *See* Fischer, *supra* note 147, at 107; Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of The Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 285-86 (2001) (citing AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch.2 (Matthew Bender & Co., Inc. ed., 2002)).

150. *See* Fischer, *supra* note 147, at 107.

151. *See id.* at 94 (first citing MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION 106 (Robert Hurley trans. Random House Inc. ed., 1978); CLAUDE LÉVI-

heirs.[152] Consequently, to ensure that "wealth circulated among families only though legitimate kin,"[153] social rule governed who could marry and restricted legitimate sexual relations solely to married partners.[154] "Marriage between a man and a woman was considered the foundation of the family and the only acceptable way of forming a new family."[155]

Contemporary modern Western societies have moved away from defining family based solely on consanguineal bonds.[156] More explicitly, the twentieth century heralded fundamental shifts in kinship that expanded the definition of family to include relations by blood, law, and also cohabitation.[157] This expansion has led to the recognition of a greater diversity of family forms such as "adoptive families, stepfamilies, families headed by cohabitants, and single-parent families."[158] Today in many contemporary Western societies, reconstituted families and single-parent families have become more common than traditional nuclear families.[159] Rising divorce rates, remarriages, and the choice to parent but not to get married "have made reconstituted families-families configured with a mix of biological and step-relatives such as stepparents, stepsiblings, or half siblings," and single-parent families "more common than the traditional nuclear family consisting of two parents and their biologically related children."[160] Notwithstanding the visible and pervasive reality of diverse

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STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (James Harle Bell & John Richard von Sturmer trans., Rodney Needham ed., 1969); then citing Gayle Rubin & Judith Butler, *Interview: Sexual Traffic*, 6 DIFFERENCES J. FEMINIST CULTURAL STUD. 62 (1994); and then citing JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 4, 9 (2nd ed. 1997)).

152. *Id.*

153. *Id.*

154. *Id.*

155. Leeni Hansson, *Towards a Definition of the Family?*, *in* SPOTLIGHTS ON CONTEMPORARY FAMILY LIFE 11, 12 (Linden Farrer & William Lay eds., 2011).

156. *See* Fischer, *supra* note 147, at 95 ("[T]wentieth-century kinship has increasingly moved away from blood relations as defining families.").

157. *See id.*

158. *Id.*

159. *Id.* (first citing Jane D. Bock, *Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER & SOC'Y 62, 63-64 (2000); and then citing NAOMI MILLER, SINGLE PARENTS BY CHOICE: A GROWING TREND IN FAMILY LIFE 11-12 (1992)); *see* Tatjana Hörnle, *Consensual Adult Incest: A Sex Offense*?, 17 NEW CRIM. L. REV. 76, 94 (2014) ("In modern times, with numerous divorces, unmarried partners, and reproductive medicine, diverging forms of families have complemented the more traditional notion.").

160. Fischer, *supra* note 147, at 95 (first citing STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 182 (BasicBooks ed., 1992); then citing ARLENE SKOLNICK, EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY 130 (BasicBooks ed., 1991); then citing Bock, *supra* note 159; and then citing MILLER, *supra* note 159); *see* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to*

family forms, some contemporary Western countries continue to define family solely based on consanguineal and legal ties.[161] In a like manner, some of these countries continue to view the traditional nuclear family as the ideal family type and choose to recognize only a family "based on heterosexual marriage, children, and a common place of residence" as the "traditional normative family."[162]

The change in family structure has influenced a change in the definition of incest in some jurisdictions. In pre-modern Western societies when family was defined solely along consanguineal lines, incest was narrowly defined to include only sexual relations, and in some instances marriage—but not sexual relations—with blood relatives within the nuclear family.[163] Social rules strictly prohibited marriage and sexual relations between blood relatives within the nuclear family on the grounds that such sexual relations were morally wrong,[164] would contaminate the gene pool and cause genetically abnormal children, cause discord within the family, undermine the family structure, and "confuse lines of inheritance around which pre-modern society was organized."[165] Put another way, incest was tabooed.

Their Stepchildren, 40 FAM. L. Q. 81, 82 (2006) [[hereinafter Mahoney, *Stepparents as Third Parties*] ("In more recent decades, the number of stepfamilies in the United States has increased dramatically, due to the increased numbers of never-before-married mothers who marry men other than the fathers of their children and custodial parents who remarry following a divorce.").

161. *See* Leeni Hansson, *supra* note 155, at 14.

162. *Id.* at 14-15 (first citing John Scanzoni, *From the Normal Family to Alternate Families to the Quest for Diversity with Interdependence*, 22 J. FAM. ISSUES 688, 695 (2001); and then citing Riitta Jallinoja, *Alternative Family Patterns; Their Lot in Family Sociology and in the Life-Worlds of Ordinary People*, 7 INNOVATION: EUR. J. SOC. SCIS. 15 (1994)); *see* Ramsey, *supra* note 149, at 285 ("The nuclear family, consisting of a married, heterosexual couple and their biological children, is still considered by many to be the preferred family form. However, a large number of children are not living in families that fit the nuclear family model because they have multiple adults in parental roles. Nonetheless, the nuclear family model is a powerful ideal and is used as a template to exclude those who do not fit within its pattern.").

163. Fischer, *supra* note 147, at 93–94 (first citing FOUCAULT, supra note 151; then citing LÉVI-STRAUSS, *supra* note 153; then citing Rubin & Butler, *supra* note 151; and then citing D'EMILIO & FREEDMAN, *supra* note 151).

164. *See* Fischer, *supra* note 147, at 95 (citing VIKKI BELL, INTERROGATING INCEST: FEMINISM, FOUCAULT AND THE LAW 130 (Maureen Cain & Carol Smart eds., 1993)); *see also* Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J. L. & PUB. POL'Y 262, 273 (2000) (noting that the United States' and England's "long religious history of incest taboos," states used community morals as another reason to justify prohibiting certain marriages) (first citing Margaret Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21, 28 (1993) [hereinafter Mahoney, *Legal Definition of the Stepfamily*]; and then citing Carolyn Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?* 18 FAM. L. Q. 257, 258 (1984)).

165. *See* Fischer, *supra* note 147, at 107; *see* Mahoney, *Legal Definition of the Stepfamily*, *supra* note 164, at 29 ("[T]he incest ban strengthens and stabilizes family relationships by removing the potential for sexual unions and jealousy within the family household.").

Taboos are actions or behaviors typically deemed culturally unacceptable and prohibited by society.[166] Taboos influence all aspects of our lives, including "[t]he [way] we behave, dress, eat, and drive, as well as our sex life."[167] The incest taboo made incest morally reprehensible and in some pre-modern societies, a crime.[168]

Contemporary changes in family structure have expanded the definition of incest.[169] With the shift from the traditional nuclear family as the dominant family structure, contemporary Western societies are trending away from defining incest solely based on consanguinity. Instead, they are adopting a broader definition of incest that mirrors the modern family structure with a diversity of family forms.[170] As an example, in addition to biological incest, which is incest based on blood relations, some contemporary Western societies, such as the United Kingdom, recognize sociolegal incest.[171] Sociolegal incest is defined as "sexual contact or attempted contact by an adult toward a child who is socio-legally but not genetically related to the [child] victim."[172] This means that the offender is not related to the victim by blood, but instead by law or affinity.[173] Victims of sociolegal incest typically include "stepchildren, adopted children, common-law children (i.e., the child of the offender's romantic partner, with whom they had been living with for at least one year), and other legally related relatives (e.g., step-siblings)."[174]

The rise in reconstituted and single-parent families, which often gives nonblood relatives increased access, power, and control over children within a household, has influenced scholars researching the impact of incest to

166. *See* Chaim Fershtman et al., *Taboos and Identity: Considering the Unthinkable*, 3 AM. ECON. J. MICROECONOMICS 139, 139 (2011).

167. *Id.*

168. *See* Bratt, *supra* note 164, at 257 ("The mere word 'incest' triggers strong feelings of revulsion in most people."); Michelle Murray, *Problems with California's Definition of Incest*, 11 J. CONTEMP. LEGAL ISSUES 104, 104-05 (2000) ("Incest taboos can be traced at least as far back as the Levitical Codes . . . The Old Testament's prohibitions, for example, include the consanguineous relationships of parent-child, full siblings and half siblings, aunts/uncles and nephews/nieces, and the relationships-by-affinity of spouse's sibling, spouse's parent, spouse's child, parent's spouse, sibling's spouse, child's spouse, and aunt's or uncle's spouse." (first quoting *Leviticus* 18:6-18; and then quoting *Leviticus* 20:11-21)).

169. *See* Fischer, *supra* note 147, at 107 ("Changes in institutions of family and kinship have transformed the meaning of incest.").

170. *See* TURNER & MARYANSKI, *supra* note 148, at 2 ("While the incest taboo applies worldwide to the nuclear family, customs and laws often extend the prohibition to other relationships, well beyond the nuclear unit."); Fischer, *supra* note 147, at 107.

171. *See* Lesleigh E. Pullman et al., *Differences Between Biological and Sociolegal Incest Offenders: A Meta-analysis*, 34 AGGRESSION & VIOLENT BEHAV. 228, 229 (2017).

172. *Id.*

173. *Id.*

174. *Id.*

advocate for an even broader definition of incest. Specifically, these scholars suggest that incest is, in large part, facilitated by power, access, and control, therefore the discussion of incest as a moral issue must consider power relations and an abuse of power.[175] They explained that morals and social norms centered on protecting children from sexual abuse necessitates an expansion in the meaning of incest to include "the sexual exploitation of emotional ties between relatives of all sorts including stepfamily, blood relatives, and chosen kin."[176] In short, a modern definition of incest should "include anyone responsible for the care of the child, including a nonblood relative, step-parents, or anyone who has assumed a family role."[177] A mother's or guardian's boyfriend or companion would fall within this modern definition of incest.

Like in pre-modern Western societies, incest in contemporary Western societies is considered a taboo. The incest taboo remains strong and universally recognized.[178] In fact, almost all cultures worldwide have proscribed incest, cementing its place as "the only universal taboo."[179] Leading expert and researcher on crimes against children, David Finkelhor, describes incest as "the ultimate taboo"[180] and the "gravest violations of the rules of human society."[181] This is so, in large part, because of incest's perceived power to produce genetically defective children; and threaten and destabilize the family—the foundation of society.[182] As in pre-modern societies, the incest taboo is intended to protect against genetically defective

175. *See* Fischer, *supra* note 147, at 107.

176. *Id.*

177. Piazza & Lunderberg-Love, *supra* note 94, at 158 (citing KATHRYN BROHL & JOYCE CASE POTTER, WHEN YOUR CHILD HAS BEEN MOLESTED: A PARENTS' GUIDE TO HEALING AND RECOVERY 165 (Jossey-Bass ed., 2004)).

178. *See* Note, *supra* note 64, at 2464 (first citing FOUCAULT, *supra* note 151; and then citing Bratt, *supra* note 164).

179. *See* Fershtman et al., *supra* note 166, at 140.

180. FINKELHOR, *supra* note 71, at 85.

181. *Id.*; *see also* Bratt, *supra* note 164, at 257 ("The mere word 'incest' triggers strong feelings of revulsion in most people."); Pusch et al., *supra* note 78, at 2 ("[i]ncest taboo is valid across cultures, and feelings of disgust and rejection about the idea of sexual intercourse with a close relative are common among the general population.") (citing Michael C. Seto et al., *The Puzzle of Intrafamilial Child Sexual Abuse: A Meta-Analysis Comparing Intrafamilial and Extrafamilial Offenders with Child Victims*, 39 CLINICAL PSYCH. REV. 42, 44 (2016)).

182. *See* Joyce McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 163 (1992) ("[I]ncest ultimately harms society.") (first citing HERBERT MAISCH, INCEST (Hans Giese & Fernando Henriques eds., Colin Bearne trans., 1972); and then citing Roland C. Summit, *Hidden Victims*, *Hidden Pain*: *Societal Avoidance of Child Sexual Abuse*, *in* LASTING EFFECTS OF CHILD SEXUAL ABUSE 39, 40 (Gail Elizabeth Wyatt & Gloria Johnson Powell eds., 1988)).

offspring and protect the integrity of the family unit and society.[183] The incest taboo also serves another important purpose, "permitting the development of children in safe environments, free of sexual exploitation."[184] More explicitly, the incest taboo serves to protect children from sexual abuse at the hands of relatives and persons domiciled in the same household who exercise power and control over the children.[185] The incest taboo furthers a fundamental human rights goal that children should be free from sexual abuse in any environment, and particularly within their households.[186]

C. Intrafamilial Child Sexual Abuse, Incest, and the Modern Family

Global research on intrafamilial child sexual abuse shows that intrafamilial child sexual abuse occurs in all family structures, including nuclear families, cohabiting families, and blended and single-parent families.[187] Intrafamilial child sexual abuse also happens in families of all

183. *See* Coleman, *supra* note 66, at 258 (Reasons advanced for the origin of the incest taboo include: protection against genetic defects in offspring; protection of the child victim; protection of the family unit; and protection of society."); *see also* Murray, *supra* note 168, at 109 n.24 (**"**Over time, and from one period to another, society's general attitude toward incest has vacillated in relation to five distinct rationales: religious tenets; quasi-scientific beliefs about genetics; protection of the family unit (preventing sexual competition within familial relationships); reinforcement of community norms (suppression of behavior the community condemns); and protection of children (preventing sexual molestation by adult relatives)." (citing AM. L. INST., COMMENTARY TO MODEL PENAL CODE § 230.2 at 402–07 (1980))).

184. *See* Zanita E. Fenton, *An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOW. L.J. 319, 321 (2012) (citing Margaret Mead, *Anomalies in American Postdivorce Relationships*, *in* DIVORCE AND AFTER 97, 104–08 (Paul Bohannan ed., 1970)).

185. *See* Coleman, *supra* note 66, at 258; *see also* Mahoney, *Legal Definition of the Stepfamily*, *supra* note 164, at 29 (1993) ("A final justification for the regulation of sexual relationships between close relatives is the protection of weak family members from sexual overreaching by more powerful relatives, especially during childhood." (citing AM. L. INST, *supra* note 185, § 230.2.2(e))); *Benton v. State*, 461 S.E.2d 202, 205 (1995) (Sears, J., concurring), *overruled by State v. Burns*, 829 S.E.2d 367, 374 (2019) ("First, the restriction forces family members to go outside their families to find sexual partners. Requiring people to pursue relationships outside family boundaries helps to form important economic and political alliances, and makes a larger society possible. A second purpose of the taboo, as the majority aptly points out, is maintaining the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members.").

186. *See* Fenton, *supra* note 184, at 321 (citing Mead, *supra* note 184, at 104).

187. Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 188 ("[i]ncest occurs in both rich and poor families, in all communities, cuts across social class and is not affected by levels of education, religious affiliation, professional status or social standing."); *see generally* Pullman et al., *supra* note 171, at 228 (stating that child sexual abuse is prevalent globally and one third of the cases are perpetrated by family members).

economic, educational, and religious backgrounds.[188] Put another way, intrafamilial child sexual abuse occurs in rich and poor families, educated and undereducated families, and religious and secular families.[189]

The prevailing narrative on intrafamilial child sexual abuse in many societies is that intrafamilial child sexual abuse occurs mostly in poor and non-traditional families.[190] This narrative lacks merit. There is a significant body of literature that supports the proposition that intrafamilial child sexual abuse occurs primarily in poorer families and non-traditional families, but there is an equally significant body of research that negates this proposition.[191]

To be clear, poverty increases the risk of intrafamilial child sexual abuse, and particularly in instances where poverty creates increased access to children in a household.[192] This is typically so in poor families that experience inadequate housing, which reduces or takes away physical boundaries between adults and children. For example, when adults and children live in tight spaces or have to share beds, bedrooms, and unsecure bathrooms, typically the children become more vulnerable and exposed to the sexual activities of the adults.[193] Equally vulnerable are children in families and communities that are alienated from mainstream society or choose to live in social isolation.[194]

Poverty also increases the risk of intrafamilial child sexual abuse particularly where a female parent or guardian must work multiple jobs or

188. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 189.

189. *See id.*

190. *See* Vivian Song, *France is Having Its Reckoning With Incest, in 2021*, VICE (Jan. 29, 2021, 1:48 PM), https://www.vice.com/en/article/4ad55w/france-is-having-its-reckoning-with-incest-in-2021; Gibson et al., *supra* note 77, at 111 (noting that sexual abuse of minors in Jamaica happens in poor, wealthy and middle class families) (citing UNITED NATIONS DEVELOPMENT PROGRAM, NATIONAL REPORTS ON THE SITUATION OF GENDER VIOLENCE AGAINST WOMEN: NATIONAL REPORT JAMAICA (1999)).

191. *See* CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 10 (stating that child sexual abuse occurs across all socioeconomic groups); *see generally* Candib, *supra* note 121, at 186 ("[H]istorical and contemporary studies reveal that the absence of a protective mother is a risk factor for intrafamilial sexual abuse.") (first citing to Jillian Fleming et al., *A Study of Potential Risk Factors for Sexual Abuse in Childhood*, 21 CHILD ABUSE & NEGLECT 49 (1997); and then citing LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (University of Illinois Press 1988)).

192. *See* CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 11.

193. *See* Bowman & Brundige, *supra* note 67 at 248 (first citing SAVE THE CHILDREN, A SECTOR REVIEW OF CHILD ABUSE AND EXPLOITATION IN SOUTH AFRICA (2003); then citing WOMEN AND L. IN SOUTHERN AFR. RSCH. TR. (BOTSWANA), No Safe Place (Lightbooks 2002); and then citing Tabisile Msezane, *Sexual Exploitation of Girl Children Growing Up on Farms*, in THE NATIONAL CONSULTATIVE CONFERENCE AGAINST THE SEXUAL EXPLOITATION OF CHILDREN 60 (Rose Barnes-September et al., eds., 1999)).

194. *See* Candib, *supra* note 121, at 195.

work outside the home and is away from home for extended periods leaving her children unsupervised;[195] or where a female head of household takes on multiple partners or a predatory partner to ensure the financial support of the household.[196]

Poverty on its own, however, is only one of the many risk factors for incest. Incest also happens in rich and privileged families.[197] As French psychologist Marie Bréhu points out, "[t]he biggest myth around incest is that it only happens within poor families, in the countryside and rural areas, and among the lower, disadvantaged classes."[198] Ms. Bréhu dispels this myth by pointing out that incest does not occur only in "one particular social class."[199] Instead, incest occurs in all social classes and at all "levels of education, religious affiliation, professional status or social standing."[200] In one sense, "children in the best-off families may be most at risk."[201] Sophie Legrand, a judge in the children's court in the city of Tours, said social services authorities tend to intervene in families that are economically or socially deprived but "in very privileged social circles, there are rarely any signs of alert."[202] In short, it is rare if at all, that incest in "best-off families" would be reported to the authorities leaving the victim to suffer in silence.[203]

Research overwhelmingly demonstrates that intrafamilial child sexual abuse is typically a crime of access and power.[204] To explain, perpetrators of intrafamilial child sexual abuse typically have higher access to the child victim because the perpetrator typically lives in, or frequently visits, the

195. *See* CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 12 ("Respondents . . . identified inadequate parental supervision as a causal factor, especially with regard to mothers who were working late at night and allowing children to be supervised by their partners or boyfriends.").

196. *See id.* at 12.

197. *See* Song, *supra* note 190.

198. *Id.*

199. *Id.*

200. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12.

201. Robert Holloway, *In France, Breaking the Code of Silence on Incest*, NEWS DECODER (Mar. 15, 2021), https://news-decoder.com/in-france-breaking-the-code-of-silence-on-incest/.

202. *Id.*

203. *Id.*; *see* Ryon Jones, *Sexual Abuse a Harsh Reality For Hundreds of Jamaican Children*, THE GLEANER (Jan. 30, 2015, 1:20 PM), http://jamaica-gleaner.com/article/news/20150208/sexual-abuse-harsh-reality-hundreds-jamaican-children (stating that socioeconomic status affect the reporting of child sexual abuse in Jamaica since most cases reported to law enforcement are of low income people while "the upper class will go to their private doctors as they are trying to protect their image").

204. *See* Pullman et al., *supra* note 171, at 231.

household where the child resides.[205] Furthermore, for the most part, the perpetrator may have caregiving responsibilities, authority, and power over the child and the child typically considers the perpetrator as a protector.[206] Overall, the relationship between the victim and perpetrator is typically characterized by power, dependence, and vulnerability.[207] Perpetrators of intrafamilial child sexual abuse include biological fathers, mothers, siblings, aunts, uncles, grandparents, stepparents, stepsiblings, adoptive and foster parents, guardians, and mothers' boyfriends.[208]

The other blistering myth that intrafamilial child sexual abuse happens primarily in non-traditional families lacks merit because intrafamilial child sexual abuse is facilitated by access to the child.[209] Studies show that in traditional nuclear family homes, where the child lives with two biological parents, the main offender is typically the biological father.[210] However, in homes where a nonbiological father such as a stepfather or an adoptive father is present, then the nonbiological father typically becomes the primary offender.[211] Studies have shown that the "presence of a nonbiological father in the household," for example, a stepfather, or the mother's boyfriend, "significantly increases" a child's risk of becoming victim to intrafamilial child sexual abuse."[212] In support of this observation, Susan Pusch explains in an article co-authored with other researchers that "the incest taboo might

205. *See id.* ("Higher access to children was defined as having more contact with children through work, use of leisure time, or at home, and could include primary caregiving responsibilities.").

206. *Id.*

207. *See* Hörnle, *supra* note 159, at 91 (providing an example in an adult situation involving police officers and inmate/suspect where "prisoner's or suspect's approval or disapproval is irrelevant; under such extreme circumstances of dependence, even explicit factual consent does not count as voluntarily given").

208. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 190; Gusti Ayu Kade Komalasari & Anak Agung Sagung Poetri Paraniti, *Incest in the Dimension of Sexual Violence Against Children*, 21 S.E. ASIA J. CONTEMP. BUS., ECON. & L., 232, 233 (2020); *see also* David Royce & Anthony A. Waits, *The Crime of Incest*, 5 N. KY. L. REV. 191, 192 (1978) (noting that father-daughter and step-father daughter incest are "the most common and produce [] the greatest harm to the familial structure").

209. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 198–99.

210. *See* La Fontaine, *supra* note 135, at 9-10.

211. *See* Pusch et al., *supra* note 78, at 7.

212. *Id.* ("[T]he probability of incestuous abuse was 3.2 times higher when the mother's partner was not the biological father, and . . . the risk of intrafamilial abuse was 2.6 times higher when a nonbiological father was living in the victim's household." (first citing Sandra S. Stroebel et al., *Risk Factors for Father-Daughter Incest: Data from an Anonymous Computerized Survey*, 25 SEXUAL ABUSE 583 (2013); and then citing Keith W. Beard et al., *Father-Daughter Incest: Effects, Risk-Factors, and a Proposal for a New Based Approach to Prevention*, 24 J. TREATMENT & PREVENTION 79, 102 (2017)).

be weaker for stepfathers, because they are not blood-related to the victims."[213] What is clear and appears uncontroverted is that the risk of intrafamilial child sexual abuse increases in family structures that allow for multiple partners.[214] However, the presence of a stable stepfather or biological father does not indicate a reduced risk for child sexual abuse.[215] It is important to note, however, that while some men: fathers, stepfathers, other male relatives abuse children in their care, others do not.[216]

III. INTRAFAMILIAL CSA IN JAMAICA

Jamaica has a widespread and national problem of intrafamilial child sexual abuse.[217] Anecdotal evidence garnered from newspaper articles and qualitative studies suggests that the problem is serious, longstanding, and pervasive.[218] Intrafamilial child sexual abuse and incest are often used interchangeably,[219] however the crime of incest in Jamaica is limited to heterosexual sexual intercourse between near blood relatives.[220] Consequently, this Article uses intrafamilial child sexual abuse to refer to child sexual abuse at the hands of relatives, including those with biological and sociolegal bonds and those that live in or exercise power and influence in the household occupied by the child.

As with most contemporary Western societies, and perhaps even before many of these societies, Jamaica's main family structure has long shifted from a traditional nuclear family as the traditional normative family to a variety of family structures ranging from traditional nuclear families, to

213. *See id.* at 3 (citing Jan Faust et al., *Differences in Family Functioning of Sexually Abused vs. Nonabused Enuretics*, 12 J. FAM. VIOLENCE 405, 405 (1997)).

214. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12.

215. *See id.*

216. *See id.*

217. *See* Samms & Cholewa, *supra* note 111, at 115-16 (citing UNICEF, VIOLENCE AGAINST CHILDREN IN THE CARIBBEAN REGION REGIONAL ASSESSMENT 18 (2006), https://bco.wimp.bz/file_directory/files/situational_analysis_belize/20061019ViolenceAgainstChildren.pdf); Gibson et al., *supra* note 77, at 116 (recommending that child sexual abuse in Jamaica should be treated as a public health issue); Hibbert, *Incest 'Hot Spot'*, *supra* note 112 (detailing an interview with the executive director of Eve for Life (EFL) who indicated that incest in Jamaica "remains an islandwide problem" and communities in some parishes appear to have "a culture of incest" because of the reported high levels of incest.) EFL is a non-government organization in Jamaica that supports "young women and children living with or impacted by HIV/AIDS." *Who We Are?*, EVE FOR LIFE, https://eveforlife.org/about/ (last visited Sept. 18, 2024).

218. *See generally* UNICEF, STAINED BY VIOLENCE, *supra* note 109, at 8 ("Sexual violence is one of the most unsettling violations of children's rights, and one of the most rampant forms of violence against children in Jamaica.").

219. *See* Pusch et al., *supra* note 78, at 2.

220. *See* Sexual Offences Act § 7.

cohabitating families, blended families, and single-parent families.[221] Consequently, family in Jamaica is not defined solely by consanguinity but also by affinity and co-residence.[222]

In Jamaica, the most common family structure is the single-parent family.[223] Typically, a female, often the mother or guardian, assumes primary parental responsibility for the children in a Jamaican single-parent family.[224] It is also highly common for someone who is not the child's parent or legal guardian to assume a parental role.[225] This reason, in part, led the 2001 Jamaica Census Bureau to posit that households "provide a more realistic description of the base unit in which formation of the child takes place."[226] The Jamaica Census Bureau defines a household as "consist[ing] of one person who lives alone or [in] a group of persons who, as a unit, jointly occupies the whole or part of a dwelling unit, who have common arrangements for housekeeping, and who generally share at least one meal."[227] "The household may be composed of related persons only, unrelated persons, or of a combination of both."[228]

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221. *See* Kay Pasley & Raymond E. Petren, Family Structure, *in* THE WILEY BLACKWELL ENCYCLOPEDIA OF FAM. STUD. 1, 1-2 (Constance L. Shehan ed., 2015) ("[A] household share[s] one or no parents. The presence of a stepparent, stepsibling, or half-sibling designates a family as blended.").

222. *See* Sonia M. Jackson, *The Jamaican Situation*, STATISTICAL INSTITUTE OF JAMAICA, https://unstats.un.org/unsd/demographic/meetings/egm/NewYork_8-12Sep.2008/EGM%20PowerPoints/Jamaica%20-%20Family%20&%20Community.ppt ("Family is a group of people affiliated by consanguinity, affinity and co-residence."); Elsie Le Franc et al., *Working Women's Sexual Risk Taking in Jamaica*, 42 SOC. SCI. MED. 1411, 1411 (1996) ("In Jamaica, one of the clearest examples of what has been called 'cognitive dissonance' is the high levels of religiosity and participation in formal religious institutions that co-exist with widespread relationships (namely 'visiting unions' and 'common-law marriages') that are strongly condemned by the churches." (first citing DIANE J. AUSTIN, URBAN LIFE IN KINGSTON, JAMAICA: THE CULTURE AND CLASS IDEOLOGY OF TWO NEIGHBORHOODS (Gordon and Breach Science Publishers ed., 1984); and then citing ELSA LEO-RHYNIE, THE JAMAICAN FAMILY: CONTINUITY AND CHANGE (Grace, Kennedy Foundation ed., 1993))).

223. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12 (identifying that in the Caribbean 50% of households are "female single-parent headed").

224. *See id.*; Dunlap et al., *supra* note 69, at 20 (citing M. BELINDA TUCKER & CLAUDIA MITCHELL-KERNAN, THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS 11, 13 (Belinda Tucker & Claudia Mitchell-Kernan eds., 1995)).

225. *See* Dunlap et al., *supra* note 69, at 20.

226. *See generally Jamaica Census 2001*, STATIN https://statinja.gov.jm/Popcensus.aspx (date last visited Sept. 4, 2024).

227. IPUMUS International, *Jamaica Census 2001 Enumeration Manual* 16 https://international.ipums.org/international/resources/enum_materials_pdf/enum_instruct_jm2001a.pdf.

228. *Id.* at 16.

Today, approximately 45% of all Jamaican households are headed by a female single-parent.[229] This number is expected to remain consistent or increase in light of data from Jamaica's 2001 Census study, which concluded that the population is typically "not the marrying type."[230] Based on data from the Census survey, approximately 90% of persons aged sixteen and above have never been married.[231]

A proverbial elephant in the room, but a fact not to be ignored when considering Jamaican family types and households, is the prevalence of misattributed paternity. Jamaica is known to have a high rate of misattributed paternity.[232] Misattributed paternity, or paternity fraud, is commonly referred to as "jacket" in Jamaica.[233] Misattributed paternity—or a "jacket"—"occurs when the mother identifies a man as the biological father of her child, knowing the man is not the child's biological father."[234] According to a study by Dr. Herbert Gayle, a sociologist at the University of the West Indies, approximately 20% of Jamaican men are raising children who are not their biological children.[235] Oftentimes, these men believe that the children are their biological children.[236] In fact, the study revealed that misattributed paternity happens at all socioeconomic levels of the society.[237] To note, "a sample of 2,000 people from the upper middle, middle, near poor or lower middle class, and poor people, [ ] indicate that 20 per cent, or one in five people, experience paternity fraud."[238] Data on paternity fraud indicates that approximately 13% of women over 60 years old admitted to committing paternity fraud; 18% of women 54 to 59; and 16% of women 36 to 41 years

229. *See* Bose-Duker et al., *supra* note 68.

230. *See* Jackson, *supra* note 222, at 10.

231. *Id.*

232. *See* Paul A. Bourne et al., *The Perspectives and Practices of Women on Paternity Fraud in Jamaica: Post COVID-19*, 8 INT'L J. HUMAN. & SOC. SCI. INSIGHTS & TRANSFORMATIONS 1, 2 (2023) [hereinafter *Women on Paternity Fraud in Jamaica*] (stating that misattributed paternity in Jamaica is "prevalen[t]").

233. *See id.* (citing Heather Draper, *Paternity Fraud and Compensation for Misattributed Paternity*, 33 J. MED. ETHICS 475, 475 (2007)).

234. *Id.*

235. *See* Kimberley Hibbert, *DNA Backlash*, JAM. OBSERVER (Nov. 11, 2021), https://www.jamaicaobserver.com/news/dna-backlash/ [hereinafter *DNA Backlash*]; Bourne et al., *supra* note 232, at 3 ("[A] study by Dr. Herbert Gayle in 2016 shows that 25% of men mind 'jackets.'").

236. *See* Bourne et al., *supra* note 232, at 2 ("[S]ome 25 per cent of Jamaican men are unknowingly raising children that are not biologically theirs." (citing Monday Richmond Efut & Amarachi Chiagoziem, *Paternity Fraud: Examining its Causes, Tort of Deceit and Victims Compensation*, 9 GLOB. SCI. J. 738, 738 (2021))).

237. *See DNA Backlash*, *supra* note 235.

238. *Id.*

old, also admitted to committing paternity fraud.[239] The practice of paternity fraud increases the possibility that a man could spend years raising children who he and others believe are his biological children, but if tested, DNA tests could reveal otherwise.

It is no secret that intrafamilial child sexual abuse in Jamaica happens in all families, rich and poor, educated and undereducated, religious and secular, and in households including single-family and traditional nuclear family households.[240] The main perpetrators of intrafamilial child sexual abuse are often adult men, and most typically the mother's or guardian's boyfriends, the children's stepfathers, and biological fathers.[241] Data from the Jamaica Constabulary Force (JCF) showed generally that "the perpetrators of incest to be between 35 to 49 years old."[242]

In Jamaica, like elsewhere, intrafamilial child sexual abuse is a crime of access, power, and control. Increased access to children in their household, a place where they should be safe and protected, increases their vulnerability and risk of being sexually abused.[243] For example, in a single female-headed household in Jamaica, the adult male in the household is typically the mother's boyfriend or boyfriends.[244] In many instances, the adult male-female relationships are temporary resulting in short-term relationships[245] with several transient male partners who leave the relationship after a short while.[246] Multiple and serial partnering are generally common,[247] but are

239. *See* Bourne et al., *supra* note 232, at 8 (stating that by age cohort, women knowingly committed paternity fraud: 36-41 years old: 15.7%; 54-59 years old: 18.3%; 60+ years old: 13.1%); *see also* Corey Robinson, *Who's the Daddy? More Women Requesting Paternity Tests to Verify Whether Sons, Brothers, Husbands Being Given 'Jackets,'* THE GLEANER (Feb. 19, 2023, 1:03 AM), https://jamaica-gleaner.com/article/lead-stories/20230219/whos-daddy#:~:text=The%20same%20study%20revealed%20that,been%20victims%20of%20paternity%20fraud ("[A recent cross-sectional study by the Northern Caribbean University (NCU)] revealed that 67 per cent of Jamaican females said they knew of another woman who had committed paternity fraud; and that 26 per cent of Jamaican fathers who took party in the study admitted that they had been victims of paternity fraud.").

240. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12.

241. *See id.*

242. *See Incest Alive in Jamaica*, *supra* note 118.

243. *See* Komalasari & Paraniti, *supra* note 208, at 233 ("The house is supposed to be a safe shelter for children, but the fact is that the house actually becomes a place of sexual violence against children committed by family members themselves.").

244. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12.

245. *See id.*

246. *See* Dunlap et al., *supra* note 69, at 20 (defining transient males as males that typically are invited in a household and shortly afterwards leave).

247. *See* Le Franc et al., *supra* note 222, at 1413-15 (defining multiple partnership as including both simultaneous partnerships and serial relationships and stating that "multiple partnership is culturally sanctioned." (first citing to Nancie L. Solien, *Household and Family in the Caribbean: Some Definitions and Concepts*, 9 SOC. & ECON. STUD. 101, 105 (1960); and

even more common in instances where women enter into successive temporary relationships as a means of economic survival for themselves and their household.[248] To explain, some women bring several successive male partners into the household, often to ensure continued financial support for themselves and their household.[249] An obvious downside, however, is that allowing multiple partners into the household increases access to children occupants, which, in turn, increases the children's exposure to sexual abuse within the household.[250] It is well documented that multiple or serial partnering exposes children in a household to several stepfathers or mother's or guardian's boyfriends, consequently increasing the children's risk for sexual abuse.[251] This increased risk exposure of children in the household to sexual abuse is particularly relevant in instances where the female head of household does not do the due diligence necessary to assess the men's character or, she may be aware but choose to ignore the men's propensity for violence and sexual abuse.[252] Also particularly relevant with intrafamilial sexual abuse, "[t]he existence of perpetrators and victims in the same place will provide a very large opportunity for perpetrators to commit sexual violence against victims."[253]

In Jamaica, when an adult male is present in the household, he often assumes a traditional family role, exercising power and authority over the children in the household.[254] In instances where the male is the children's stepfather or the mother's boyfriend, even in an albeit transient relationship, he typically becomes an integral member of the family and exercises power

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then citing to Hymie Rubenstein, *Caribbean Family and Household Organization: Some Conceptual Clarifications*, 14 J. COMPAR. STUD. 283, 293–94 (1983))).

248. *See id.* at 1413-14 (explaining that multiple partnerships have been described as "an economic survival or coping strategy." (citing Solien, *supra* note 247; and then citing to Rubenstein, *supra* note 247, at 293–94)).

249. *See id.* (citing Solien, *supra* note 247; and then citing Rubenstein, *supra* note 248); *see also* KARYL POWELL BOOTH ET AL., "IT AFFECTS YOU FOR A LIFETIME"! PERSPECTIVES ON CHILD SEXUAL ABUSE IN JAMAICA 44 (Univ. of Huddersfield Queensgate ed., 2021) [hereinafter IT AFFECTS YOU FOR A LIFETIME] ("In some cases, bringing persons into the home environment to visit or reside exposed children to perpetrators of abuse."); JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 150 ("[I]dentified single parent families, the presence of a step-father or boyfriend, and an unstable family situation, allowing a succession of partners without much, if any, prior knowledge of character into the house, as contributing to [child sexual abuse].").

250. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 12.

251. *See id.* ("While the presence of a stable stepfather does not indicate reduced risk, the study suggests that the presence of several stepfathers may increase it.").

252. *See id.* at 150.

253. *See* Komalasari & Paraniti, *supra* note 208, at 235.

254. *See* Dunlap et al., *supra* note 69, at 24.

and authority over the children in the household.[255] The mother or female guardian typically demands that the children in the household respect and obey him.[256] As a sign of respect, the children may refer to him as 'Uncle' or 'Mister' and they typically look to him as the de facto father figure.[257] Paradoxically, the adult male may view the children not as family members with whom he should form a nurturing parental bond, but as a part of a transactional package that comes only because of his association with the mother or female guardian.[258] He may also take the perspective that the children are not his biological children and therefore, are not off limits to his sexual advances.[259] The male's ability to exercise power and control over the children, his increased access to them from being in the household, and the lack of paternal bond increase the children's risk for sexual abuse.

There are several factors that have been posited to explain why children are sexually abused by persons who have power and control over them within the household, a place where they should feel safe and protected. High on the list are entrenched patriarchal cultural beliefs of power and entitlement to all females within the household, including female children.[260] In fact, a study conducted in Jamaica revealed "that some men believe that they have a right to a sexual liaison with a girl who is under their care and protection."[261] Put simply, some men, including the mother's or guardian's boyfriends, stepfathers, and biological fathers, believe that they have a right to have sex with the children in their care.[262] This belief is true and sometimes more

255. *See id.* at 20.

256. *See id.* at 24.

257. *See Culture and Etiquette in Jamaica,* ROUGH GUIDES, (Nov. 1, 2024) https://www.roughguides.com/jamaica/culture-etiquette/; Fernando Henriques, *Kinship and Death in America*, 12 PHYLON 272, 272 (1951).

258. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 31.

259. *See* Bowman & Brundige, *supra* note 67, at 242 ("[s]ignificance of abuse by stepfathers and uncles—stepfathers perhaps because they do not regard the child as their own . . . ." (citing Inge Petersen et al., *Sexual Violence and Youth in South Africa: The Need for Community-based Prevention Interventions*, 29 CHILD ABUSE & NEGLECT 1233, 1241 (2005))); Patricia Phelan, *The Process of Incest: Biologic Father and Stepfather Families*, 10 CHILD ABUSE & NEGLECT, 531, 532 (1986) ("Some stepfathers construe the sexual behavior with their stepdaughter (and similar behavior by other stepfathers) as less 'serious' than the same actions would be between biological fathers and daughters with the rationale that the children are not blood relatives.").

260. *See* Samms & Cholewa, *supra* note 111, at 116 (citing PAULO SERGIO PINHEIRO, WORLD REPORT ON VIOLENCE AGAINST CHILDREN IN THE CARIBBEAN REGIONAL ASSESSMENT: UN SECRETARY GENERAL'S STUDY ON VIOLENCE AGAINST CHILDREN 72 (2006), https://violenceagainstchildren.un.org/content/un-study-violence-against-children).

261. *See* Gardner et al., *supra* note 108, at 3, 12 (citing Griffin Benjermin et al., *Risk Factors for Child Abuse in Dominica* (2001), https://global.uwi.edu/sites/default/files/bnccde/dominica/conference/papers/Benjamin.html).

262. *See id.* (citing Benjermin et al., *supra* note 261).

pronounced, even among men who do not contribute financially to the household or are not the sole breadwinners.[263] First, the patriarchal belief that underscores ownership of the female body causes some men to believe that they should be the child's first sexual experience and "they have an *obligation* to 'bring' [the child] into the world of sex."[264] Second, it appears that the patriarchal belief of entitlement to sex with all women and children in the household is heightened when the men are financial contributors to the household and more so when they are the main breadwinners.[265] In fact, a "common attitude among nonbiological fathers is" that children of their partners will "not eat[] [their] food for nothing."[266] Put another way, some men and women with this entitlement belief, typically expect the children in the household who directly or indirectly benefit from the male breadwinner's financial provision to reciprocate with sexual favors.[267]

The predatory and transactional attitude of some men toward their non-biological children creates a paradoxical dilemma and increases the risk of child sexual abuse in the home particularly in instances where some women, albeit out of poverty, engage in the significant practice of calculated child-rearing as an "investment activity."[268] This means that the women fall into a cycle of having children with several different male partners as a further step to guarantee financial support for themselves and their family, but this practice makes the children more vulnerable to sexual abuse, particularly where the male feels no biological connection to child[269] and feels entitled to sex with the child for maintaining the household, a bargain the child did not make and does not have the capacity to make.[270]

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263. *See* Heather Little-White, *Sex with Family*, THE GLEANER (May 31, 2009), http://mobile.jamaicagleaner.com/20090531/out/out9.php (noting that fathers who are "unsuccessful in earning a living at [their] social level" are "more likely to sexually victimise their daughters"); Bowman & Brundige, *supra* note 67, at 248 (explaining that men who are unemployed or underemployed typically experience a "loss of feeling of power" also described as a "crisis of masculinity" which creates a risk factor for child sexual abuse in which other forms of sexual violence are related to the "disempowerment and emasculation" of African men.) (first citing Romi Sigsworth, *'Anyone Can Be a Rapist…': An Overview of Sexual Violence in South Africa* 19 (2009), http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=110216&lng=en.; then citing Carol Bower, *The Relationship Between Child Abuse and Poverty*, in AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY (2003); and then citing Denis McCrann et al., *Childhood Sexual Abuse Among University Students in Tanzania*, 30 CHILD ABUSE & NEGLECT 1343, 1344 (2006)).

264. Little-White, *supra* note 263 (emphasis added).

265. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 11.

266. *Id.*

267. *See id.*

268. *See* Le Franc et al., *supra* note 222, at 1414.

269. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 11.

270. *See* Jemmott & Maharaj, *supra* note 70, at 46.

Inadequate parental supervision and "child shifting" are also factors that increase a child's risk of intrafamilial sexual abuse in Jamaica.[271] In some households, children are at heightened risk for sexual abuse when their mother or female guardian works outside the home, has multiple jobs, or has jobs that keep them outside the homes, particularly for long periods.[272] By de facto, the male adult partner is left in charge of the home and the children.[273] This child-caring arrangement typically allows the father, stepfather, mother's or guardian's boyfriend, or other adult male unfettered access to the children in the household.[274] Child shifting, "sending children to stay with friends and relatives for extended periods of time,"[275] is another common practice in Jamaica that typically increases a child's risk of intrafamilial child sexual abuse. To explain, in instances of child shifting where a child is sent to live with a relative, that relative and their partner or partners have unrestrained access to the child and may assume parental responsibilities for the child, but may not see the child as a close blood relative that would invoke the incest taboo.[276] Consequently, the child becomes fair game for their predatory sexual practices.[277]

In Jamaica, inadequate housing caused by poverty or natural disaster also increases a child's risk of intrafamilial child sexual abuse.[278] To illustrate, Adele Jones's and Ena Trotman Jemmott's study of child sexual abuse in Barbados and other Eastern Caribbean Islands (sister islands to Jamaica) demonstrated that in overcrowded and tight living spaces "the physical proximity of adult males (in most cases step-fathers) to their step-

271. *See* IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 43-45 (stating lack of proper supervision and child shifting as factors that increase the possibility of intrafamilial child sexual abuse (citing Christine Barrow & Martin Ince, Early Childhood in the Caribbean (Working Paper No. 47, 2008), https://files.eric.ed.gov/fulltext/ED522741.pdf)).

272. *See id.* at 43 (referencing Julia Rudolph et al., *Child Sexual Abuse Prevention Opportunities: Parenting, Programs, and the Reduction of Risk*, 23 CHILD MALTREATMENT 96, 101 (2017), https://doi.org/10.1177/1077559517729479).

273. *See* CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 12 (stating this occurs when "mothers who were working late at night and allow[] children to be supervised by their partners or boyfriends").

274. *See id.*

275. *See* FRAY ET AL., *supra* note 93, at 4.

276. *See* IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 45 (citing Barrow & Ince, *supra* note 271); *see also* Rohan D. Jeremiah et al., *Exposing the Culture of Silence: Inhibiting Factors in the Prevention, Treatment, and Mitigation of Sexual Abuse in the Eastern Caribbean*, 66 CHILD ABUSE & NEGLECT 53, 58 (2017) (detailing the story of young woman in Trinidad who was raped by her uncle when she was twelve years old while she lived with her grandmother after her mother migrated to the United States).

277. *See generally* Bowman & Brundige, *supra* note 67, at 242 ("[S]ignificance of abuse by stepfathers and uncles—stepfathers perhaps because they do not regard the child as their own . . . .") (citing Petersen et al., *supra* note 263).

278. See Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 190.

daughters increased the risk that these girls would be abused."[279] This study and its findings could easily be transported to, and be relevant in, Jamaica because of the similarities among the islands.[280] In most cases driven by poverty, children and adults sleep in the same bedroom or on the same bed, or mattress on the floor.[281] Also, there is often little or no privacy when the children go to the bathroom or makeshift bathrooms.[282] The tight living spaces and lack of privacy typically increase the occurrences of child sexual abuse.[283]

Like men, women in Jamaica also sexually abuse children in their family and household.[284] Women sexually abuse their sons, daughters, step-children, and other relatives in their care.[285] To note, while the reported incidents of "mother-son incest in Jamaica are rarer than father-daughter incest," mother-son incest "is common enough to be discussed as some mothers feel that they have the right to initiate their sons into ways of having sex."[286] Still, the prevailing narrative and law surrounding intrafamilial sexual abuse that limit incest to penile sexual penetration often remove women from the cast of perceived incest perpetrators.[287] It is true that women are less likely than men to inflict physical sexual harm, but they are equally culpable of causing severe psychological harm.[288]

More widely acknowledged in Jamaica, women are most often enablers and co-conspirators of intrafamilial child sexual abuse.[289] Some women

279. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 216-17.

280. *See* id. at 7 (noting that the countries selected: Anguilla, Barbados, Dominica, Grenada, Montserrat, and St. Kitts and Nevis, "collectively considered representative of the region").

281. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 189.

282. *See* JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 143.

283. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 189; *see generally* Anna Ramdass, *'I have lived around incest'*, DAILY EXPRESS, https://trinidadexpress.com/news/local/i-have-lived-around-incest/article_da2108e0-2f33-11e9-b957-bb6c2e483e78.html (last updated Feb. 13, 2019).

284. *See Mother from Hell - Woman Charged for Daughter's Rape*, THE GLEANER (June 3, 2012, 12:00 AM), https://jamaica-gleaner.com/gleaner/20120603/lead/lead33.html [hereinafter *Mother from Hell*]; *see* FINKELHOR, *supra* note 71, at 93 (noting that women also sexually abuse children).

285. *See* Davis, *Incest Alive in Jamaica*, *supra* note 118 ("[C]ases involving activities between mothers and daughters.").

286. Little-White, *supra* note 263.

287. *See generally* Sexual Offences Act.

288. *See* Candib, *supra* note 121, at 185-86.

289. *See Mother from Hell*, *supra* note 284 (detailing incidents where a mother held her fifteen-year-old daughter hostage so that she could be repeatedly raped by the mother's fifty-seven-year-old male partner who had "indicated to the mother that the money would be cut off if the 15-year-old did not have sex with him").

ignore and even encourage intrafamilial sexual abuse.[290] When a child within the household or family is sexually abused, the women often contribute to the abuse by ignoring the abuse, "failing to protect children even when they are aware that abuse is going on, disbelieving the child, putting male partners before the protection of the child, minimising the harm that abuse does."[291] Ignoring the abuse and failing to stop it compounds the harm to the child and signals to the abuser that it is okay to continue to abuse that child and other children in the household.[292] Equally damaging, some women are actively complicit in the sexual abuse of their children.[293] Alarmingly, some women allow or actively encourage sexual abuse, often for *material gain* but also to satiate their male partner's perverse desires and keep them from leaving the relationship.[294] While it may be true that most women who encourage or allow their male partners to sexually abuse their children or children relatives in their household do so because they are dependent on the financial support of the male who is most likely the sole or primary breadwinner in the household,[295] some women cannot envision living without the male partner, or do not want to upset the perception of a stable home, and as a result put his pedophilic desires before their children's safety and wellbeing.[296] As a concrete example, Greig Smith, Registrar of the Child Registry of Jamaica, says that he has "been summoned to court on a number of occasions in which parents, females, mothers, have been charged in conjunction with their boyfriend, husband, or stepfather for the sexual abuse of these children."[297]

A. Harm of Intrafamilial Child Sexual Abuse to the Victim

Intrafamilial child sexual abuse, whether at the hands of a biological father, stepfather, mother's boyfriend or other relative, causes significant

290. *See id.*

291. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 10; *see also Mother from Hell*, *supra* note 284; *cf.* Candib, *supra* note 121, at 185 ("[T]he maternal response to the disclosure of incest is central in the daughter's recovery." (first citing JANIS TYLER JOHNSON, MOTHERS OF INCEST SURVIVORS: ANOTHER SIDE OF THE STORY (Indiana Univ. Press 1992); and then citing Margaret H. Myer, *A New Look at Mothers of Incest Victims*, 3 J. SOC. WORK & HUM. SEXUALITY 47 (1985)).

292. *See* Jeremiah et al., *supra* note 276, at 58.

293. *Cf.* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 229.

294. *See id.* at 10.

295. *See* Wilson-James, *supra* note 70, at 161; CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 23 ("Poverty, which compels single mothers who are unable to sufficiently provide for their family, and economically dependent on men, to ignore abuse within the home in order ensure the family's economic survival.").

296. *See* Claudia Ghica-Lemarchand, *Incest in French Law: A New Offence for an Old Prohibition*, 60 INT'L ANNALS CRIMINOLOGY 43, 44 (2022).

297. Jones, *supra* note 203.

harm to the child, the family, and society. Victims of intrafamilial sexual abuse typically suffer devastating emotional, psychological, and physical harm.[298] Harm occurs whether the abuser is male or female.[299] Physical harm is typically most visible and arguably most likely to be acknowledged and treated.[300] Unlike physical harm, emotional and psychological harm are typically invisible and consequently can go unnoticed and untreated resulting in more harm to the victim and by extension society.[301] It is well-documented that victims of child sexual abuse typically suffer serious mental and emotional harms,[302] but victims of intrafamilial child sexual abuse "have been found to experience greater negative consequences than victims of child abuse committed by non-relatives."[303] Scholars and researchers examining sexual abuse have posited that "child sexual abuse is the most heinous form

298. *See* Bowman & Brundige, *supra* note 67, at 285–86 (citing Joseph H. Beitchman et al., *A Review of the Short-Term Effects of Child Sexual Abuse*, 15 J. CHILD ABUSE & NEGLECT 537, 548 (1991)); *see generally* Lucinda Moore, *Growing Up Maya Angelou*, SMITHSONIAN MAG. (April 2003), https://www.smithsonianmag.com/arts-culture/growing-up-maya-angelou-79582387/ (noting that Maya Angelou was raped by her mother's boyfriend at the age of eight years old and when the perpetrator was found dead, Maya believed that she was responsible for the perpetrator's death because she reported the rape).

299. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 10.

300. *See id.* at 238 (listing some physical consequences to victims of sexual abuse such as "injury to reproductive organs, STIs, HIV, abortion and associated risks").

301. *Id.*

302. *See* Pullman et al., *supra* note 171, at 228 (first citing David M. Fergusson et al., *Childhood Sexual Abuse and Adult Developmental Outcomes: Findings from a 30-Year Longitudinal Study in New Zealand*, 37 CHILD ABUSE & NEGLECT 664 (2013); then citing Kathleen L. Ratican, *Sexual Abuse Survivors: Identifying Symptoms and Special Treatment Considerations*, 71 J. COUNSELING & DEV. 33 (1992); and then citing Ron Roberts et al., *The Effects of Child Sexual Abuse in Later Family Life; Mental Health, Parenting and Adjustment of Offspring*, 28 CHILD ABUSE & NEGLECT 525 (2004)).

303. *Id.* (citing Sandra S. Stroebel et al., *Father-Daughter Incest: Data From an Anonymous Computerized Survey,* 21 J. CHILD SEXUAL ABUSE 176 (2012)); *see also* Michael H. Stone, *Individual Psychotherapy with Victims of Incest*, 12 PSYCHIATRIC CLINICS N. AM. 237, 237 (1989) ("Psychological damage . . . [is] most serious when the offending relative is of an older generation and had clearcut protective obligations toward the victim: father or stepfather, as opposed to uncle or grandfather."); Bowman & Brundige, *supra* note 67, at 285–86 ("The psychological consequences of child sex abuse may be particularly acute in the case of a child who has been a victim of incest. Abuse by a father or stepfather has been found to correlate with increased mental health harm. A South African study found that sexual violence by stepfathers caused adolescent victims significantly more emotional distress than sexual violence experienced by victims of other perpetrators. These heightened mental health effects relate to a child's feelings of betrayal at being abused by a family member, particularly a parental figure, who had occupied a position of trust." (first citing Joseph H. Beitchman et al., *A Review of the Short-Term Effects of Child Sexual Abuse,* 15 CHILD ABUSE & NEGLECT 537 (1991); and then citing Mary Sibongile Mkhize, *An Investigation of the Relationship Between Childhood Sexual Abuse Experiences and Psychosocial Adjustment in a Sample of Black South African Adolescents* (2009) (M.A. thesis, University of KwaZulu-Natal, Pietermaritzburg)).

of abuse …,"[304] with unique trauma consequences particularly when the child trusts or depends on the perpetrator.[305] To explain, when a child is abused by a trusted parental figure, the child typically suffers from increased mental health harms because of the child's feeling of betrayal.[306]

Both girl and boy victims of intrafamilial child sexual abuse typically experience emotional and psychological harm that includes aggression, depression, low self-esteem, substance abuse, poor school performance, suicidal ideation, rage, violent behavior, hyper-sexuality, problems with authority, overeating, poor impulse control, and difficulties in forming and maintaining inter-personal relationships.[307] It is important to highlight, however, that boys typically suffer more severe psychological damage from intrafamilial child sexual abuse than girls.[308] In fact, a study from the United States demonstrates that males who experience sexual abuse are "5.64 times more likely to develop [Post-Traumatic Stress Disorder (PTSD)]" than those who were not abused, whereas female survivors are "2.14 times more likely to develop PTSD than those who were not abused."[309] Relatedly, "males with a history of CSA are at a higher risk for suicidal ideation"[310] "and are more likely than girls to act out in aggressive and antisocial ways as a result of abuse."[311]

Jamaica is a hugely gendered and homophobic society which highly influences how boy victims and other members of the population perceive the impact of intrafamilial child sexual abuse on boy victims.[312] To explain,

304. Janice Haaken, *Sexual Abuse, Recovered Memory, and Therapeutic Practice: A Feminist-Psychoanalytic Perspective*, 40 SOCIAL TEXT 115, 122 (1994).

305. *See* David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AMER. J. ORTHOPSYCHIATRY 530, 530-31 (1985); *see also* Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169, 193 (2017).

306. *See* Bowman & Brundige, *supra* note 67, at 285–86; (citing Mkhize, *supra* note 307); *see also* Ellen Edge Katz, *Incestuous Families*, 1983 DET. C. L. REV. 79, 86 (1983) ("To the child, the violation of family trust is psychologically damaging." (citing ROBERT L. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 58 (Beacon Press ed., 1979))).

307. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 14; *see also* Little-White, *supra* note 263 ("Very often, incest victims end up as prostitutes, engage in petty crimes and may eventually molest children of their own sex."); Jeremiah et al., *supra* note 276, at 54 (citing Shanta R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREVENTATIVE MED. 430, 431 (2005)).

308. *See* IT AFFECTS YOU FOR A LIFETIME*, supra* note 249, at 90.

309. Rochelle F. Hanson et al., *Relations Among Gender, Violence Exposure, and Mental Health: The National Survey of Adolescents*, 78 AM. J. ORTHOPSYCHIATRY 313, 316 (2008).

310. IT AFFECTS YOU FOR A LIFETIME*, supra* note 249, at 90.

311. Finkelhor, *Nature of Child Sexual Abuse*, *supra* note 80 at 47 (citing FRANK G. BOLTON, JR. ET AL., MALES AT RISK: THE OTHER SIDE OF CHILD SEXUAL ABUSE 78–79 (Sage Publ'ns, Inc., ed., 1989)).

312. *See id.*

Jamaica's macho, masculine culture typically dictates that boys view sex with an unrelated older woman as a badge of honor and an "opportunit[y] to strengthen their masculinity."[313] This perspective does not necessarily follow where the female is a parent or parent figure, guardian, or close relative.[314] In fact, where boys are sexually abused by a female parent, parent-figure, guardian, or close relative, the boys tend to exhibit the range of psychosocial harm, including extreme aggression, depression, substance abuse, and difficulty relating to women.[315] The difficulty relating to women sometimes translates into a practice of having surface-level relationships with multiple female partners because of an inability to trust and form a solid relational bond with one woman.[316] When the abuser is male, the boy victim typically suffers from heightened trauma which is largely attributed to a "perceived stigma of homosexual connotations,"[317] which runs at the margins of Jamaica's deeply entrenched macho, masculine culture.[318] Consequently, the boy victim is often conditioned to keep the abuse a secret out of fear of being labeled a homosexual or he is silenced by his family out of fear of bringing shame onto them, and also out of fear for the boy's and their own physical safety. Overall, the abuse typically goes unreported to the authorities, the boy victim may never get the medical and social help he needs to heal the emotional wounds, and he sees the abuser go unpunished. Importantly, the abused boy typically suffers from extreme anger, uncertainty about his sexuality, and self loathe, which sometimes leads to psychotic breaks.[319] This observation is in line with research that shows that boys "with a history of

313. *See* IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 88; *see also* Arthur Hall, *Women on the Prowl: Grown Women Sexually Abusing Teenage Boys Much More Frequently Than Reported*, THE GLEANER (Jan. 31, 2010), https://mobile.jamaica-gleaner.com/20100131/lead/lead3.php.

314. *See* JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 29 ("Furthermore we must disabuse ourselves of the popular misconception that sexual abuse by women is relatively harmless as compared to sexual abuse by men. While female perpetrators of abuse are very much in the minority and are less likely than men to use force and violence, they nevertheless inflict serious psychosocial damage on children.").

315. *See* Coleman, *supra* note 66, at 281 n.213 ("When the incestuous parent is the mother, the boy may have a very difficult time relating to women in the future."); *see also* Roffee, *supra* note 133, at 177 (agreeing that "mother-son incest is probably the most harmful of all, and that some believe that invariably the victim will become psychotic as a result of the relationship." (first citing JEAN RENVOIZE, INCEST: A FAMILY PATTERN 129-30 (Reutledge & Kegan Paul Ltd ed., 1982); and then citing Narcyz Lukianowicz, *Incest*, 120 BRIT. J. PSYCHIAT. 301 (1972)).

316. Hall, *supra* note 313.

317. IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 88.

318. Keon West, *Jamaican Masculinity: Construction and Consequences*, THE GLEANER (Mar. 21, 2010), https://jamaica-gleaner.com/gleaner/20100321/lead/lead9.html.

319. Coleman, *supra* note 66, at 281.

CSA are at a higher risk for severe mental health problems and suicidal ideation."[320]

The duration of the abuse further intensifies the impact on both girl and boy victims of child sexual abuse. Intrafamilial child sexual abuse typically occurs "over a longer period of time" which deepens the devastating impact on the child victim.[321] It is also most likely to occur over generations.[322] Research shows that continued or long-term intrafamilial child sexual abuse typically causes more severe psychological consequences to girl and boy victims, compared to "sexual abuse perpetrated once or by someone outside of the family."[323] Victims of continued or long-term child sexual abuse will most likely develop borderline personality disorder (BPD), post-traumatic stress disorder (PTSD), severe depression, schizoaffective illness, suicide ideation, substance abuse, and poor impulse control without proper medical intervention.[324]

A Jamaican female victim of intrafamilial child sexual abuse interviewed at age 48 reported having suicide ideation and was diagnosed with complex PTSD because of longstanding and ongoing sexual abuse at the hands of her biological father and stepfather.[325] The victim was repeatedly sexually abused by her stepfather starting at age five while her mother "turned a blind eye" to the abuse.[326] She went to live with her biological father and he too started to sexually abused her when she turned nine years old.[327] She ran away from her father and returned to her mother, but her stepfather continued to sexually abuse her.[328] She described her ordeal as "being in a prison with no way out."[329] She mentioned feeling like she could not report the abuse to the police officers who frequented her father's business place because "[t]hey were getting too much from him."[330] The victim also mentioned telling her primary school teacher about the abuse but "nothing came of it."[331] She later became pregnant, and gave birth to her

320. IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 90.

321. Finkelhor, *Nature of Child Sexual Abuse*, *supra* note 80, at 46.

322. *See* Jones & Jemmott, *Opinions on Child Sexual Abuse, supra* note 92, at 189 ("[I]ncest if often intergenerational.").

323. Piazza & Lunderberg-Love, *supra* note 94, at 162.

324. Stone, *supra* note 303, at 238; Jeremiah et al., *supra* note 276, at 54.

325. Janet Silvera, *My Father Impregnated Me, Says 48-Year-Old*, THE GLEANER (June 2, 2023), https://jamaica-gleaner.com/article/lead-stories/20230602/staggering-abuse [hereinafter Silvera, *My Father Impregnated Me*].

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

father's child at the age of 17.[332] In explaining the victim's PTSD diagnosis, the clinical psychologist noted that the victim was "significantly affected" by "early exposure to abuse and the continual abuse by lack of meaningful intervention" which adversely affected her neural wiring.[333] Drawing an important link between the harm caused by intrafamilial child sexual abuse and a victim's mental health, the clinical psychologist noted that "a lot of adult's mental health issues can be traced back to a trauma in childhood . . . [therefore] it is so important to safeguard the most vulnerable, which are children in the society."[334]

B. Harm to the Family and Society

In addition to harming the child victim, intrafamilial child sexual abuse also harms the family and society.[335] Put more concretely, intrafamilial child sexual abuse can cause the disintegration of the family through jealousy, discord, and resentment[336] and by the voluntary or involuntary removal of a parent or child.[337] When the abuse is reported, the abuser or victim is typically removed from the household. Removing the victim or the offender often leaves the family to grieve the severed relationship. "In addition, although the sexually abused children are unquestionably the victims, clinicians should not rule out the fact that the parents and caregivers may also be emotionally impacted as a result of their child being sexually assaulted."[338] Sometimes siblings, parents, guardians or other members of the household who want to help the victim but feel powerless to do so may also suffer from secondary trauma.[339] Secondary trauma typically includes feelings such as confusion, helplessness, isolation, and excessive guilt and brings health consequences such as headaches, gastrointestinal difficulties,

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332. *Id.*

333. *Id.*

334. *Id.*; *see* Burns, *supra* note 82 (pointing out that children are the most "vulnerable members of the family and society," they depend on adults for their survival and are sometimes victims of child sexual abuse "at the hands of adults who are responsible for their care and protection.").

335. Samms & Cholewa, *supra* note 111, at 123-24; *see* Roffee, *supra* note 133, at 172 (suggesting that intrafamilial sexual abuse harms the victims, perpetrators and other family members); McConnell, *supra* note 182, at 163.

336. Note, *supra* note 64, at 2464.

337. *See* JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 32 (Noting that in many instances the child does not report the sexual abuse out of fear for that the abusing father will be imprisoned.).

338. Samms & Cholewa, *supra* note 111, at 123.

339. Piazza & Lunderberg-Love, *supra* note 94, at 178 (noting that "secondary traumatic stress (STS), also known as compassion fatigue, may emerge when a non-offending parent or someone close to the child helps the incest victim through this crisis.").

susceptibility to illness, high blood pressure. . . ."[340] Secondary trauma may continue even after the abuse has ended causing serious health issues.

Intrafamilial child sexual abuse also harms society by imposing a significant social and economic costs on society.[341] On the one hand, the immediate medical expense resulting from physical harm to the victims is often borne by the government as is future medical expense resulting from emotional and psychological harm. On the other hand, society typically suffers productivity losses where victims are incapacitated or function at diminished capacity because of the abuse and also where perpetrators are jailed. Importantly, the harm to society continues as "sometimes abused children become abusers as adolescents and adults."[342]

C. Unreported and Underreported

There is no question that intrafamilial child sexual abuse in Jamaica is underreported. In fact, intrafamilial child sexual abuse in Jamaica often goes unreported even in light of a mandatory reporting requirement and the recognizable harm to the victims and to the society.[343] As a direct consequence of the underreporting, national statistics on child sexual abuse fail to capture the true extent of the problem.[344] There are several reasons, some culturally unique, that influence a parent's, guardian's, child's, or third party's decision not to report an incident of intrafamilial child sexual abuse. Chief among these reasons in Jamaica is the willingness of some women to turn a blind eye to the abuse, especially when the perpetrator is a romantic partner, breadwinner, or family member.[345] Additional reasons are the strong

340. *Id.* at 178-79.

341. ANNE M. NURSE, CONFRONTING CHILD SEXUAL ABUSE: KNOWLEDGE TO ACTION 75-76 (2020).

342. Ena Trotman Jemmott, *Using Our Brain: Understanding the Effects of Child Sexual Abuse, in* UNDERSTANDING CHILD SEXUAL ABUSE: PERSPECTIVES FROM THE CARIBBEAN. *supra* note 70, at 76, 77 (pointing out that in a study of child sexual abuse in the Caribbean "[b]etween 40 and 80 per cent of adolescent sexual offenders" were victims of child sexual abuse.).

343. Samms & Cholewa, *supra* note 111, at 121, 122 (noting the mandatory reporting requirement in instances of child sexual abuse); Hibbert, *Incest 'Hot Spot'*, *supra* note 112 (positing that reporting incest in Jamaica is "often a difficult task."); *see* CAPRI, *supra* note 108, at 32 (acknowledging that child sexual abuse in Jamaica is underreported).

344. Little-White, *supra* note 263, at 1; *see* Gardner et al., *supra* note 108, at 9 (noting that there is likely a "significant underreporting" of child sexual abuse "across all countries of the Caribbean." "Some of the suggested reasons for this underreporting are the fear of reprisal; shame amongst family members and the view that abuse is a private matter; the family's economic dependence on the perpetrator; the child's fear of the perpetrator; a lack of awareness of what constitutes abuse and neglect by parents and by other adults and professionals (for example, police, teachers, health professionals); a lack of awareness of the consequences of abuse and neglect; the social and cultural sanctioning of child abuse; and a lack of, or inefficient, reporting procedures.").

345. *See* Wilson-James, *supra* note 70, at 163.

culture of silence that surrounds disclosing intrafamilial sexual abuse and violence; the culture of victim blaming; a fear of physical harm to anyone who discloses the abuse; and a lack of confidence in the judicial system to deliver justice when the child sexual abuse is reported.

Global research shows that an overwhelming number of women do not report child sexual abuse when the abusers are their partners or a relative.[346] Specifically, approximately "(70.2%) of women dismiss the sexual abuse of a child when their partners or relatives are the abusers."[347] This means that seven out of every ten women fail to report child sexual abuse when the abuser is a relative or their partner. Similarly, in Jamaica, some women fail to report incidents of child sexual abuse particularly when the perpetrator is their romantic partner or a family member even where they know the men are sexually abusing their children.[348] This is especially true when the abuser is the breadwinner in the family.[349] Often these women are afraid of losing their romantic interest, financial support, or both.[350] Consequently, the women typically turn a blind eye to abuse. Alarmingly, some women may go to great lengths to protect the perpetrator by silencing the child.[351] To explain, she may accuse the child of lying and threaten to punish the child; she may forbid the child from disclosing or further talking about the abuse;[352] she may manipulate the child into thinking the abuse was the child's fault and the child wanted to be abused; and she may manipulate the child into feeling responsible for breaking up the family unit and destroying the economic support.[353] In instances where a child or a third party reported the

346. Little-White, *supra* note 263, at 1 (noting that "[i]t is hard to get a general handle on the rate of incest in Jamaica as cases are not reported . . ."); *see* Wilson-James, *supra* note 70, at 63 (noting that underreporting of child sexual abuse is a global problem).

347. Wilson-James, *supra* note 70, at 37.

348. Candib, *supra* note 121, at 185 ("[W]omen . . . participate in the sexual abuse of their daughters" when they "know that their daughters are being sexually abused by their fathers or other male relatives" but ignore the abuse.).

349. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 77; JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 118.

350. JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 33 (noting that child sexual abuse often goes unreported in "the absence of an ally for the child (the most powerful being the mother)").

351. Wilson-James, *supra* note 70, at 163 ("Elaborate coverup schemes are also carried out to protect the perpetrator when it is someone of stature, a relative, or breadwinner of the family. Smith et al. (2019) found that Jamaican parents discourage their child from disclosing sexual abuse when the perpetrator is a relative."); Hibbert, *Incest 'Hot Spot'*, *supra* note 112 (describing incest in Jamaica as a "family secret.").

352. Little-White, *supra* note 263 (mentioning that in instances of intrafamilial child sexual abuse "even when a child may tell an adult, especially mothers and step-mothers, the child victim is suspected of lying and it is not taken any farther."); *see* Wilson-James, *supra* note 70, at 5.

353. Mondragon et al., *supra* note 147, at 3.

sexual abuse, it is similarly common for the mother or female guardian to use her best efforts to protect the perpetrator[354] and keep him "out of prison."[355] As a common example, she may force the child to deny the abuse or retract their statements.

It is important to note that while it is true that some women know intrafamilial child sexual abuse is wrong, but they are willing to turn a blind eye to the abuse or execute elaborate coverups to protect the perpetrator because of financial or personal gain, some women do not report intrafamilial sex abuse because they genuinely do not think of intrafamilial child sexual abuse as abuse.[356] Crushingly, because sex between an adult male and a child, particularly adolescent girls, is typically normalized in Jamaica, some members of the society accept intrafamilial child sexual abuse as normal behavior even in light of the incest taboo.[357] Using this same rationale, because intrafamilial child sexual abuse is often intergenerational some women are conditioned to normalize the abuse, especially if they or other family members were abused as children.[358] Instead, they view the abuse as "inevitable," or "just a little sex" and may not see a reason to report it, even [in cases] where the child becomes pregnant.[359]

Another key reason intrafamilial child sexual abuse in Jamaica is underreported is because of the culture of silence and shame surrounding child sexual abuse, particularly when the abuse happens within family.[360] Because the Jamaican society is one that is largely built on pride, sexual abuse within the family consequently carries a lot of shame and the shame of intrafamilial sexual abuse is often misplaced on the female parent or guardian and the child who is accused of inviting the abuse or allowing it to happen. Pride, the fear of shame, and the cultural norm that forbids disclosing matters

354. Wilson-James, *supra* note 70, at 163 ("Elaborate coverup schemes are also carried out to protect the perpetrator when it is someone of stature, a relative, or breadwinner of the family. Smith et al. (2019) found that Jamaican parents discourage their child from disclosing sexual abuse when the perpetrator is a relative.").

355. *See id.* at 149, 162 (noting that "about seven percent of victims chose not to report or disclose the sexual abuse to protect the perpetrator").

356. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 28.

357. *Id.* at 147-48.

358. *Id.* at 13.

359. *Mother from Hell*, *supra* note 284, at 2 (referencing comments from a mother regarding sexually active minor, "little sex nah kill you"); Wilson-James, *supra* note 70, at 109; Emma Davies et al., *Mandatory Reporting? Issues to Consider When Developing Legislation and Policy to Improve Discovery of Child Abuse*, 2 IALS L. REV. 9, 10 (2014); *See* Candib, *supra* note 121, at 197, 198 (noting the tacit acceptance of intrafamilial child sexual abuse and quoting a mother who in reference to the incestuous abuse of her child stated "I had to go through this; why should my daughter be spared?").

360. Jeremiah et al., *supra* note 276, at 59.

in the household that are considered private ensures that the sexual abuse at home is not disclosed to anyone outside the home and certainly not to the authorities.[361] To "save face" and maintain the appearance of an intact family, particularly in more affluent families, the children are instructed to keep the abuse quiet.[362] Sometimes the abuse is addressed within the family but never reported, other times the mothers often turn a blind eye to the abuse and pretend not to notice it.[363] When the perpetrator is held in "high" esteem and has power and status in his community, and when he is also the breadwinner there is a greater tendency to ignore intrafamilial child sexual abuse.[364]

Intrafamilial child sexual abuse thrives in silence.[365] Not surprisingly, the culture of silence works to ensure that intrafamilial child sexual abuse is almost never reported. In the Jamaican culture, children are taught to obey adults, especially family members and adults who care and provide for them.[366] Children are "aware of possible dire consequences if they disobey."[367] Consequently, a child is almost guaranteed not to resist the sexual advance and to remain silent about the abuse when the perpetrator is a trusted person in the child's household who has power and control over the child. The child's duty to obey and the adult's exercise of power and control typically serve as an invisible chokehold that often renders the child mute.[368]

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361. *Id.*

362. Wilson-James, *supra* note 70, at 149 (In Jamaica, "13% of victims believe incidents of sexual abuse is a personal and family matter.").

363. Nadine Wilson-Harris, *3-Year-Old Daughter Raped by Landlord, Now Mother Fears Her Child has Suffered a Second Sexual Assault*, THE GLEANER (Jan. 23, 2015), https://jamaica-gleaner.com/article/lead-stories/20150125/ruined-rape (detailing an interview with a victim of incest whose father repeatedly sexually abused her and her sister. The victim noted that a neighbor told their mother of the suspected abuse. "Our mother did nothing. I don't know why she did nothing. She said the only reason she let him stay is that she didn't want another man to come into the house. She just wanted to make sure that we had both parents."); Janet Silvera, *'Dad raped us' - Sisters Accuse Father of Years of Sexual Abuse*, THE GLEANER (May 17, 2009), http://mobile.jamaicagleaner.com/20090517/lead/lead1.php [hereinafter Silvera, *Dad raped us*] (recounting the story of four sisters whose father, a teacher, sexually abused them over several years. "The sisters claim his wife, their mother, turned a blind eye to the abuse. Mom's response was, "It happen already, what would you like me to do?").

364. FRAY ET AL., supra note 93, at 5; *see generally* Roffee, *supra* note 133, at 178-79 ("Loss of social status and community respect for the family is likely to follow as well as a pervasive social stigma."); *see generally* Ramdass, *supra* note 283 (denouncing the "culture of hiding offenders").

365. SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 4 (1996).

366. *See* Bowman & Brundige, *supra* note 67, at 244 (pointing out that children are highly unlikely to disclose sexual abuse especially in cultures "where children are generally raised to be exceptionally deferential and obedient to older persons, especially males and specifically those males who have authority within their families."); Jane F. Gilgun, *We Shared Something Special: The Moral Discourse of Incest Perpetrators*, 57 J. MARRIAGE & FAM. 265, 277 (1995).

367. Gilgun, *supra* note 367, at 277.

368. Bowman & Brundige, *supra* note 67, at 244.

The culture of silence and the Jamaican male entitlement culture, which undergirds a culture of victim blaming, work in tandem to make victims of intrafamilial sex abuse feel ignored, gaslit, powerless to report the abuse, guilty, and complicit in their abuse.[369] To explain, research in Barbados, which may carry similar weight in Jamaica, revealed that "[a]dolescent victims of sexual abuse, especially intrafamilial abuse, were found not to be believed when they disclosed abuse and were more likely to be blamed for the abuse by teachers, clinicians, the judiciary and the general community."[370] Equally disappointing, the perpetrator, family, and community may blame the victim for causing, participating in, or wanting the abuse to happen, thus compounding the victim's feeling of guilt, shame, powerlessness, and stifling any inclination to report the abuse.[371]

The culture of silence tends to be even more oppressive to boy victims who are more likely to suppress rather than report the abuse.[372] On the one hand, boy victims may refuse to report sexual abuse if the perpetrator is male for fear that they are seen as homosexuals.[373] On the other hand, the macho culture in Jamaica that fuel the practice of multiple female lovers and sexual initiation for boys at an early age, compel the boys to keep silent when the perpetrators are women for fear of appearing "soft."[374]

Additionally, the culture of silence coupled with the "ethic of non-interference in the domestic affairs of others" often deter neighbors, other family members, and friends who know of the intrafamilial sexual abuse from reporting the abuse.[375] They may fear being accused of "being 'nosey,' 'interfering,'" or worse, that the "families and perceived 'victims' might deny the abuse and, instead, 'turn against' the 'Good Samaritan'."[376]

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369. *See* Jeremiah et al., *supra* note 276, at 59.

370. JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 29 (noting also research conducted in Britain on attitudes among teachers and social workers to intrafamilial sexual abuse, particularly father-daughter rape, found both groups demonstrated a willingness to attribute blame to the child victim.); *see* CAPRI, *supra* note 108, at 35 (noting that when children speak out at intrafamilial child sexual abuse they are not believed.).

371. *See* Mondragon et al., *supra* note 147, at 3 ("The abuse is the secret that, according to the perpetrator, is shared with equal responsibility by the adult and the child.").

372. *See generally* Gibson et al., *supra* note 77, at 116.

373. *See* CAPRI, *supra* note 108, at 33 (noting that if "the victim of sexual abuse was male the case would almost certainly not be reported."); *see generally* Gibson et al., *supra* note 77, at 116 (victimization is suspected to be deeply shrouded in secrecy since homosexual activity in Jamaica, if revealed, is often met with mob violence.).

374. *See* NICK DAVIS & CULTURE SMART, JAMAICA - CULTURE SMART!: THE ESSENTIAL GUIDE TO CUSTOMS & CULTURE (2011) (detailing the macho culture in Jamaica).

375. La Fontaine, *supra* note 135, at 14.

376. JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 119.

Fear of physical harm also influences decisions not to report intrafamilial child sexual abuse. In Jamaica's "informer fi dead" culture, it is not uncommon for the perpetrator to use threats of violence to dissuade the victim, other family members, or anyone who knows of the abuse from reporting the abuse.[377] Oddly enough, the perpetrator is sometimes joined by family and community members in using threats of violence to suppress reports of intrafamilial child sexual abuse.[378]

In Jamaica, the justice system has been a factor in the underreporting of child sexual abuse. While there are several recent improvements to the justice system in Jamaica, there is a general "lack of confidence in the system [which serves] as [a] disincentive[] to reporting abuse."[379] Notably, victims and their families are overwhelmingly dissuaded from reporting intrafamilial sexual abuse largely because of the length of time it takes to schedule the case on the judicial calendar, the financial and emotional costs to the victim, the protracted delays,[380] the lack of empathy to victims of child sexual abuse by some members of the judicial system;[381] and a fear that justice will be perverted allowing the perpetrator to influence the direction of reports, avoid punishment, or receive a proverbial slap on the wrist.[382] To foster a belief in the integrity of the justice system, and to further the goal of criminal law as

377. Samms & Cholewa, *supra* note 111, at 118 (noting that persons who may know of an incident of intrafamilial may "often keep silent for fear of being labeled an informant."); Haniff, *supra* note 126, at 365 (noting Jamaica's informer culture); Davies et al., *supra* note 359, at 10; *see* Devon Ricketts v. R [2021] JMCA Crim 20 [2].

378. *See* Gardner et al., *supra* note 108, at 9 (Also related, family and community members may sympathize with the perpetrator and blame the victim for reporting the sexual abuse.); *see also* Silvera, *Dad raped us, supra* note 363.

379. CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 22.

380. IT AFFECTS YOU FOR A LIFETIME, *supra* note 249, at 91 (noting that the systemic court delays deter victims from reporting child sexual abuse).

381. *See id.* (one of the factors that contributed to under-reporting and general help seeking intentions was the systemic challenges within the justice system and how CSA matters were handled. Participants suggested that first contact professionals such as the police, even those at the special unit in charge of child abuse cases, are not sensitive to cases of CSA, particularly with boys.); *see generally* Betsy Ann Lambert Peterson, *A Legal Perspective of Child Sexual Abuse in the Caribbean, with a Focus on Trinidad and Tobago, in* UNDERSTANDING CHILD SEXUAL ABUSE: PERSPECTIVES FROM THE CARIBBEAN 51, 70 (Adele D. Jones ed. 2013) (noting that "[M]any psychiatrists and those engaged in the assessment and treatment of abused children posit that the legal process is itself abusive and causes damage to the child witness.").

382. *See* Wilson-James, *supra* note 70, at 148-49 (arguing that "[B]ecause of the high percentage of perpetrators who escape prosecution, victims are unwilling to disclose the sexual abuse. The data also showed that perpetrators of sexual abuse are less likely to receive prison time compared to other criminals."); *see* JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 10 ("The perpetrator may be in a position of power or is likely to know someone who is and may be able to influence the outcome of a report.").

a deterrent, it is important that the child and others who know of the sexual abuse see that the perpetrator is punished.[383]

Intrafamilial child sexual abuse that is not disclosed is unlikely to be reported.[384] It is important to understand that sometimes victims never disclose the abuse or they do so many months or years later because they do not know that the sexual contact is wrong and abusive, they do not have the vocabulary to describe the abuse, or they suppress memories of the abuse.[385] For example, young children may not be aware that the sexual contact is wrong and if they are aware, they may not have the vocabulary to describe the abuse.[386] Moreover, older children may only become aware that the sexual contact is wrong months or years later "when they have had the opportunity to talk to someone."[387] This opportunity is often nonexistent or significantly delayed because of the secrecy surrounding intrafamilial child sexual abuse.[388] It is a common coping strategy for adult survivors of intrafamilial child sexual abuse to deny, minimize, or suppress memories of the abuse.[389] Forgetting the abuse happened is also another common coping strategy.[390] Approximately one third of adult victims of intrafamilial child sexual abuse cannot recall the abuse; in fact "the younger the child was at the time of the abuse, and the closer the relationship to the abuser, the more likely one is not to remember."[391]

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383. JONES & JEMMOTT, ISSUES FOR BARBADOS, *supra* note 82, at 16 (noting that convictions for child sexual abuse are rare because of the many impediments to prosecution); Todres, *supra* note 66, at 99 (criminal law's core goal is deterrence and punishing the perpetrator).

384. *See* Bowman & Brundige, *supra* note 67, at 244 (suggesting that even if the victims do not verbally disclose child sexual abuse, the abuse can nonetheless be detected through "physical symptoms, injuries, or behavioral changes."); *see also id.* at 245 ("To address this problem requires educating caregivers and the community at large to recognize behavioral signs that a child has been sexually abused, to understand what constitutes child sexual abuse short of intercourse, and to respond sensitively").

385. Mondragon et al., *supra* note 147, at 3 (noting that "many people who are victims of childhood sexual abuse do not disclose the abuse until many years later.").

386. *Id.*; Jemmott, *supra* note 348, at 77.

387. *See* Bowman & Brundige, *supra* note 67, at 244 (noting that "societal taboos and silence about sexual matters also hamper older children from understanding and disclosing what has happened to them."); *see also* Gilgun, *supra* note 373, at 273 (noting that a stepdaughter learned in school that the sexual abuse by her stepfather was wrong); *see* Chung, *supra* note 1, ¶ 13 (alleged victim learned from talking to her friends that sex with her father was wrong); *see* BUTLER, *supra* note 365, at 31 (child may take years to understand that sexual contact with father is wrong where the father's behavior is non-violent).

388. Mondragon et al., *supra* note 147, at 3 ("Incest is an abusive act surrounded, supported, and enabled by secrecy.").

389. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 231 (noting that "the closer the relationship to the abuser, the more likely one is not to remember.").

390. *Id.* at 230.

391. *Id.* at 231.

While the barriers to reporting intrafamilial child sexual abuse are many, the downsides of failing to report the abuse are even worse. To note, in instances where the abuse is not reported, the perpetrator typically goes unpunished and likely feels empowered to continue the abuse and sexually abuse other children in the household.[392] In fact, it is generally posited that "[o]ffenders do not stop until they are caught or there is an intervention,"[393] which creates ample opportunity for the abuse to continue for years and happen to multiple children. Equally tragic, the child victim and others who may be aware of the abuse may feel frustrated and revictimized when they see that the perpetuator faces no consequences for the harm done. As such, it is important that the child sees that the perpetrator is held accountable for sexual abuse.

IV. JAMAICA'S INCEST LAW AND ITS LIMITATIONS

A. Jamaica's Incest Laws

Jamaica has long shifted away from the traditional nuclear family consisting of mother, father, and biological children as the predominant family structure, yet the incest laws remain narrowly drawn to proscribe solely heterosexual sexual intercourse by close blood relatives. Until July 2011, incest in Jamaica was regulated under the Incest Punishment Act of 1948 (the Incest Act).[394] As a former British colony, Jamaica's incest laws are rooted in British Incest Laws.[395] The Incest Act narrowly defined incest based on consanguinity and proscribed sexual intercourse between close lineal ancestors and descendants. The Incest Act applied equally to persons

392. Gardner et al., *supra* note 108, at 12; Jeremiah et al., *supra* note 276, at 58 ("When there is more than one daughter in the family, father will target the oldest, but he may abuse more than one, simultaneously, in private acts or in sequence as they grow."); *see* Little-White, *supra* note 263 ("When there is more than one daughter in the family, father will target the oldest, but he may abuse more than one, simultaneously, in private acts or in sequence as they grow."); *see generally* Wilson-Harris, *supra* note 363 (father abuses multiple siblings); *see generally* Silvera, *Dad raped us, supra* note 363 (father abuses multiple siblings for several years).

393. RAVEN L. BADGER, SEXUALITY AND ADDICTION, MAKING CONNECTIONS, ENHANCING RECOVERY 126 (2012); *see* Komalasari & Paraniti, *supra* note 208, at 235 (positing that "[c]onfidentiality of incest makes incest unknown to the surrounding environment. As a result, this violence can occur many times in a long period of time.").

394. *See* Sexual Offences Act (The Sexual Offences Act came into effect on July 15, 2011, repealed the Incest (Punishment) Act, added certain provisions set out in the previous Offences Against the Person Act, and repealed Sections 44 to 67 of the Offences Against the Persons Act (1864)).

395. *See* Murray, *supra* note 168, at 105 n.7 (U.S. incest laws trace back to English ecclesiastical statute).

related by whole or half-blood.[396] For example, the term "sister" under the Incest Act included half-sister and the term "brother" included half-brother.[397] Knowledge of the familial relationship was an essential element to establishing incest.[398] The offender had to know that the person with whom he or she had sexual relations was a close blood relative.[399] For example, sexual intercourse between a male and a female who the male knew was his grand-daughter would be prohibited under the Incest Act.[400] In this instance, the male could be charged with a misdemeanour punishable by up to five years in prison with hard labor.[401] Consent of the female was immaterial.[402] If the male had sexual intercourse with a female who at the time was under 12 years old, the punishment extended to up to 16 years of imprisonment with hard labor.[403] Attempted incest carried a penalty of up to two years of imprisonment with hard labor.[404]

Females ages 16 and older could also be convicted of the crime of incest under The Incest Act. Specifically, the Incest Act proscribed sexual intercourse between females aged sixteen and above and their father, grand-father, brother, or son.[405] Like with the males, knowledge of consanguineal ties was essential to establishing incest. However, unlike with males, consent was essential to proving incest by a female.[406] The Incest Act explicitly stated that "[a]ny female person of or above the age of sixteen years who with *consent permits* her grand-father, father, brother, or son, to have carnal knowledge of her (knowing him to be her grand-father, father, brother, or son, as the case may be) shall be guilty of a misdemeanour . . . "[407] Upon conviction, a female would face imprisonment with hard labor for a term of up to five years.[408] Unlike with males, the Incest Act did not include a charge for attempted incest for females.[409]

396. Incest (Punishment) Act, § 4 (1948) (Jam.).
397. *Id.*
398. *Id*. at § 2.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* at § 3.
406. *Id.*
407. Incest (Punishment) Act, *supra* note 415.
408. *Id.*
409. *Id.*

Stakeholders implored the legislature to amend the Incest Punishment Act to give it "more teeth."[410] Specifically, the stakeholders requested changes to the Incest Act to "create a single, gender-neutral incest offence by persons of 16 years and older, and broaden the scope of people who can be found guilty of the offence to include among others, aunts, and uncles, nephews, and nieces and people in *loco parentis* relationships (persons, not parents, in parental-type relationships with children.)"[411] The stakeholders also requested "the re-classification of the offence of incest as a felony, with a maximum penalty of life imprisonment."[412]

The Incest Act was repealed by The Sexual Offences Act of 2009, which came into effect on July 15, 2011.[413] The Sexual Offences Act regulates incest and several other sexual offenses including rape, grievous sexual assault, sexual offences against children, and indecent assault.[414] The Sexual Offences Act expanded the scope of blood relatives who can be found criminally liable for incest to include grandmother, aunts, uncles, nieces, and nephews, and made incest a felony instead of a misdemeanor.[415] Under the Sexual Offences Act, the crime of incest is established when a male person "willingly has sexual intercourse with another person knowing that the other person is his grandmother,[416] mother, sister, daughter, aunt, niece or granddaughter" and when a female person "willingly has sexual intercourse with another knowing that the other person is her grandfather, father, brother, son, uncle, nephew or grandson."[417] Like the Incest Act, the Sexual Offences Act makes no distinction between persons related by whole blood or half blood.[418] Culpability for incest would apply to a man who has sexual intercourse with his sister or his half-sister.

Additionally, The Sexual Offences Act removed consent as an element of incest by adult females.[419] Consent is now immaterial to establishing criminal liability for incest.[420] This means that consent cannot be used as a

410. Alicia Dunkley, *Smith says Incest Punishment Act Needs 'More Teeth,'* JAM. OBSERVER (Dec. 15, 2006), https://www.jamaicaobserver.com/2006/12/14/smith-says-incest-punishment-act-needs-more-teeth/.

411. *Id.*

412. *Id.*

413. Sexual Offences Act, §§ 1–44 (2009) (Jam.) (amending the Offences Against the Person Act (1864)).

414. *Id.*

415. *Id. a*t § 7.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

defense to a charge of incest.[421] Sexual intercourse between blood relatives within the statutorily defined degree of consanguinity equates to incest irrespective of whether both parties gave consent. Interestingly, drafters of the Sexual Offenses Act made it clear that incest was not a strict liability crime.[422] Instead, the drafters added "willingly [had] sexual intercourse" to explicitly indicate that the crime of incest cannot stand against the accused unless he or she consciously, voluntarily, and intentionally had sexual intercourse with a person within the prohibited degree of consanguinity.[423]

Answering the concerns of the stakeholder, The Sexual Offences Act includes higher penalties for incest, now reclassified from a misdemeanor to a felony.[424] As a result, any male or female found guilty of incest could be sentenced up to life in prison.[425] Unlike with its predecessor, the Incest Act, females can be found guilty of attempted incest under the Sexual Offences Act.[426] And, both males and females who are found guilty of attempted incest can face a punishment of up to ten years of imprisonment.[427]

Children under sixteen years old and persons with a mental disorder at any age may be removed from the custody and control of a blood-related or non-blood-related sexual abuser. The Sexual Offences Act gives the court discretion to divest a convicted person of authority or guardianship;[428] appoint a guardian; or refer the matter of guardianship to the Children's Court for further proceedings.[429]

Part IV of the Sexual Offences Act contains several provisions that proscribe sexual contact with children. For purposes of these provisions, a child is defined as a person under the age of 16 years.[430] The Sexual Offences Act explicitly proscribes sexual touching or interference of a person under 16 years,[431] sexual grooming of a person under 16 years,[432] sexual intercourse with a person under sixteen,[433] and inducing or encouraging violation of a child under 16 years by an owner or occupier of a premises.[434] The Sexual

421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.* at § 8.
429. *Id.* at § 7.
430. *Id.* at § 8.
431. *Id.*
432. *Id.* at § 9.
433. *Id.* at § 10.
434. *Id.* at § 11.

Offences Act also empowers the court to divest the parents or guardians of custody of a child under 16 years if it has been proven at trial that the parents or guardians have "caused, encouraged, or favoured" seduction or prostitution of the child.[435] The Sexual Offences Act includes a sex offenders registry.[436]

B. Limitations to the Incest Provision of the Sexual Offences Act

Under the Sexual Offences Act, the crime of incest remains limited to people with consanguineal relationships.[437] Stepparents, adoptive parents, foster parents, persons acting in *loco parentis* to a child, a parent or guardian's boyfriend living in the same household as the child, cannot be found criminally liable for incest under the Sexual Offences Act.[438] At best, a stepparent, adoptive parent, foster parent, person acting in *loco parentis* to a child, parent, or guardian's boyfriend living in the same household as the child, or other "adult in authority" who has sexual intercourse with a child under the age of 16 years may be charged with the offense of having sexual intercourse with a person under the age of 16 years.[439] An adult in authority is defined under the statue as: a position of trust or authority in relation to a child; a person with whom a child is in a relationship of dependency; or a person who stands in *loco parentis* to a child.[440]

If "an adult in authority" is convicted of sexual intercourse with a child under the age of 16, he or she may be sentenced to "imprisonment for life, or such other term as the Court considers appropriate," which should be no less than 15 years.[441] The convicted person may be eligible for parole only after serving 10 years of imprisonment. Like persons convicted of incest who have authority or guardianship of the child victim, the Court may divest the "adult in authority" of authority or guardianship of the child.[442] Consent of the child under the age of 16 is immaterial to imposing criminal liability.[443] It is important to point out that persons over the age of 16 are unable to benefit from this provision.

By contrast, consent becomes material to invoking criminal liability, if a stepfather, adoptive father, foster father, mother's or guardian's boyfriend,

435. *Id.* at § 12.
436. *Id.* at § 29.
437. *Id.* at § 7.
438. *Id.*
439. *Id.* at § 10.
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*

or other male adult in authority has sexual intercourse with a female over the age of 16 years.[444] The adult male may be charged with rape. Under the Sexual Offence Act, "[a] man commits the offence of rape if he has sexual intercourse with a woman (a) without the woman's consent; and (b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not."[445] Consent is vitiated only in the limited instances of physical assault or fear of physical assault to the victim or a third person and fraud.[446] The Court has discretion in sentencing a person convicted of rape to 15 years to life imprisonment.[447]

Incest is a crime under the Sexual Offences Act only where the sexual intercourse is between a male and a female.[448] Put another way, the Sexual Offences Act only proscribes heterosexual incest. Sexual intercourse is material to establishing incest. The Sexual Offences Act explicitly defines sexual intercourse as "the penetration of the vagina of one person by the penis of another person."[449] Sexual touching, including oral, anal, and digital penetration will not meet the threshold to establish incest.[450] Consequently, homosexual sexual penetration, male to male or female to female, will not qualify as criminal incest under the Sexual Offences Act.[451] Homosexual sexual penetration by a close blood relative or an adult in authority may be prosecuted under grievous sexual assault.[452] Grievous sexual assault requires proof that the offender penetrates or causes another person to penetrate the vagina or anus of the victim by a body part other than the penis of the offender or the other person or an object manipulated by the offender or the other person; the offender places his penis or causes another to place his penis into the mouth of the victim; or the offender places his or her mouth or causes another person to place his or her mouth onto the vagina, vulva, penis or anus of the victim. Consent is material in establishing grievous sexual assault.[453] Like rape, the Sexual Offences Act requires that the acts are carried out without consent of the victim; and knowing that the victim does not consent to the act or recklessly not caring whether the victim consents or not.[454]

444. *Id.*
445. *Id.* at § 3.
446. *Id.*
447. *Id.* at § 6.
448. *Id.* at § 7.
449. *Id.* at § 2.
450. *Id.*
451. *Id.* at § 3.
452. *Id.* at § 4.
453. *Id.*
454. *Id.*

Again, like rape, consent is vitiated only in the limited instances of physical assault or fear of physical assault to the victim or a third person, and fraud.[455]

C. Current Incest Protections Fall Short of International Standards

Replacing the Incest Act with the Sexual Offences Act of 2009 shows the Jamaican government is serious about protecting children from sexual abuse, but there is still room for improvement. The Sexual Offences Act needs more "teeth" as it fails to adequately protect all children, male and female, equally from intrafamilial child sexual abuse. In short, current incest protections, albeit a step in the right direction, fall short of international standards, particularly the international mandate under the United Nations Convention on the Rights of the Child (CRC).

International standards require that all children are protected from sexual abuse regardless of sex or gender. The CRC defines a child as "any human being under the age of 18."[456] Taking guidance from the CRC, the World Health Organization also defines a child as a person under the age of 18.[457] Article 19 of the CRC, ratified by several countries, including Jamaica, requires all state parties to take all appropriate measures, including legislative measures, to "protect the child from all forms of physical or mental violence, injury, or abuse … including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[458] Article 27 further recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."[459] Article 34 obliges state parties to "protect the child from all forms of sexual exploitation and sexual abuse."[460] In addition, Jamaica is also signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which prohibits sexual violence against girls and women.[461] Sexual violence against girls and women is a form of discrimination explicitly prohibited by CEDAW.[462] CEDAW requires State

455. *Id.* at § 3.

456. *Convention on the Rights of the Child*, adopted Nov. 20, 1989, G.A. Res. 44/25, 1 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/49 (1989), (entered into force Sept. 2, 1990) [hereinafter *Convention*].

457. World Health Organization [WHO] *Report of the Consultation on Child Abuse Prevention*, at 14, (29-31 Mar., 1999).

458. *Convention*, *supra* note 456, at art. 19.

459. *Id.* at art. 27.

460. *Id.* at art. 34.

461. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, (entered into force Sept. 3, 1981) art. 1& 2 [hereinafter CEDAW].

462. *Id.*

Parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[463] Put another way, the State Parties must take all appropriate measures, including amending legislation, to "prevent, respond to, protect against, and provide remedies for child sexual abuse within the family."[464]

It is globally understood that international standards require that "[c]hildren have a right to safety and security in their homes and communities."[465] Yet, the family and household which are important bases for socialization of children are oftentimes where children face most harm, and in particular sexual violence.[466] In the 1988 article *The Politics of Child Sexual Abuse: Notes From American History*, Professor Linda Gordon states that for sexually abused children "the most dangerous place for [the child] is the home, [and] the most likely assailant [is] their father."[467] Over three decades later, this statement remains true and relevant globally and locally. The change in the family structure from a traditional nuclear family to a predominantly single-parent headed household in Jamaica with other existing family structures such as a reconstituted, blended, or cohabiting family structure means that the definition of the most likely assailant has expanded from a biological father to include a permanent or transient step-father, adopted father, a mother's or guardian's partner, or another adult male in the household.

The incest provision of the Sexual Offences Act fails to meet international standards because one of the goals of incest law is to protect children from sexual abuse in their homes and at the hands of relatives and persons who have power and control over them, yet the incest provision does not fully take into consideration Jamaica's diversity in family structure and the increased vulnerability of children to persons who are living in their household who may not be blood relatives. Because of the prominence of the single-female headed household and reconstituted families in Jamaica, the incest provision of the Sexual Offences Act should extend beyond close blood relatives to include relationships by co-habitation and affinity. This includes stepfathers, adopted fathers, mother's or guardian's boyfriends, fathers who are raising a non-biologically related child as in the case of

463. *Id.* at art. 2.

464. Bowman & Brundige, *supra* note 67, at 264.

465. Davies et al., *supra* note 359, at 28.

466. Bowman & Brundige, *supra* note 67, at 264 ("The Committee on the Rights of the Child, which monitors compliance with the CRC, has recognize[d] that much of the violence experienced by children, including sexual abuse, takes place within a family context").

467. Linda Gordon, *The Politics of Child Sexual Abuse: Notes from American History*, 28 FEMINIST REV. 56, 61 (1988).

surrogacy or sperm donation, and cohabiting men who exercise power and control over the children.

Currently, and as a stark example, sexual intercourse between a stepdaughter and her stepfather is not prohibited under the incest provision of the Sexual Offences Act even where the parents are legally married or are in a long-term common-law relationship.[468] The same holds true for a daughter and her adopted father. Affinity relationships of any kind, whether legal or by association, are not included in the incest provision.[469] A stepfather who has sexual intercourse with his stepdaughter may be charged with Sexual Intercourse with a Person under 16 years old if the stepdaughter is under 16 years old at the time or with the offense or rape if the stepdaughter is 16 years old or older.[470] Similarly, in situations of misattributed paternity, even where the perpetrator has raised the child from birth and the child lives in the same household, the incest provision of the Sexual Offences Act does not apply because consanguinity cannot be established.

To illustrate the issue, imagine that Ann's biological father died when she was two years old. Ann's mother married Tom when Ann was four years old. Tom and Ann's mother had two other children; girls named Isla and Martha. They all lived in the same household. Tom is the only father Ann knows. She calls him dad. Tom started to fondle Ann when she turned 12 years old. He had sexual intercourse with her for the first time the month after her sixteenth birthday and frequently thereafter. Similarly, Tom started to fondle Isla and Martha when they turned 12 years old, and he started to have sexual intercourse with them the month after they turned 16 years old. Isla told her guidance counselor at school that her father was touching her, and the principal reported it to the police. Upon investigation by the police, it was discovered that Tom was also sexually abusing Martha. Tom immediately got a lawyer who advised him to get a DNA test. The DNA test showed that Isla was not Tom's biological child. Martha, who was born eleven months after Isla was Tom's biological child. Tom was charged with incest under the Sexual Offences Act only in relation to Martha who was his biological child. As for Ann and Isla, he could not be held criminally responsible for incest under the Sexual Offences Act because he was not their close blood relative. Even though Tom had raised all three girls as his children, and Isla and

468. *See* Sexual Offences Act § 7.

469. *Id.* at §§ 7-15.

470. A stepfather may be found to be an "adult in authority" which allows for a sentence of life imprisonment upon conviction, but this only applies if the child is under 16 years of age. Sexual Offences Act, §§ 6, 10; *see* Stephen Collins v. R [2016] JMCA Crim 17 (Mr. Collins was found to be an adult in authority and charged with having Sexual Intercourse with a Person under 16 years old. He was the victim's 59-year-old stepfather).

Martha practically as twins given that they are only 11 months apart, Tom could only be found guilty of incest for sexually abusing Martha, his biological child.

Under the Sexual Offences Act, Tom could be charged for lesser offenses such as sexual touching in relation to Isla and Ann for the sexual abuse they endured up to the age of sixteen years old. Since Tom started to have sexual intercourse with them when they were a month over sixteen years old, he could be charged with rape but would be found guilty only if consent was not proven in both cases. Under the Sexual Offences Act, Tom would have committed no offense if he had consensual sexual intercourse with his daughters Isla and Ann. In Isla's situation, where paternity was misattributed, it would be interesting if the courts were to rule as the Court of Appeals in California did in *People v. Russell*,[471] that because Isla's mother was married to and cohabitating with her husband Tom at the time of Isla's birth, she was to be considered his daughter for purposes of the statute.[472]

In another scenario, Elsa, her mother, older brother, younger sister, and Jake lived in the same house. Elsa's mother and Jake were not married but were in a long-term relationship and she was Jake's common-law wife. They were the biological parents of Elsa's younger sister. Elsa and her brother called Jake "Uncle Jake." Jake owned the house the family lived in and was the primary breadwinner. They lived as a family. Jake began to sexually touch and digitally penetrate Elsa the month after she moved into his house. She was five years old. Elsa, Jake, and her younger sister were alone at home. Her sister was asleep. Elsa went to use the bathroom. Jake approached Elsa, pulled her shorts and underwear down and rubbed his penis on her vagina. He then inserted his penis into her vagina. She was thirteen years old at the time. Jake gave Elsa $500 to keep her quiet and not tell anyone what had happened. She ran away from home the next day. Like Tom, Jake could not be held criminally responsible under the Sexual Offences Act for incest because Elsa is not related to him by blood. Although Elsa and her siblings live with Jake and their biological mother, Jake provides for them financially and they call him "Uncle," which shows a sign of respect and signals that he is a part of the family, Elsa is still not his biological daughter, granddaughter, or niece.[473] Because Elsa is under the age of sixteen, Jake could be charged with having Sexual Intercourse With a Person under Sixteen. Based on precedent, he could be found to be an adult in authority, which carries a penalty of "imprisonment for life, or such other term as the Court considers

471. *People v. Russell*, 22 Cal. App. 3d 330 (1971) as mentioned in Murray, *supra* note 168, at 107.

472. Murray, *supra* note 168, at 107.

473. *See* Sexual Offences Act, § 7.

appropriate, not being less than fifteen years."[474] If Elsa were Jake's biological child, he could have been charged with incest for having sexual intercourse with her regardless of her age.

The failure of the incest provision of the Sexual Offences Act to include non-biological "parents" and family within the household makes the age of the victim even more crucial in determining criminal liability for intrafamilial child sexual abuse. The age of the victim is immaterial under the incest provision of the Sexual Offences Act.[475] A perpetrator who has sexual relations with a statutorily defined closely related person can be found criminally responsible for incest irrespective of the victim's age.[476] If the victim is considered the perpetrator's child, foster child, or stepchild, or lives in the same household but is not within the statutorily defined group of close blood relatives, age becomes crucial in determining criminal responsibility. Although the CRC and the WHO define a child as "a person under the age of eighteen," part IV of the Sexual Offences Act, which explicitly addresses Sexual Offences Against Children and Indecent Assault, defines a child as "a person under the age of sixteen."[477] To that end, as with incest, consent is immaterial to establishing a charge for Sexual Intercourse With a Person under Sixteen but material to establishing rape – the charge that would apply when the victim is sixteen years old and older.

It is critical to note that even if Elsa were Jake's biological child, while he could be charged for incest for having sexual intercourse with her, the years he spent sexually touching and digitally penetrating her would not carry a charge of incest because incest under the Sexual Offences Act requires proof of sexual intercourse. Consequently, other forms of harmful and abusive sexual contact not limited to sexual touching; or digital, anal, or oral penetration, cannot establish criminal liability for incest.

The incest provision of the Sexual Offences Act falls short of international standards because it discriminates based on sex. This is because the Sexual Offences Act limits criminal responsibility for incest to heterosexual sexual intercourse same-sex sexual contact would not be proscribed as incest and may warrant a lesser penalty.[478] For example, while harmful to the child, mother-daughter sexual contact would not qualify as incest. Similarly, father-son or grandfather-son sexual contact would not be proscribed as incest under the Act.

474. *Id.* at § 10; *see* Stephen Collins v R [2016] JMCA Crim 17.
475. *Id.* at § 7.
476. *Id.*
477. *Id.* at §§ 2, 10.
478. *Id.* at § 7.

Boys are not protected even in situations where a similarly situated girl would have been protected under the incest provision. To explain, a man can be charged for incest if he has sexual intercourse with his biological daughter, but he cannot be charged for incest for any type of sexual penetration with his son because sexual intercourse is a material element in the crime of incest and sexual intercourse can only be established in heterosexual contacts – "the penetration of the vagina of one person by the penis of another person."[479] In yet another scenario, after a brief illness, Judith lost her husband and the father of their charming three-year old son Nate. Three years later, Judith married Bob, a widow. Bob had a son, Theo, who was two years older than Nate. Together, Bob, Judith, Nate, and Theo settled into their happy blended family. Five years into the marriage, Judith got a promotion and started traveling frequently for work. She noticed that Nate had become withdrawn while Theo was overly aggressive. Judith attributed their behavior to the 'relentless" pre-teen years. When she took the boys to the doctor for their annual physical exam, her worst nightmare came true. Bob was sexually abusing both boys. Under the Sexual Offences Act, the crime of incest is limited to heterosexual sexual contact by close blood relatives.[480] Bob could not be charged with incest in either scenario. Although Bob was Theo's biological father, Bob is male and so is Theo. The criminal prohibition against incest proscribes only vaginal penetration.[481] If Theo had been a girl, Bob could have been charged with incest which carries an automatic starting point of life imprisonment. Similarly, although Nate was not Bob's biological child, if Nate were a girl, Bob could not be charged with incest but he could have been charged with Sexual Intercourse with a Person Under Sixteen which does not require proof of consent and which carries a penalty of no less than fifteen years to life imprisonment.[482] However, since both Nate and Theo are boys under the age of sixteen, Bob can be charged with grievous sexual assault[483] and a lesser offense of sexual touching or sexual interference.[484] Like Bob, family members or people in *loco parentis* can be charged with grievous sexual assault, under section 4 of the Sexual Offences Act, where they engage in or cause another to engage in penile or non-penile penetration of a victim that is not sexual intercourse.[485] Unlike incest, consent

479. *Id.* at § 2.
480. *Id.* at § 7.
481. *Id.* at § 2.
482. *Id.* at § 10.
483. *Id.* at § 4.
484. *Id.* at § 8.
485. *Id.* at § 4.

is material to the charge except in instances involving children sixteen years old and younger.[486]

In the above scenario, it is also likely that Bob could be charged for unnatural crime under section 76 the Offences Against a Person Act.[487] Comparatively, section 76 criminalizes homosexuality and by its very wording revictimizes the victim by first calling the offense "unnatural" and second by labeling the crime as "the abominable crime of buggery."[488] If convicted, unlike incest which is a felony and carries a life sentence, an unnatural crime is misdemeanor[489] that carries a sentence of up to ten years of imprisonment.[490] That said, based on the labeling and the stigma attached, it is unlikely that a male victim of same sex intrafamilial sexual abuse would report the abuse and risk being stigmatized.[491]

V. HOW LEGAL PROTECTIONS AGAINST INCEST CAN BE BETTER

Several scholars have looked at the variations in incest laws among jurisdictions and opined on ways to change the laws to provide greater protection for child victims of sexual abuse. Most notably, scholars have observed that the contemporary expansive definition of family necessitates a change in the definition of incest to reflect this change in societal family structure.[492] The family is no longer a nuclear construct consisting of closely related people with consanguineal ties. The family in Jamaica and elsewhere now typically includes people by affinity and cohabitation. This change in the family structure, however, has increased the proximity and vulnerability of children who are exposed to people who exercise power and control over them and on whom the children are dependent, but who may not see them as blood relatives.

Scholars seem to typically agree that laws proscribing incest solely on sexual intercourse with close linear ascendants and descendants, as is the case

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486. *Id.*

487. Offences Against the Person Act, ¶ 76.

488. *Id.*

489. *Id.* (Buggery under the Offences Against the Person Act is a misdemeanour punishable for up to ten years imprisonment; attempted buggery is punishable for up to seven years imprisonment).

490. *Id.*

491. *See* Coleman, *supra* note 66, at 280-81 ("Current incest legislation fails to protect child victims in one additional respect. Many incest statutes prohibit only heterosexual activity. While the overwhelming majority of offenders are adult males and the majority of victims are female children, at least some men engage in sexual contact with male children. This deficiency in the statutes is particularly distressing because, whereas girls seem able, with competent professional help, to learn to cope with many of the psychological problems caused by incestuous behavior, boys may experience psychotic breaks.").

492. *See generally* Mahoney, *Legal Definition of the Stepfamily*, *supra* note 164, at 30, 36.

with most traditional incest laws, do not adequately consider the diversity of the modern family structure nor serve the overall goals of the incest taboo, which includes protecting the institution of family from [jealous, discord, resentment] ensuring "harmony and stability" in the family[493] and protecting children,[494] particularly in light of the power imbalance that typically exists in parent-child relationships in the home.

Recognizing that a substantial number of children are sexually abused within the home, scholars have repeatedly argued that incest laws need to extend their limited reach beyond the traditional nuclear family consisting primarily of persons related solely by blood to consider the modern family and its diversity of forms which include affinity and cohabitating relationships.[495] At the heart of these arguments is the vulnerability of the children, the power imbalance between parents or people acting in *loco parentis* and the children, and protecting the family institution from cracks caused by jealousy and discord.[496] Professor Margaret Mahoney examined how stepparent-child relationships are treated under U.S. state laws regulating incest and observed that state incest laws that expressly exclude step-relatives, and by extension people related by affinity on the grounds that some people related by affinity should be allowed to marry, broadly look at stepfamily relationships as a monolith and ignore clear justifications for the incest ban.[497] Mahoney further observed that states that strictly adhere to traditional incest laws and prohibit "sexual activity between close relatives without regard to the age" of the parties typically excluded stepfamily members but "[s]tepparent-child relationships are included in almost all of the laws that combine age and family relationship."[498] Regarding the latter state laws, Mahoney noted that "[t]he factors employed in these state statutes are designed to identify situations where a power imbalance exists in the family, similar to the authority exercised by parents over their children."[499] Typically, in these instances, the prohibition is lifted when the child reaches the age of majority.

Mahoney noted that some citizens may argue that including stepfamily members in incest laws limits "the freedom of adults to select sexual partners outside the biologic family," however, numerous policy interests support

493. *Id.* at 30, 34.
494. *See id.* at 30.
495. *Id.*
496. *Id.* at 29, 31.
497. *Id.* at 30.
498. *Id.* at 31.
499. *Id.*

including stepchildren without limitation on age.[500] "First, the vulnerability of stepchildren in the family may continue beyond their age of majority, thereby justifying the ban on adult relationships."[501] "Second, stability and harmony in the stepfamily may be enhanced by the restriction on sexual relationships between consenting adults. Last, the broad application of criminal prohibitions on sexual activity without regard to age may, in fact, vindicate the views of the community, past and present, regarding moral behavior in the stepfamily."[502] Mahoney notes that "a relationship even when the stepdaughter is at the age of majority could likely cause discord in the family."[503] In short, quoting *Rhodes v. McAfee*, Mahoney posited that where a "stepdaughter lived in the home with the mother and stepfather . . . [and her] status in this family would be closely akin to the natural children of a mother and stepfather . . . If there were no statutes prohibiting such marriages, there likely would [be] discord and disharmony in the family."[504] Mahoney argues that if the stepparent exercises a true parental role in the child's life, the sexual encounter is more likely to be deemed incestuous than if the stepparent did not play a parental role.[505]

Adopting a similar line of reasoning, Professor Cynthia Godsoe argues that to "effectively deter and punish the harm" from incest, the scope of incest laws should be expanded to include stepfathers, stepmothers, "and others in a parental relationship" with the child.[506] Godsoe posits that "criminal law in the relational context imposes a hierarchy among families,"[507] favoring the traditional nuclear family. Consequently, "[t]he scope of liability perpetuates a biocentric, gendered, and heteronormative family, while leaving other families unrecognized ..."[508] In particular, the laws typically exclude "non-biological adoptive parents, stepparents, and functional parents,"[509] and some states persistently fail to criminalize same-sex adult incest.[510] On this observation, Godsoe aptly noted that considering the "significance of the parent-child relationship in determining certain types of harm" criminal law

500. *Id.* at 32.
501. *Id.*
502. *Id.*
503. *Id.* at 33-34
504. *Id.* (citing to Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970)).
505. Mahoney, *Legal Definition of the Stepfamily*, *supra* note 164, at 23-24.
506. Godsoe, *supra* note 305, at 202, 216, 225; *see also id.* at 221 ("[V]ertical incest should be expanded to include functional parents and other relatives (such as step-uncles) a generation older.").
507. *Id.* at 200.
508. *Id.*
509. *Id.*
510. *Id.*

has failed to adopt key "changes in family law doctrine recognizing functional parenthood."[511]

Godsoe posits that power imbalance is critical in assessing liability in relational crimes. Godsoe supports the ongoing criminalization of vertical incest in large part because of the power imbalance that typically exists in vertical familial relationships.[512] Godsoe notes that "the parent-child relationship constitutes perhaps the ultimate power imbalance" yet some "states continue to very narrowly define parenthood" based solely "on formal [traditional] rather than functional definitions."[513] This practice "leaves a large swath of persons unprotected from exploitation by stepfathers and others who have served as parents."[514] Confirming global findings, Godsoe agrees that stepfathers are "some of the most common offenders" of intrafamilial sexual abuse.[515] Godsoe defines stepfather as "a parental figure whose parentage is not necessarily legally established via adoption or even marriage to a child's mother, but rather comes through his romantic relationship with a child's mother."[516]

Godsoe notes that "the majority of [contemporary] American households are "non-traditional," meaning unmarried, cohabitating, or single parent households.[517] To that end, "non-marital, adoptive, same-sex, and functional (including step) families"[518] deserve greater recognition which "is particularly important in the parenthood context, given children's inherent dependence, both financial and physical."[519] Overall, Godsoe notes that "[e]xpanding definitions of parenthood [to] incorporate functional as well as formal family statuses, permitting the capture of power dynamics, [are] essential to truly parsing out relational crimes."[520]

Importantly, Godsoe argues that the power imbalance inherent in the "parent-child dyad" vitiates valid consent.[521] Godsoe further argues that the power imbalance in parent-child relationships does not automatically end when the child becomes an adult.[522] In fact, Godsoe notes that "[P]arental

511. *Id.* at 182.
512. *Id.* at 216 (arguing that "horizontal incest should be decriminalized.").
513. *Id.* at 197.
514. *Id.*
515. *Id.* at 202.
516. *Id.*
517. *Id.* at 208.
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.* at 173, 175.
522. *Id.* at 175.

authority does not suddenly dissipate when children turn eighteen; instead, the relationship remains inherently unequal."[523]

Equally importantly, Godsoe posits that:

> The criminal law has also long recognized the impossibility of consent with authority figures such as police officers and mental health professionals. The analysis of consent through this exploitation lens is being applied in new contexts, such as trafficking and sexual assault by coercion or exploitation. The failure to apply it within the family-the site of archetypal power imbalances - leaves harm unpunished and perpetuates a traditional family model with a gendered and heteronormative hierarchy baked in.[524]

In a similar vein, Tatjana Hörnle notes that traditional limitations based solely on sexual intercourse with near blood relatives is blindly anchored in eugenics which "does not survive critical scrutiny."[525] Along those lines, incest laws based solely on consanguinity may be too narrow to reach perpetrators within the home with whom the child has a social but not a biological parent-child relationship, such as stepfathers, but so broad that they reach persons who have had no previous relationship with the child or adult – for example, a sperm donor who neither he nor the female knew he is her biological father.[526] Hörnle argues that a critical barometer should be whether a biological or social parent-child relationship exists or existed or "whether the common past has been shaped by extraordinary dependence and submission of the younger one."[527] In exploring the argument that incest laws should not be so broadly construed that it prevents consenting adults from having sexual relations, Hörnle posits that consent should be carefully defined.[528] Hörnle contends that a clear distinction must be made between factual consent and valid consent particularly in instances of biological or social parent-child relationships because of the power imbalance in such relationships or other familial relationships where a power imbalance exists.[529] Hörnle defines factual consent in a sexual context as an explicit or implicit indication by a person that they do not object to the sexual act.[530] Hörnle contends that factual consent is insufficient in intrafamilial sexual acts, in that, even if both parties agree to the sexual act, that fact does not change the sexual act from being criminally or morally wrong.[531] In instances

523. *Id.*
524. *Id.* at 176.
525. *See* Hörnle, *supra* note 159, at 97.
526. *Id.* at 92.
527. *Id.*
528. *Id.* at 86.
529. *Id.*
530. *Id.*
531. *Id.*

of intrafamilial sexual encounters, consent has to be valid.[532] Valid consent requires personal competence.[533] Looking at the German statute, Hörnle further contends that while juveniles, defined as ages fourteen to eighteen, may be able to give valid consent in certain instances,[534] it is highly unlikely that they are able to give valid consent when the sexual partner is a "parent, sibling, or another close relative"[535] largely because of the dependencies and power dynamics in biological and social family relationships.[536] Hörnle observed that most modern criminal statutes define "sexual offense" to include "adults in situations without explicit coercion"[537] for example "corrections officers and police officers commit a sexual offense if they have sex with an inmate or a suspect in a criminal investigation" irrespective of whether the prisoner or suspect approved or disapproved of the sexual encounter,[538] because "under such extreme circumstances of dependence, even explicit factual consent does not count as voluntarily given."[539] Hörnle notes that a "[s]imilar reasoning applies to parent-child relationships."[540] In fact, Hörnle suggests factors that are important in determining if consent is valid: "the intensity of the parent-child relationship, its features of essential inequalities and dependences, and the time factor, that is, a long practice that has inescapably ingrained these structures into the relationship over many years."[541] Interestingly, and as Hörnle points out, "if two formerly unequal persons interact again at later stages in their lives, it might be possible to transcend the status quo and to restructure the relationship, but this is unlikely if the relationship is one between parent and child."[542] To that end, "the "child's 'D' consent should be evaluated as deficient even if the child is now legally an adult."[543] Hörnle surmises that "[t]he social conditions within families, the pronounced and persistent conditions of dependence and inequality experienced by the younger family member in her or his relation to parents and siblings, can interfere with the personal competence that is

532. *Id.*

533. *Id.* at 87.

534. *Id.* at 88.

535. *Id.*; *see* Godsoe, *supra* note 305, at 175 ("Parental authority does not suddenly dissipate when children turn eighteen; instead, the relationship remains inherently unequal.").

536. Hörnle, *supra* note 159, at 88.

537. *Id.* at 91.

538. *Id.*

539. *Id.*

540. *Id.* (note again, this is seen as a social relation; it does not matter if parenthood is biological).

541. *Id.*

542. *Id.* at 91-92.

543. *Id.* at 92.

necessary to give valid consent."[544] Consequently, "[e]ven if both partners are over age at the time of the sexual encounter, but one partner is aware of the other's high degree of dependence and personal vulnerability, a moral demand to abstain from sexual intimacy can be defended."[545] On this line, Hörnle strongly suggests that these "reasons support a general moral rule that social parents should never seek sexual contacts with their children even if the children are legal adults."[546]

Scholars have also argued that incest laws criminalizing sexual intercourse defined solely as penile-vaginal penetration are underinclusive and fundamentally unfair as they do not treat same-sex violations equally.[547] Looking at Scottish incest laws which only "criminalises penile-vaginal penetration between two people within the specified degrees of relationship,"[548] James Roffee argues, that by exclusively protecting penile-vaginal penetration "protection provided by the offence of incest is unavailable to all males and those females who are orally or anally violated."[549] In short, incest laws that choose to criminalize only penile-vaginal penetration "do [not] account for the equally pernicious harm caused by oral or anal sexual penetration."[550] Highlighting the unfairness and lack of sound justification for including only penile-vaginal penetration, Roffee further argues that "[j]ust as there are family members in need of protection from non-consensual vaginal intercourse, there are individuals who need protection from family members who engage in non-consensual anal and oral penetration."[551] Additionally, by proscribing solely sexual intercourse, incest laws discriminate based on sex because males cannot avail themselves of the protection of these incest laws.[552] Roffee further notes that "[r]esearch highlights the profound effect that incest has on males, which is surely exacerbated by the law's ignorance of their plight."[553]

Recognizing the changes in modern family structures to more diverse forms, some countries have moved or are moving toward including affinity and cohabitating relationships in their incest laws. England has recognized the changes in the modern family and has included adoptive and foster

544. *Id.* at 102.
545. *Id.* at 98.
546. *Id.* at 98-99.
547. *See* Roffee, *supra* note 133, at 169.
548. *Id.*
549. *Id.* at 170.
550. *Id.*
551. *Id.* at 172.
552. *Id.* at 169.
553. *Id.* at 180.

parents in its incest laws.[554] Additionally, several African countries changed their incest laws and have broadened the scope of persons who may be charged for incest. Professors Cynthia Bowman and Elizabeth Brundige reviewed several African countries that had undergone legislative reforms to better fulfill their duties under international and regional human rights treaties "to protect children from sexual violence within the family and to provide redress where it occurs."[555] In fact, the authors noted that several African countries, "including Liberia, Kenya, Lesotho, Namibia, South Africa, and Tanzania, have promulgated new specialized sexual offences laws, and others have enacted relevant amendments to existing laws."[556] The laws increased penalties for perpetrators of child sexual abuse and in some countries penalized persons who allow children to be abused.[557] The authors further noted that legislative reform expanded the "definitions of incest and of other offences under which it may be prosecuted."[558] To illustrate, "laws in Ethiopia and Kenya have included 'indecent acts' and penetration within the definition of incest," and South Africa "defines incest as involving an "act of sexual penetration" between two persons and now can be used to punish homosexual abuse of children by a female or male relative."[559] Like England and the UK, South Africa and Zimbabwe incest prohibitions include adoptive parents.[560] The authors also observed that some countries have "amended their laws to make the offences of rape and defilement gender neutral, to include penetrative anal or oral sex within their definitions, and to increase penalties for the offence of sexual assault.[561] A number of countries have increased the age of consent to eighteen."[562]

Each state in the United States decides the scope of its incest laws. The incest laws in all states criminalize sexual relations between biological parent

554. Sexual Offences Act 2003, c. 42 (U.K.), https://www.legislation.gov.uk/ukpga/2003/42/contents (defines familial sexual abuse as being "between a person and their parent (including adoptive or foster), grandparent, child, grandchild, sibling or half-sibling, uncle, aunt, nephew or niece.").

555. Bowman & Brundige, *supra* note 67, at 263.

556. *Id.* at 266. (The authors also noted the observations of the South African Law Commission (SALC) which indicated that "more attention should be paid to abuse in the home, in part because such abuse plays a major role in commercial sexual exploitation of children, who run away from home to escape incest and then often fall prey to prostitution and human trafficking."); *id.* at 268.

557. *Id.* at 266-68.

558. *Id.* at 267.

559. *Id.* (discussing South Africa's 2007 *Criminal Law (Sexual Offences and Related Matters) Amendment Act*).

560. *Id.*

561. *Id.*

562. *Id.* at 268.

and child[563] but the laws vary as to who is considered a family member and what sexual acts are prohibited. All states criminalize sexual relations between biological parent and child, in large part because of the history of the traditional family as the normative family and the universal taboo on parent-child sexual relations.[564] Considering the proliferation of the reconstituted family, some states also criminalize sexual relations with social parents and persons related by affinity.[565] For example, Georgia's incest laws explicitly proscribe stepparent-stepchild sexual contact.[566] In a case from that state, a stepfather challenged the statue on the grounds that incest cannot be established because he and the victim, his stepdaughter, are not related by blood. The court rejected his argument, noting that "[c]lassification on the basis of stepparent and stepchild bears a rational relationship to the governmental interest in protecting children and family unity.[567] This rationale applies to prohibiting sexual intercourse between a parent and stepchild related by marriage, as for those persons related by blood."[568] In a concurring opinion Justice Sears noted that looking at the incest taboo, "history has defined "close relative" in different ways."[569] Therefore, "Georgia's decision to include step-parents in its statutory proscription against incest is neither unreasonable nor out of keeping with the historical purpose and meaning of the taboo."[570]

As Professor Christine McNiece Metteer points out from looking at caselaw from states courts that criminalize sexual relations with minors and adults related by blood and affinity,[571] those states have reasoned that they have a vested interest in protecting '"young persons from sexual contact by

563. Murray, *supra* note 168, at 104.

564. Fischer, *supra* note 147, at 94, 95.

565. GA. CODE ANN. § 16-6-22 (2022); UTAH CODE ANN. § 76-7-102 (2022); MONT. CODE ANN. § 43-5-507 (2023) (Montana's incest statute prohibits marriage, cohabitation, and sexual intercourse, and statutorily defined sexual contact between "an ancestor, a descendant, a brother or sister of the whole or half blood, a nephew or niece, or any stepson or stepdaughter. The relationships referred to in this subsection include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter. [C]onsent is a defense to incest with or upon a stepson or stepdaughter, but consent is ineffective if the stepson or stepdaughter is less than 18 years of age and the stepparent is 4 or more years older than the stepson or stepdaughter.").

566. GA. CODE ANN. § 16-6-22 (2022).

567. Benton v. State, 461 S.E.2d 202, 205 (Ga. 1995), *overruled by* State v. Burns, 829 S.E.2d 367 (Ga. 2019) (The stepfather had sexual intercourse with his stepdaughter at gunpoint).

568. *Id.*

569. *Id.*

570. *Id.*

571. *People v. Armstrong*, 536 N.W.2d 789, 793 (Mich. Ct. App. 1995) (using Random House College Dictionary's (rev. ed.) definition of "affinity" which is a "relationship by marriage or by ties other than those of blood.").

persons with whom they have a special relationship, such as relatives.'"[572] McNiece Metteer also notes that "[s]uch "special relationships" are generally assumed to be those between children and adults living in the same household, when the adult has some power over the child. . . . that adult is usually a parent or someone with "parental authority," but may be anyone who acts as a "caretaker" and is responsible for the child."[573] McNiece Metteer further notes that where "state incest legislation assumes a "special relationship," the state's interest must be in regulating situations in which there is a "power imbalance."[574] Power imbalances within family situations are not limited to blood relatives but are also present with persons related by affinity.[575] This power imbalance is typically more pronounced when the child is a minor, but may also continue "even after the age of majority" particularly if the weaker family member lives in the same household or the "more powerful relative continues in a dominant role" in the weaker family member's life.[576]

In the United States, the incest laws in some states, like Alabama, proscribe marriage and sexual intercourse with adoptive parents and child and stepparents and stepchildren but limits the restriction until the "the marriage creating the relationship ceases to exist."[577] Also in some states, like New York, the incest law is gender neutral and expands the scope of punishable sexual conduct to include sexual intercourse, and oral and anal sexual penetration.[578]

In France, incest recently became an autonomous crime in 2021.[579] Significantly, however, France has a longstanding and pervasive problem of intrafamilial child sexual abuse. Results of a 2020 poll offered as proof of the problem showed that "[o]ne in 10 French people say they are victims of incest, "with 78 percent of the reported victims female and 22 percent

572. McNiece Metteer, *supra* note 164, at 275 ("The Legislature intended to provide young people with enhanced protection from assaults by family members.").

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.* at 276.

577. ALA. CODE § 13A-13-3 (2023); *see id.* at 275.

578. N.Y. PENAL LAW § 255.25 (Consol. 2024) ("A person is guilty of incest in the third degree when he or she marries or engages in sexual intercourse, oral sexual conduct or anal sexual conduct with a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.").

579. Peter Yeung, *France Is Finally Thinking About Making Incest a Crime But Politicians Are Accused of Watering the Law Down*, DAILY BEAST (Feb. 15, 2021, 10:37 AM), https://www.thedailybeast.com/france-is-finally-thinking-about-making-incest-a-crime-but-politicians-are-accused-of-watering-the-law-down.

male."[580] Yet, prior to 2021, intrafamilial sexual abuse of minors under fifteen years old in France was not a crime but viewed by the French justice system as an "aggravating circumstance."[581] A movement to protect children from intrafamilial sexual abuse gained traction after French lawyer and author, Camille Kouchner published her memoir in which she accused her stepfather, prominent political scientist, and journalist Olivier Duhamel of sexually abusing her twin brother when he was fourteen years old.[582] Kouchner alleged that the sexual abuse remained undisclosed for years because of a gripping culture of silence.[583] Friends and family who knew of the abuse chose to remain silent, and the small group of people who wanted to talk about the abuse were persuaded to remain silent.[584] Disappointingly, the children's biological parents also chose to remain silent.[585] Kouchner alleged that her mother remained silent, choosing to "protect her husband rather than her children"[586] and Kouchner's biological father, Dr. Bernard Kouchner, founder of Doctors with Borders, also chose silence.[587] Kouchner's twin brother, "the victim," refused to talk about the abuse for a long time.[588]

Kouchner's book served as a catalyst for the #IncesteMeToo movement which gave victims of intrafamilial sexual abuse the platform on social media to bring awareness to the instances and harm of intrafamilial sexual abuse.[589] The flood of allegations of incest caused the French legislature to recommend "tougher laws against the sexual abuse of children."[590] As a result of these efforts, French incest laws proscribe any sexual penetration of a person under fifteen years old by an adult who is related by blood or by social ties, such as the "the spouse, the cohabitee, the partner bound by a civil union" to the blood relative.[591] Stepfathers and parent's boyfriends, are considered to be

580. *Id.*

581. Mondragon et al., *supra* note 147, at 2.

582. Ghica-Lemarchand, *supra* note 296, at 44; Constant Méheut, *Incest Scandal Sets Off a New #MeToo Movement in France*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2021/01/18/world/europe/duhamel-france-incest.html.

583. *See generally* Ghica-Lemarchand, *supra* note 296, at 44.

584. *Id.*

585. *Id.*

586. *Id.*

587. *Id.*

588. *Id.*

589. *See id.*

590. Holloway, *supra* note 201, at 2; *see M*ondragon et al., *supra* note 147, at 9 (noting that "movement created on social networks has already had a direct impact on French politics (with the creation of specific commissions and changes in laws).").

591. Ghica-Lemarchand, *supra* note 296, at 57.

persons related by social ties.[592] Sexual penetration and blood ties are sufficient to establish incest, but for people with social ties it must be shown that "they have a legal or de facto authority over the victim."[593]

Most incest laws in the Caribbean narrowly define incest as sexual intercourse between close blood relatives.[594] However, a survey of child sexual abuse in the Eastern Caribbean by social scientists Adele Jones and Ena Trotman Jemmott found that "respondents defined incest as also including sex with non-biological parents such as step-parents and adoptive parents."[595] Jones and Trotman Jemmott noted that "[t]his broadening of the definition marks an important shift in attitudes and is probably linked to changes in the nature of the Caribbean family with many more families now including stepparents (usually stepfathers) and perhaps reflects a wide acceptance of this family type."[596] Jones and Trotman Jemmott urged "legislators and policy makers to ensure that the incest laws also fully reflect the contemporary nature of Caribbean family life."[597]

Amnesty International made a similar suggestion, one that is central to this Article, that Jamaican laws "need to be updated to reflect the high number of live-in, serial common-law relationships that women may experience during their lifetimes."[598] Amnesty International argued that "[t]he classic case of incest involves a girl child and her father, step-father or father figure"[599] and that "[I]ncest does not necessarily imply a biological relationship but a social one between a child and a parental figure."[600]

Importantly, Amnesty International highlighted that "[t]he law and the administration of the law are crucial to the formation of social attitudes."[601] When put into context, this statement suggests that including affinity and cohabitating "relatives" into the incest provision of Jamaica's Sexual Offences Act will typically influence social attitude toward viewing sex with relatives as incest and therefore taboo.

592. *Id.*
593. *Id.*
594. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 13.
595. *Id.*
596. *Id.*
597. *Id.*
598. AMNESTY INT'L, *supra* note 114, at 6.
599. *Id.*
600. *Id.*
601. *Id.* at 28.

VI. NEW FRAMEWORK FOR MOVING FORWARD

It is clear that intrafamilial child sexual abuse harms victims, families and society. It is also clear that Jamaica has a pervasive problem of intrafamilial child sexual abuse and "people really want it to end."[602] Most Jamaican citizens are tired of the scourge of intrafamilial child sexual abuse and are ready for it to end. The Jamaican government has displayed commitment to end violence against children, including sexual abuse, by joining the United Nation's Global Partnership and Fund to End Violence Against Children "which is focused on ending all forms of violence, abuse and exploitation of children."[603] In fact, Jamaica became a Pathfinder country which shows a strong commitment to ending all forms of violence against children.[604] "Pathfinder countries are prepared to stand up for children. They are committed to fast-track efforts to make children safe and ensure that child victims of violence are not marginalized in the global development agenda."[605] As a Pathfinder country, Jamaica has committed "to three to five years of accelerated actions towards ending violence against children."[606] Jamaica's National Plan of Action for an Integrated Response to Children and Violence (NPACV) was created to fulfil this commitment and "will be implemented over a five-year period."[607] One of the five expected outcomes of the NPACV is to have "stronger policy and legal and regulatory framework to ensure the protection of children from all forms of violence and abuse."[608]

To that end, it is important to revisit the incest provision of the Sexual Offences Act. Specifically, it is time to get rid of the idea of the nuclear family as Jamaica's normative family, face reality of the current predominant single-parent household and expand the incest provision to include affinity and cohabiting relationships; it is time to make the incest provision gender

602. Hibbert, *Incest 'Hot Spot'*, supra note 112 (noting that people in Jamaica are at the stage where they really want intrafamilial child sexual abuse to end).

603. Latonya Linton, *PM Says Gov't Will Act With Urgency To Address Violence Against Children*, JAMAICA INFO. SERV., (Nov. 20, 2019), https://jis.gov.jm/pm-says-govt-will-act-with-urgency-to-address-violence-against-children/.

604. Judith A. Hunter, *Jamaica in Global Partnership to End All Forms of Violence, Abuse and Exploitation of Children,* JAMAICA INFO. SERV., (Nov. 17, 2023), https://jis.gov.jm/jamaica-in-global-partnership-to-end-all-forms-of-violence-abuse-and-exploitation-of-children/#:~:text=As%20part%20of%20its%20strategies,abuse%20and%20exploitation%20of%20children.

605. *Id.*

606. *Id.*

607. Hibbert, *Incest 'Hot Spot'*, *supra* note 112 (noting NPACV was approved by the Cabinet in 2019); NATIONAL PLAN OF ACTION, *supra* note 116.

608. Hunter, *supra* note 604.

neutral; expand the proscribed sexual act beyond sexual intercourse to at a minimum include anal, oral, and digital penetration; and increase the age of consent for all sexual offenses to eighteen years old.

First, the incest provision under the Sexual Offences Act should move beyond limiting the incest prohibitions to consanguineal relationships and broaden the scope of persons responsible for incest under the Sexual Offences Act to include persons related by affinity and cohabitation. To be clear, the incest provision should explicitly include stepfathers, mother's or guardian's partners, foster parents, adopted parents, caretakers, and legal and nonlegal guardians. The traditional nuclear family as the normative family is no longer the predominant family structure and has not been for a while. In a country dominated primarily by single-parent households, it is time to put aspirations to the side and acknowledge what is present. Based on the prevailing single-parent and reconstituted family structures, children are being exposed at a higher rate to non-blood relatives who live in the same house or exercise dominance, control, and power over their lives, simulating a biological child-parent relationship, however, in the eyes and four corners of the incest law, they are not accorded the same protection as biological children. In fact, even when some men raise their stepdaughters from birth, they may not consider them as their children and the incest law agrees. The double standard is lethal. David Finkelhor has maintained throughout his extensive study of child sexual abuse that a definition of incest based solely on consanguineous relationships is illogical because "many step-parents and step-siblings live together in relationships that are virtually indistinguishable from those maintained by natural parents and siblings."[609] Finkelhor further maintained that "incest with step-parents and step-siblings violates a taboo that does exist – especially in those families in which step-relations have taken on the trappings of normal family – and when violated, the consequences are similar to those in cause with natural family members."[610]

Expanding the reach of the incest statute beyond close blood relatives is also particularly relevant given the prevalence of misattributed paternity in Jamaica and the possibilities of assisted reproduction. In both instances, children are raised by adults who they believe are their parents, in families that take on the trappings of a normative Jamaican family, yet DNA evidence proves that there is no biological connection between the children and

609. FINKELHOR, *supra* note 71, at 84.

610. *Id.*; *see* Dorothy Willner, *Definition and Violation: Incest and the Incest Taboos*, 18 ROYAL ANTHROPOLOGICAL INST. OF GREAT BRITAIN & IR., 134, 141 (1993) ("[I]f sexual abuse by a father surrogate or familiar male is no less destructive than incest imposed by a father or older brother, this might be an element underlying the extension of kinship categories and incest taboos to most or all adults . . . such extensions also help to protect the children from sexual abuse by adults.").

"parent." In instances such as these, a charge of incest would not be sustained, and the perpetrator goes unpunished, or the victim faces more hurdles to get justice.

It is clear that the legislative intent is not to proscribe incest based solely on genetics because the law clearly limits the list of persons who may be charged for incest to blood relatives who "knew or had reasons to know" that they are related. Knowledge of the consanguineal bond is material to establishing a charge for incest. This means that two people who are closely related and who would have otherwise been charged with incest would escape liability because they did not know they were related by blood. The lack of requisite knowledge does not negate the blood ties or minimize arguments based on possible genetic defects.

Naming the violation as incest matters. The incest taboo continues to be universally recognized. Taboos and laws are among examples of the three types of incentives that "govern individuals' behavior.[611] The incest taboo is powerful in that it sends a clear signal that an act is repugnant which may cause persons to refrain from doing that act.[612] While intrafamilial child sexual abuse can be prosecuted under other provisions of the Sexual Offences Act, it does not seem fair that victims who are not related to the perpetrators by blood, but who have similar relationships with the perpetrator like their biological children, would have to face additional hurdles - it is important to name it - incest.

Second, the incest provisions of Jamaica's Sexual Offences Act should be gender neutral. The incest provision as it currently stands makes it impossible for same sex perpetrators to be charged with incest. In truth, by ignoring and explicitly excluding same-sex violations, the incest provision sends a message that these violations are invisible, unimportant, or worse, nonexistent. The current incest provision makes it a crime for a man to have sexual intercourse with a statutorily defined close blood female relative or a female to have sexual intercourse with a statutorily defined close blood male relative. What then happens to boys who are sexually abused by close blood male relatives, including fathers and grandfathers? Despite the plethora of literature that shows that boys[613] are being sexually abused at alarming rates inside their homes and at the hands of close blood and affinity relatives of

611. Fershtman et al., *supra* note 166, at 142 ("[I]n every society there are three types of incentives that govern individuals' behavior: private rewards such as any monetary incentives; social incentives such as norms, taboos, social prestige; and legal incentives that enforce certain types of behavior and penalize deviations.").

612. *Id.* at 140.

613. JONES & JEMMOTT, CHILD SEXUAL ABUSE REPORT OF STUDY, *supra* note 78, at 55; Finkelhor, *Nature of Child Sexual Abuse*, *supra* note 80, at 58.

the same sex, the incest provision of the Sexual Offences Act chooses to ignore this reality and instead force victims of intrafamilial same sex abuse to look outside of the provision to seek a remedy. By continuing with a gender normative position that proscribes solely heterosexual intrafamilial sexual abuse, the incest provision explicitly others non-heterosexual intrafamilial sexual abuse relegating such violations to a lesser status of importance. It is no surprise that because the law "others" same-sex child sexual abuse, boys may not seek the help they so desperately need to work through the emotional and psychological trauma surrounding the abuse.[614] The same applies for girl-victims of same-sex child sexual abuse. The reasons stakeholders calls to revise the incest law to make it gender neutral have not been considered by the legislature are longstanding and beyond the scope of this Article.[615] However, Jamaica has an international obligation to protect all children from child sexual abuse. The duty to protect is not limited to physical harm. The duty extends to emotional and psychological harm resulting from intrafamilial sexual abuse. If a male or female child feels unsafe to report a same-sex encounter because society stigmatizes the abuse and the law echoes that stigma, then the duty has been breached.

Third, the incest provisions of the Sexual Offences Act should be revised to include all forms of sexual touching and penetration within the family, not only sexual intercourse.[616] Limiting the proscribed sexual act to sexual intercourse is underinclusive in that it captures only one form of sexual contact, and it makes space for boys to be treated unequally to girls. As an initial matter, sexual intercourse is not the only sexual encounter that harms children. Sexual touching, and other forms of sexual penetration are also harmful and threaten a child's feeling of safety.[617] In addition, sexual intercourse defined as penile penetration of the vagina explicitly excludes equally harmful and violative sexual acts such as non-penile penetration of the vagina; other forms of sexual penetration such as oral, digital, or anal

614. Coleman, *supra* note 66, at 281 (arguing that there is a deficiency in the incest statutes that proscribe only heterosexual because men sexually abuse male children, "whereas girls seem able, with competent professional help, to learn to cope with many of the psychological problems caused by incestuous behavior, boys may experience psychotic breaks.").

615. *See* Edmond Campbell, *Boys at risk - Hanna wants tougher sanction for men who abuse boys,* THE GLEANER (Apr. 3, 2018, 12:00 AM), https://jamaica-gleaner.com/article/lead-stories/20180404/boys-risk-hanna-wants-tougher-sanction-men-who-abuse-boys.

616. *See* McConnell, *supra* note 182, at 163 (noting that because of the power imbalance in intrafamilial relationships, incest significantly harms the victim "irrespective of whether there is full, forced sexual intercourse.").

617. Finkelhor, *Nature of Child Sexual Abuse*, *supra* note 80, at 42-43; Roffee, *supra* note 133, at 175.

penetration.[618] Lastly, proscribing solely penile penetration of the vagina means that boys cannot qualify as victims and girls who have been orally, digitally, or otherwise penetrated also cannot qualify as victims of incest even where that would be the case if the abuse involved penile penetration.

Relatedly, the legislature should revise the Sexual Offences Act to be consistent in defining a "child." In the interpretation to the Sexual Offences Act, a child is defined as "a person under eighteen years old", which accords with the international definition of a child. Yet, in part IV of the Act which addresses Sexual Offences Against Children and Indecent Assault, a child is defined as "a person under 16 years old."[619] Put another way, the age of maturity under the Act is 18 years old, yet the age of consent for sex is sixteen years old.[620] This change is significant in many ways for effectively prosecuting intrafamilial sexual abuse. For one, children now typically do not leave home or the custody and control of their relatives or caregivers at age sixteen. In fact, many children aged sixteen to eighteen are about to finish high school and are still living at home. It is most typical for a child to leave home after the age of eighteen. As it stands, a close relative who has power and control over the child, acts as a parent, lives in the same household or frequents the household where the child lives but who is not named in the statutorily defined group that can be charged with incest, and cognizant of this gap in the law, may sexually groom the child over a period of time but would wait until the child reaches 16 years old to have sexual intercourse. In that scenario, what would have clearly been incest under Jamaica's Sexual Offences Act if the offender were a statutorily named linear ascendant of the child or Sexual Intercourse with a Person Under Sixteen would now have to be prosecuted as rape or grievous sexual assault. Unlike incest or Sexual Intercourse with a Person Under Sixteen, a charge of rape and grievous sexual assault carries an additional burden of disproving consent, a material element.

618. Finkelhor, *Nature of Child Sexual Abuse*, *supra* note 80, at 42 (pointing out that the criminal code and law enforcement "places a lot of emphasis on distinguishing between sexual crimes that do involve penetration and those that do not" but child protective and mental health professionals have found from their research and clinical experience that "non-penetrative abuse . . . have an equally serious impact on the children."); Roffee, *supra* note 133, at 175 (nothing the harm in incest is "the violation caused by a perpetrator who 'is assumed to stand in a protective role to the victim'" therefore consistent with the views of therapists, incest should not be defined solely to penile-vaginal acts because the harm, the violation of a position of trust to occur in sexual acts outside of penile-vaginal penetration.").

619. Sexual Offences Act, (2009) § 8, (Act No. 12/2009) 1, 12 (Jam.).

620. NATIONAL PLAN OF ACTION, *supra* note 116.

Now, my proposal will not end the current intrafamilial epidemic because even with the best laws, enforcement must be equally robust.[621] It is my hope however, that strengthening the incest laws will drastically reduce incidents of intrafamilial child sexual abuse. Like Professor Jonathan Todres mentioned regarding human trafficking, you cannot prosecute yourself out of the intrafamilial child sexual abuse epidemic.[622] As I envision it, a winning framework would be the revised statute, robust enforcement, available rehabilitative services, and persistent and targeted education. The government should focus on targeted strategies to educate citizens of the incest law, and the harms caused by intrafamilial child sexual abuse. All media forms including social and traditional media, and music should be used to share the message of incest harms and punishment to perpetrators.[623] In addition, the message should be shared widely though the community, including at churches, rum bars, schools, hairdressing parlors, and in the markets. Like France's #IncesteMeToo, the aim here should be to rewrite the narrative. First, make clear that intrafamilial child sexual abuse is a crime that causes dire individual and societal harm and that its perpetrators will be prosecuted. Second, name it (incest) and name them (the perpetrators). Include stepparents and stepchildren, adopted parents and children, and persons in *loco parentis*, particularly if the child is dependent on them.

VII. CONCLUSION

Jamaica should revise the incest provision of the Sexual Offences Act to include affinity and cohabiting relationships, homosexual penetration and sexual acts, and other forms of sexual touching: specifically oral, anal, and digital penetration. Jamaica has an international obligation to adequately protect all children from child sexual abuse and the fact that sexual abuse happens most often in the home is a pressing reality. Presently, Jamaica's incest law only proscribes heterosexual sexual intercourse with close blood

621. CHILD SEXUAL ABUSE EASTERN CARIBBEAN: PERCEPTIONS, *supra* note 85, at 25 (documenting comments from child sexual abuse practitioners in the Caribbean that there is room for improvement in substantive law but even where "laws and policies [are] in place, their implementation was so weak that it rendered the systemic responses to child sexual abuse almost useless.").

622. Todres, *supra* note 66, at 99; *see* Samms & Cholewa, *supra* note 111, at 122 ("[T]he increased rate of sexually abused children in Jamaica may indicate that more public education campaigns need to be developed." Also suggesting public health campaigns and education campaigns to inform the public of the legal ramifications of failing to report child sexual abuse).

623. FRAY ET AL., supra note 93, at 8 (noting that "[p]romoting CSA prevention is everyone's responsibility and there needs to be greater emphasis on increasing awareness at all levels of society about the risks for, and signs of, CSA, sexual grooming and the contribution of bystander apathy to the problem.").

relatives. The narrow reach of the current incest law is inadequate because it fails to protect all vulnerable children and deter a known group of perpetrators who typically have unrestricted access to children within their homes, who act as parental figures and upon whom the children depend for care and affection. This groups includes stepfathers, mother's or guardian's boyfriends, and persons acting in *loco parentis*.

Based on the Census Bureau statistics and anecdotal evidence, it is safe to say that a majority of children in Jamaica live in homes where the male or female who is responsible for their care or on whom they are dependent is not a biological relative.[624] In fact, the traditional nuclear family consisting of a mother and father, and biological children as Jamaica's normative family has long been superseded by the single-parent female-headed household that often allows non-biological parental figures to move in and out of the home. This arrangement creates unbridled sexual access to the children, boys and girls alike, in these households, and therefore increases the risk of child sexual abuse at the hands of parental figures who are unrelated to the children by blood. Additionally, Jamaica's patriarchal culture that supports the belief that the man is entitled to access to any female under his roof that he feeds, and the added tragic perspective that stepchildren and other non-biological children have to earn their keep through sexual favors, create a toxic and unsafe home environment that robs the child of the right to a safe and secure home.

It is without question that intrafamilial child sexual abuse at the hands of biological and non-biological, transient and non-transient, parental figures affects the victims, their families, and the society at large. Victims of intrafamilial child sexual abuse suffer long-lasting mental, emotional, and physical harms including severe mental health issues, PTSD, and drug addiction. Some victims have developed violent propensities, and some have themselves becoming abusers perpetuating a vicious and unhealthy cycle. Some family members carry the burden of secondary trauma while society loses what could have been productive citizens while paying directly or indirectly to support the victims and perpetrators. Intrafamilial child sexual abuse is not an individual problem. It is Jamaica's problem.

With this information in mind, research-based findings that child sexual abuse occurs disproportionately at home, and Jamaica's acknowledged need to extend protection into the home, it is time to expand the incest law. Name it. There is power in naming. Naming invokes the incest taboo which may

624. *See* Bose-Duker et al., *supra* note 68 (noting that based on the Census Bureau statics and anecdotal evidence, it is safe to say that a majority of children in Jamaica live in homes where a male or female who is responsible for their care or on whom they are dependable is not a biological parent); *see also* NATIONAL PLAN OF ACTION, *supra* note 116, at 25.

deter some perpetrators from acting. Crime in Jamaica will never get better until sexual violence against children and adults is dealt with effectively. In short, the law needs to be clear and adequately cover the harm.

ABSENCES THAT TALK: LESSONS FROM THE LACK OF A CODE OF EVIDENCE IN THE REFORMED CRIMINAL JUSTICE SYSTEM IN THE PROVINCE OF SANTA FE IN ARGENTINA

Bruno Leonidas Rossini*

Abstract

Many Latin American criminal justice systems have been reformed over the last decades. These reforms involved the transition from inquisitorial to accusatorial criminal justice systems. The Province of Santa Fe in Argentina faced the same process in 2014 and has had a criminal accusatorial system since then. This article analyzes the traits that were left out of the transformation to an accusatorial criminal justice system, rather than those that were included. The reform of the criminal justice system in Santa Fe did not include a Code of Evidence. This omission is not rare since we have witnessed this vacancy in the vast majority of the recently reformed criminal justice systems in Latin America. This absence is counter-intuitive because it goes against these countries' civil law legal roots and their tradition of relying heavily on positive law. The article explores three stages in Santa Fe's reform process to find answers to this absence. The first covers the political discussions and struggles during the formal design of the new system. Second, the dynamics that the criminal justice systems have displayed since its implementation. Lastly, the counter-reforms that have occurred since last year. The article proposes analytical categories to explain the different postures regarding evidentiary rules. Despite not having a Code, it is possible to find scattered and anarchic rules of evidence

* Bruno Leonidas Rossini (he/him) is a lawyer and criminologist from Argentina. He earned his J.D. from the University of Litoral (UNL). He also received a Master's in Criminology from the University of Vàlencia (UV), Spain. He also holds an LL.M. from Southwestern Law School, having been awarded the José Siderman-Fulbright Human Rights Fellowship for the 2023-2024 academic year. The author thanks his mentor at Southwestern, Prof. Jonathan Miller, for his relentless help and encouragement throughout the time he devoted to pursuing his LL.M. in Los Angeles. He would also like to thank Prof. Mark Cammack for his guidance and constructive criticism in the research and writing of this article, as well as his helpful comments on the first draft.

in a system with professional judging as the santafesino. This situation can be explained as a diluted codification process. The article proposes this category to explain how the rules of evidence are added to criminal justice systems as part of wider transformations and not as the result of autonomous initiatives. Finally, this article examines the relationship between evidentiary rules and jury trials. It is a starting point to disentangle a complex process that shares a structural absence with many similar criminal justice systems reform processes, especially in the Global South.

I. INTRODUCTION

There is no doubt that the inquisitorial criminal justice system is antique, contradictory, and, in most cases, unfair. The accusatorial system is easier to reconcile with democratic values and constitutional rights. There is a widespread agreement that it is better than the inquisitorial system in almost every regard, especially in aspects such as judicial actors' accountability, publicity and transparency. These assumptions may lead us to believe that the 2014 reform of the Criminal Procedure Code in Santa Fe was an effort to update the system and harmonize the state's use of violence against its own citizens to conform to the limits of democratic regimes. There is much more to say about that transition, especially from its silence.

The reform in Santa Fe has an absence that speaks loudly: a Code of Evidence. Latin America is widely known as a region with a strong civil law tradition that has led the countries of these regions to rely densely on written codes. Positive law is central to the legal system since it is the instrument judges traditionally use to solve any controversy. In contrast, in common law countries, the legal decisions made by judges create and modify law. These differences affect legal practices and influence how legal changes occur over time.

The reform processes that have played out in Santa Fe, and in many other Latin American countries that have instituted similar reforms,[1] have produced unexpected results that contradict the lessons of history and legal traditions. Any person who should guess in which system we can find a Code of Evidence and in which these rules are still, apparently at least, constructed by the judges will likely miss the mark. That is because the scenario regarding the Code of Evidence does not respond to the rules of logic. The United States, a country with a long-standing tradition in common law, has a codified law of evidence, the Federal Rules of Evidence. Santa Fe, a state within a country with a legal system deeply-rooted in continental law, does not.

To explore that absence, I must talk with silence. This article examines a characteristic the system does not have instead of one it does. When I dialogued with the judicial actors and reformers about why they did not behave in a particular way, their responses were vague. The actors' interest was to share what they did, not what they avoided or failed to accomplish.

1. *See* Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 659-60 (2007) (According to this author fourteen (14) Latin American countries have reformed their criminal procedures codes since the beginning of the 1990, as well as an even bigger number of Latin American provinces and states. None of these processes have incorporated a Code of Evidence. Some of them, although, have included rules of evidence through a diluted codification process.).

Although, there is no other choice. To understand why a State with a tendency to solve the vast majority of its legal, and even non-legal, problems through positive law decided not to include an Evidence Code, I must enter the territory of the no-actions and examine what the actors did not do, even if they would prefer to talk about what they did.

Because of that epistemological challenge, some of the sections of this article are based on concrete information, while opinions and inferences shape others. The sections of the second group, particularly those related to the current dynamics of the criminal justice system in Santa Fe, are included for two important reasons. First, my goal is to insist on assessing an accusatorial criminal justice system from how it works and not in comparison with inquisitorial flaws supposedly avoided by its mere existence. Second, they pretend to provide analytical categories to explain some dynamics within the system related to the lack of clear and systematic evidentiary rules. They are not, and neither are expected to be, total explanations of how the santafesino legal system works. The limited scope and number of interviews require us to be cautious. Even more so considering the thunderous silence that has governed this field until now.

Every judicial reform is unique because it involves specific actors and dynamics. However, criminal justice reforms in Latin America share commonalities,[2] such as the absence of an Evidence Code. This article primarily focuses on the criminal justice reform in Santa Fe, Argentina, but it examines a characteristic shared by many other countries and states throughout Latin America.[3] The article suggests new categories that could be used to explain similar processes in other recently reformed criminal justice systems without losing sight of their unique aspects. The presence of evidentiary rules not included in a Code can be understood as a diluted codification. At the same time, differing opinions can be classified under the categories of legality and certainty defenders. Even if the transformations vary in content or intensity from one region to another, similar heuristic strategies can apprehend many of their traits.

This article covers over forty years of ups and downs and involves the efforts of many actors to implement a new criminal justice system or prevent it. I will analyze the reform process in Santa Fe from different perspectives. All of them, nevertheless, will share the common theme of exploring an objective effect rather than the vision of the system that existed in the

2. *Id.*

3. *See* Pierre G. Belanger, *Algunos Apuntes Sobre las Razones de la Reforma del Procedimiento Penal en América Latina,* [Some Notes on the Reasons for the Reform of Criminal Procedure in Latin America], DERECHOS Y VALORES [RIGHTS AND VALUES] 59, 61 (2010).

reformers' imaginations. By explaining how the current system was forged and functioning, I will answer why a Code of Evidence was not included in the reformed Code or any of its numerous amendments.

In this article, I will explore three stages of the reform process and how they interact and overlap. The first wave of reform has as a starting point the democratic return after the last Argentinian dictatorship in 1983. However, the study began with the approval of the Criminal Procedure Code in 2007 after years of legal debate and advocacy for reform needs because that is when all the previous efforts were finally translated into positive law.[4] This phase concluded with the implementation of the new criminal procedure system in Santa Fe in 2014.[5]

The second stage is the period from 2014 to 2023. The analysis is focused on how the criminal justice system functioned after it was reformed. The reform's impact has shaped the system's procedures and the dynamics of investigation and prosecution in the past decade. The expected reforms have found resistance and obstacles, especially since all the key actors of the inquisitorial system—judges, prosecutors, and public defenders—remained in the new system.[6] Concrete practices have altered the attitudes and opinions of the judicial actors regarding evidence rules since many of the expectations and ideas failed. This article will also include how the subsequent counter-reforms reverted many initial manifest functions and increased the political control over the criminal justice system.

The third part explains the second wave of reforms proposed by the governor, who assumed office in 2023, and such reforms are currently underway in Santa Fe. The proximity of these events offers an opportunity to investigate how the political sphere manipulates criminal procedure to align it with its interests. The political decision to include jury trials presented in this second wave proves that the accusatorial practices of the last ten years have produced profound transformation within the criminal justice system and its actors. The resistance against jury trials of judicial actors who successfully prevented its inclusion since the creation of the province of Santa Fe was beaten. I will explain the reasons why this long-awaited transformation was finally possible.

An examination of every one of these stages provides elements to explain why there is still no Evidence Code in Santa Fe, as well as in many other countries and states that have reformed their criminal justice systems

4. *Id.* at 73.

5. *Tras el golpe del caso Fraticelli* [*After the blow of the Fraticelli case*], LA CAPITAL [THE CAPITAL] (Feb. 9, 2014), https://www.lacapital.com.ar/edicion-impresa/tras-el-golpe-del-caso-fraticelli-n637739.html.

6. *See* Belanger, *supra* note 3, at 73.

in recent decades. The main reason is that almost all of them keep professional judging systems. There is an intimate relationship between evidentiary rules and jury trials. The decision to maintain the criminal judges at the center of criminal justice widely affected the possibility of including evidentiary rules during the design of the new systems. Moreover, the discussion regarding evidentiary rules is a technical discussion that can only be propelled by decision-makers interested in improving the functioning of the criminal justice system. The intention of the politicians has been more centered on instrumentalizing the criminal justice system according to their agenda than improving the system's performance.

The reforms the criminal justice system faced in the last decade respond to the logic of penal populism. A process in which expert opinions and advice are abandoned in the pursuit of immediate political gains.[7] Since politicians started to use the criminal justice system as an instrument to try to share the disquietude produced by the public safety claims, technical and complex issues such as an Evidence Code were disregarded.[8] As Bombini[9] has shown, many authors have studied the effects of this subordination. Penal populism is a frame originally offered by Bottoms[10] to explain a political tendency that has been increasing in the last decades. Following Bombini's proposal, penal populism also implies that the political and legislative initiatives are directed to produce symbolic effects rather than effective solutions.[11] In the penal populism context, politicians propel changes and transformations that pretend to calm the societal claims regarding public safety and adopt a punitive shift to send strong messages that appeal to atavic emotions as revenge.[12] The criminal justice system became an instrument to gain political benefits instead of a mechanism to manage the administration of justice.

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7. *See* JOHN PRATT, PENAL POPULISM (2007); John Pratt & Michelle Miao, *The End? Punishment, Populism, and The Threat to Democratic Order, in* GLOBALIZATION, HUMAN RIGHTS AND POPULISM 171, 187 (Adebowale Akande ed., 2023).

8. *See* Gustavo A. Beade, *El populismo penal y el derecho penal todoterreno en la Argentina* [*Penal Populism and All-Terrain Criminal Law in Argentina*], 31 DERECHO PENAL Y CRIMINOLOGÍA [CRIMINAL LAW AND CRIMINOLOGY] 55-70 (2010).

9. Gabriel Bombini, *Politization de la penalidad y proceso de producción normativo: discursos y prácticas populistas en el escenario local* [*Politicization of punishment and normative production process: populist discourses and practices in the local scenario*], CRITICA PENAL [CRIMINAL CRITICISM] (2014).

10. ANTHONY BOTTOMS, THE POLITICS OF SENTENCING REFORM 39 (Chris Clarkson et al. eds., 1995).

11. *See id.* at 40.

12. *See* GRAEME NEWMAN, THE PUNISHMENT RESPONSE 238 (2nd ed. 2017); John Pratt, *Emotive and Ostentatious Punishment: Its Decline and Resurgence in Modern Society*, PUNISHMENT & SOC'Y 417, 417-439 (2000).

Traditionally, penal populism has been associated with political campaigns and with the pursuit of votes. The recurrent crises in Santa Fe have made this approach stable in interacting between the political and criminal justice systems. Penal populism, as Bombini underlines, erases the differences between the different political parties.[13] The solutions that politicians craft are tainted by this perspective beyond their party affiliations. The politicization of the criminal justice system is noticed in two dimensions. First, in the importance that crime had in the political agendas.[14] Second, in the instrumental usages of the criminal justice systems' reforms that politicians do to send messages to society.[15] The inclusion of technical proposals, such as a Code of Evidence, is not likely in a context where politicians are worried about immediate political benefits and displaced the experts' and judicial actors' opinions in the selection of priorities to change.

The necessity of an Evidence Code is not beyond controversy. There is a wide range of positions that I have grouped into two categories: certainty defenders and flexibility defenders. During the initial discussion, the reformers were mostly aligned with the flexibility ideas. They thought at the time that including an Evidence Code would create excessive rigidity within the borning system. Because of that decision, the judges conserved the power to judge and assess the evidence freely. They could control the process by controlling the evidence used at trial. As soon as the social pressure increased, judges began to have a lenient attitude regarding this control in an attempt to protect themselves and avoid criticism. These actions are facilitated by the trial designed in Santa Fe, in which the judge who admitted the evidence is not the trial judge. The intermediate judges' tendency to accept charge evidence significantly increased the number of appeals. The repetition of petitions and discussion generates what the reformers pretended to avoid: bureaucracy. The appeals started to respond to formalistic actions instead of the dynamism that the accusatorial system is known for.

The fact that the reform did not include a Code of Evidence does not mean that the criminal justice system has no evidentiary rules. However, its incorporation responded to an anarchic process that is not easily harmonized with other legal dispositions and does not always make sense. The evidentiary rules were included through a diluted codification. This form of codification is precarious since it is not the result of an autonomous discussion but part of wider transformations. The diluted codification can be explained by the mechanical translation of 'ought to be' instead as a

13. Bombini, *supra* note 9.

14. *See* David Garland, *What's Wrong with Penal Populism? Politics, the Public, and Criminological Expertise*, 3 ASIAN J. CRIMINOLOGY 257, 259 (2021).

15. *Id.*

conviction of the need for its inclusion. This process ends up in rules that are disconnected from the real functioning of the system. For instance, the criminal justice system in Santa Fe has some rules regarding leading questions but, until recently, not juries.

This article will examine why a system with a strong tendency to codify almost every aspect of its legal frame did not include the Evidence Code in that process. Taking into account this inquiry, this article proposes explanations that attempt to answer it in light of the criminal justice system's historical, political, and judicial evolution in Santa Fe.

Initially, the reformers abandoned the evidentiary reflection partly because they based their expectations on what they believed the system should be, which was fostered by their lack of litigation experience. Criminal judges resisted the changes and fought not to lose more power that was strictly necessary to make the legal system formally viable. Besides keeping the power to decide who is guilty, they succeeded in conserving other powers, such as determining which evidence could be used.

While public safety has become the center of the political agenda, politicians have developed strategies to split the burden of their inefficiency in providing political responses to society. They discovered the criminal justice system was potentially guilty, with limited mechanisms to engage and succeed in the political debate. Politicians started to reform the criminal justice system not to improve it but to build a narrative that allowed them to share responsibilities for the recurrent crises in the public safety realm. The initiatives were focused on the intention of dividing responsibilities, and technical discussions were not considered.

Recently, the decision to incorporate jury trials gives belief that a Code of Evidence may soon be a reality in the province of Santa Fe. As soon as jury trials are included in the criminal justice system, the discussion regarding evidentiary rules cannot be delayed. When a system permits individuals with no legal and litigation expertise to decide other citizens' faith, the information presented before them becomes a fundamental issue. The high risk of popular decisions based on circumstances outside the trials demands that the legal system has mechanisms to avoid it. The limited scope of application of jury trials established by the current legislation in Santa Fe might be an excuse not to encourage this discussion.

On the other hand, the increasing political control over the criminal justice system can impede the incorporation of this type of rule in Santa Fe. When politicians analyze the criminal justice system through the lens of penal populism, technical and complex discussions are easily disregarded. This phenomenon poses a problem in expecting a future agenda centered on improving the system. As long as the politicians pretend to enforce the

narrative of action rather than a real commitment to enhancing the criminal justice system, entering an Evidence Code into the political agenda will be burdensome.

This article is intended as a first contribution to a debate that has just begun. Regardless of the possible reasons for their absence, it is evident that as the adversarial system grows stronger and after ten years since the implementation of the reformed criminal justice system in Santa Fe, there is less margin to continue avoiding the necessary discussion regarding the importance of a codified law of evidence.

II. THE FIRST WAVE OF CRIMINAL PROCEDURE REFORMS: FROM THE INQUISITOR TO THE PROFESSIONAL JUDGE

A. The Function(s) of the Reform

Some observers have defended that the reform in Santa Fe was a valid effort to update the system and harmonize the state's use of violence to democratic principles. This section will evaluate that argument by analyzing the context in which these changes were proposed, and the system designs they adopted.

Focusing on the decisions that the reformers made at the moment of the implementation, as well as those that were not made, will allow us to understand the motives behind the reform and the political disputes that it engendered. Merton[16] has said that social transformations must be studied in the light of two dimensions. First, according to their manifest function, which is related to the actors' discourses and intentions to accomplish some objectives through the selected means; in other words, subjective dispositions that foresee intended and recognized consequences.[17] On the other hand, latent functions happen when intentions become acts, and the objective consequences are produced beyond the discourses and intentions.[18]

Merton's device for exploring social phenomena has not been without critics.[19] Many of the debates on Merton's approach focus on its usage in the sociological framework. Scholars have criticized this approach because it added nothing new to the traditional analysis. These critics argue that the manifest function is nothing more than the actors' intentions, and the latent

16. ROBERT K. MERTON, ON SOCIAL STRUCTURE AND SCIENCE 13 (Piotr Sztompka eds., 1996).

17. *See* PAUL HELM, MANIFEST AND LATENT FUNCTIONS, THE OXFORD J. 51, 51-60 (1971).

18. *Id.* at 52.

19. *See* Colin Campbell, *A Dubious Distinction? An Inquiry Into the Value and Use of Merton's Concepts of Manifest and Latent Function*, AM. SOCIO. REV. 29, 41 (1982).

function is simply the effect of their actions. The intentions of the social actors and the impact of their actions have been a central inquiry for social science studies since the configuration of this field.

There is clearly some validity to these criticisms, but at least in the context of understanding the actions of the state, the Mertonian framework is still relevant.[20] When the State decides to operationalize a transformation, it needs to justify the swiftness and align it with the pretension that is recognized as expected by society. The universe of justification can be explained through the category of manifest function. Thus, all the reasons put forward by the state to make the change appear reasonable in the eyes of the society are located at the level of discourse and need to be separated from the objective effects that the transformation produced.

The Santa Fe reformers promised that implementing the new system of criminal procedure would inaugurate a democratic spring.[21] They also maintained that the reforms were in response to obligations imposed by the federal and state constitutions. They built their expectations around the argument that a new process would repair many of the errors that the inquisitorial systems had made for years.[22]

All these promises were integrated into a discourse that was the platform for building social engagement in the reform process. The necessity for change, pushed and promoted from various directions, was justified at the level of speeches for these ideas rooted in democratic and humanistic advancement. Among the most hackneyed promises included in the discourses of the experts and politicians, there are three that stand out above

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20. *See* Mariano H. Gutierrez, *La urgencia (y los horizontes) de una política criminal humanista* [*The urgency (and horizons) of a humanist criminal policy*] 92 REVISTA BRASILEIRA DE CIÊNCIAS CRIMINAIS [BRAZILIAN JOURNAL OF CRIMINAL SCIENCES] (2011).

21. *See Esto será una visagra para la vida institucional de Santa Fe* [*This will be a hinge for the institutional life of Santa Fe]*, PÁGINA 12 [PAGE 12] (Oct. 26, 2006), https://www.pagina12.com.ar/diario/suplementos/rosario/10-5911-2006-10-26.html [hereinafter *Institutional Life of Santa Fe*].

22. *See Olazábal: "con el nuevo sistema penal que se está tratando, se investigará globalmente"* [Olazábal: with the new criminal justice system being addressed, the investigation will be global], UNO SANTA FE (Apr. 10, 2013), https://www.unosantafe.com.ar/santa-fe/olazabal-con-el-nuevo-sistema-penal-que-se-esta-tratando-se-investigara-globalmente-n2135388.html (Julio De Olazábal was the first attorney in charge of the recently created Prosecution Office in Santa Fe. The former criminal justice system in Santa Fe had received, and still has, qualifications such as archaic and unconstitutional); *see also El gobernador Bonfatti pone en marcha el nuevo sistema de Justicia Penal* [Governor Bonfatti launches the new Criminal Justice System], LA CAPITAL (Nov. 11, 2013), https://www.lacapital.com.ar/politica/el-gobernador-bonfatti-pone-marcha-el-nuevo-sistema-justicia-penal-n428300.html; *see also* Jose Curiotto, *De Fraticelli al MPA: así fue el complejo nacimiento del nuevo sistema penal de Santa Fe* [From Fraticelli to the MPA: this was the complex birth of the new penal system of Santa Fe], AIRE DIGITAL [DIGITAL AIR] (Feb. 10, 2024), https://www.airedesantafe.com.ar/politica/de-fraticelli-al-mpa-asi-fue-el-complejo-nacimiento-del-nuevo-sistema-penal-santa-fe-n567996.

the rest: 1) publicity and transparency, 2) participation of the victim, and 3) timely and efficient resolution of criminal charges.[23]

The manifest functions of the proposed reform also incorporated the enhancement of the defendant's rights threshold, increased victim involvement during the process, and, overall, a democratization of the application of punishment. The creation of a new actor, Ministerio Público de la Acusación, who is in charge of the investigation, was expected to make the administration of the process more fair. Time savings was another promise of the proposal. The reformers said that the new system would be more efficient and effective, and every phase of the process would move more quickly.[24] The proponents also touted publicity and transparency as important values justifying the change. The trial and all the hearings would be public and open to the community instead of behind closed doors, the hallmark of the inquisitive model.[25]

Another central debate concerned the Public Defense. The defense was reduced to a mere symbolic role under the inquisitorial system. Public and private defenders had difficulties accessing and overseeing a process designed to concentrate all power in one person. Thus, a strong Public Defense was considered imperative to enable defendants for the first time to effectively resist the punitive efforts of the state.

If we assume that the discourses of the executive branch and members of the Santa Fe legislature regarding the decision to implement the reform in 2014 is valid and fairly reflects their intentions, we will be mistaken. To avoid that error, exposing the truth behind the curtains is obligatory. Since the beginning, competing forces have existed relating to transforming the criminal justice system.[26] There was a part of the political spectrum that defended progressive ideas, and others insisted on punitive solutions. The manifest functions of the reform suggest that at the time the Code was implemented, the progressive ideas occupied the center. The punitive

23. *See* Marcelo I. Hidalgo et al., *¿Cuáles son las principales características del nuevo Proceso Penal* [*What are the main traits of the New Penal Process?*], Ministerio de Justicia y Derechos Humanos de la Provincia de Santa Fe [MINISTRY OF JUSTICE AND RIGHTS HUMANS OF THE PROVINCE OF SANTA FE] (2010) https://www.santafe.gov.ar/index.php/web/content/download/173741/856111/ (illustrating that this document was prepared by the government in occasion the diffusion of the ideas of the criminal procedure reform in Santa Fe).

24. *See id.* at 4.

25. *Id.* at 2.

26. *See* Pablo Ciocchini, *El rol de los jueces en el marco de la 'lucha contra el delito' en el Sur Global: un análisis comparativo de los casos de la Provincia de Buenos Aires y Metro Manila* [The Role of Judges in the Framework of the 'Fight against Crime' in the Global South: a Comparative Analysis of the Cases of the Province of Buenos Aires and Metro Manila], REVISTA ESTUDIOS SOCIO-JURÍDICOS [SOCIO-LEGAL STUDIES JOURNAL], May 2019.

discourses have been gaining territory in the political landscape since then. The last reforms are aligned with traditional punitive solutions, such as recognizing more power for law enforcement officers. The possibility of separating manifest from latent function precisely allows us to escape from this narrative of winners and losers.

A political action announced as severe and punitive may not have any impact in terms of punishment. In contrast, others sustained in progressive arguments can generate the most populous incarcerated population in the history of Santa Fe, as was the case of the new procedure criminal justice system.[27] It may be advantageous to recognize the clash of discourses because it is an indicator of competing tendencies. Albeit, the concrete effects are which supply the material to comprehend the real reasons behind a particular social, political, or legal dynamic.

Understanding the reform process requires lowering the veil and revealing what it is in reality behind the intentions, rhetoric, and discourses. During the last ten years, the counter-reforms indicate that humanism and democratic values are not at the center of the political agenda. The current discussion about the pretended new transformation of the criminal procedure system in Santa Fe proves that politics regards this field as an arena to realize its own selfish interests, such as deflecting the negative social costs of crime.

To escape from the trap of discourses, it is necessary to shine a light on the consequences of the design and the implementation of the system, which are latent functions. This effort is relevant because it will allow us to evaluate the system according to its true potential and foresee its future possibilities.

The dichotomy between manifest and latent function as an explanatory device will be part of the entire analysis. The main reason is that discourses and promises related to the criminal justice system and its silences change their disguise but can be found in the past, present, and most likely in the future.

B. The Recent History of the Reform

1. "Because They Could"

The criminal justice system was changed in Santa Fe on February 1, 2014.[28] The Code of Criminal Procedure that established the new rules was

27. *See* MINISTERIO DE SEGURIDAD [MINISTRY OF SECURITY], REPORTE DE ACTUALIZACIÓN ANUAL PERSONAS PRIVADAS DE LIBERTAD - PROVINCIA DE SANTA FE PERÍODO 2008-2022 [ANNUAL UPDATE REPORT PERSONS DEPRIVED OF LIBERTY - PROVINCE OF SANTA FE PERIOD 2008-2022] (2023) (The total number of incarcerated individuals in 2014 was 4560 and in 2022, the number escalated to 9350).

28. After the Blow of the Fraticelli Case, *supra* note 5.

sanctioned on the 31st of August 2007, under the law number 12.734.[29] The nearly seven-year gap between approval and implementation may be explained by the investments and adaptations that any structural change demands. However, other circumstances also contributed to the delay in the implementation to the point that some of my informants reported that segments of the legal, academic, and political communities thought the reform would never be implemented.

Even though the 2007 Code of Criminal Procedure approved by the political branches had overwhelming support, it was not the first attempt in Santa Fe to replace the inquisitorial system with a system based on the accusatorial model.[30] Since the return of democracy in Argentina in 1983, these ideas have been part of legal discussions, especially in Santa Fe and Rosario, where the University of Litoral and the University of Rosario are located.

Many students and young lawyers were convinced that the Santa Fe's criminal justice system had to be opened up and democratized and believed that the transition to an accusatorial approach would be an important first step. In the late 1980s, judges and politicians criticized these groups as idealists lacking in practical experience. The judicial establishment dismissed any change and scorned the discussion of reform as an academic exercise, an intellectual debate that cannot be considered relevant for improving the system. That was the era in which the criminal judge was omnipresent and omnipotent.

In 1992, a Commission was created to discuss and propose a new accusatorial code.[31] The Commission was under the direction of a jurist brave enough to defy the constellation of power at the time: Jorge Eduardo Vázquez Rossi, a professor at the University of Litoral.[32] This technical Commission wrote and proposed a new criminal procedure Code in 1993.[33] Politicians and judges refused to discuss it systematically to the point that the Legislature never took it up. The procedural system and the powerful judges who controlled it remained in place until external forces intervened and eliminated the possibility of denying any transformation.

One of the architects of the successful 2007 legislation characterized this failed attempt to reform the system of criminal procedure as an important

29. Code of Criminal Procedure Law 12.734, SANTA FE LEGAL (2007), https://www.santafelegal.com.ar/cods/cpp1.html.

30. *See* After the Blow of the Fraticelli Case, *supra* note 5.

31. Ciocchini, *supra* note 26.

32. *See* JORGE EDUARDO VAZQUEZ ROSSI, DERECHO PROCESAL PENAL: LA REALIZACIÓN PENAL [CRIMINAL PROCEDURE LAW: CRIMINAL PERFORMANCE] 160 (Rubinzal-Culzoni ed., 1995).

33. *Id.* at 178.

milestone in the reform pathway, even though it was not as ambitious as the reforms that were ultimately approved. When asked why judges and politicians closed the door to any change and rejected it without discussion, he answered simply and compellingly: "Because they could."

This comment shows that neither politicians nor judges believed any reform was necessary. They capitalized on the fact that the discussion regarding the design of the criminal process was limited to relatively narrow circles. The demand for the kind of fundamental transformation offered by the new code was not yet a matter of general public.

The inquisitorial model of criminal procedure has as its main component an inquisitor. This figure reflects the concentrated power that the judge who filled this role had over the interior functioning of the system as it operated in the past. This concentration of power in the person of the judge is a legacy of an image that emerged during the Spanish Inquisition of an individual who both conducted the investigation but also made the final determination. The functions of the inquisitor during the Inquisition were often exercised through torture and humiliation in the name of god. Although there is disagreement over how closely this portrait of the mythical inquisitor matches reality,[34] one trait that is undeniable is power.

When we say that the judge in an inquisitorial system resembles an inquisitor, we refer to the extent of the judge's power and control over the process. Other features of the modern process that were characteristic of trials during the Inquisition are secrecy, the absence of any meaningful defense, and the primarily written nature of the process. These components structured a procedure that operated almost entirely out of public view and a model of a judge whose decisions and opinions were often treated as the truth.

The remoteness from society of the criminal process, particularly the judges, caused difficulties when judges were forced to interact with the general public. Judges exercised absolute power in the realm of their courts. However, as will be discussed in the following section, when their legitimacy became linked to the validation of the community, judges began to be confronted with the same challenges that faced the other branches of government, but they had fewer mechanisms to defend themselves from social pressure.

Judges had been promoting themselves as aseptic and neutral for too long. To the moment they tried to change the narrative of their role, these ideas were too deeply rooted. Public demands have turned into pressure that is difficult to handle for professionals who have been making decisions

34. Angus MacKay, *Historia de la Inquisición en España y América* [*History of the Inquisition in Spain and America*], 62 J. MOD. HIST. 411, 411-14 (1990).

according to their beliefs and needs since the creation of their charges. With the implementation of the reforms, judges were invited to participate in a political game they were unprepared to play and did not have the tools to win.

Judges in Santa Fe were reluctant to relinquish their centrality in the criminal process and the power that position gave them. They disputed the narratives regarding the necessity for changes. On the other hand, politicians did not want to create a conflict with other state actors in a context of a reform effort that was isolated and confined within the walls of the universities.

The political branches "could" suspend all efforts to reform the criminal justice system during those years because they considered that the demands for change was confined to a minority, mostly located in law faculties. The voices of the first wave of defenders of these ideas were not loud enough to defy the opinion of the active judges. Politicians seemed unwilling to open a front in a conflict with powerful enemies just because a minority in the legal community maintained that change was mandatory according to the new rules of democracy.

The judges' power was sufficient to overcome all the voices advocating importance of reform. The judges' attitude built a wall that blocked all the previous attempts to change the criminal justice system, which remained governed by a law passed in 1972. The voices of my informants suggested that it would not be possible to open the cracks in the wall of resistance to reform without the pressure being exerted from outside Santa Fe. Moreover, that is exactly what happened. It was only after Santa Fe's system came under criticism from reputable and powerful outsiders that cracks in the wall began to appear. At that point, the politicians could not postpone the debate any further.

2. Outside Pressure: Cracks in the Wall[35]

The criminal justice system designed by law N°6740 passed and enacted in 1972 was inquisitorial.[36] Despite this law being modified several times, the basic nature of the system was not altered until the implementation of the new Code. The 1972 Code continued to govern the criminal process in Santa Fe until 2014, even a new law was approved in 2007.[37]

35. Belanger, *supra* note 3, at 62 (recognizing that external pressures do not mean there is no pressure inside the state for changes; however, the author underlined the influence of external factors as cracks in the systems walls).

36. *Dispone la vigencia del nuevo Codigo Procesal Penal de Santa Fe a partir del 10/02/2014* [The New Crminal Procedure Code of Santa Fe is in Force as of 10/02/2014], Sistema Argentina de Informacion Juridica [ARGENTINA SYSTEM OF JUDICIAL INFORMATION], 2013, http://www.saij.gob.ar/legislacion/decreto-santa_fe-3811-2013-nuevo_codigo_procesal_penal.htm.

37. *Id.*

Over the span of forty-two years, the judges almost entirely controlled the criminal justice system in Santa Fe. Article 25 of the 1972 Code states, "Instruction judges investigate the crimes attributed to an individual older than eighteen years old."[38] Article 27 similarly assigns to a judge—albeit a judge with a different title—the investigation of crimes with a maximum sentence of less than three years.[39] The judge controlling the investigation also determines the appropriate strategy and means to discover the truth. The same judge, afterward, based on the proof gathered according to their decision, determines whether there is sufficient evidence to take the defendant to trial, at which point a different judge adjudicates guilt or innocence.

It strains credulity that the person who exercises power can simultaneously enforce controls on how that power is exercised, but this presumption was central to the operation of the criminal justice system in Santa Fe for more than forty years. In the situation in which an investigation has been deemed complete, the case was elevated to a different judge, a judge of crime, who was charged with assessing proof that was not presented in front of him, and who took it on trust that the evidence was obtained legally and fairly reflected what occurred in the investigation phase. However, the vast majority of the cases were resolved in the early stages of the investigation through a private and secret negotiation where the investigation judge interacted directly with the defendant.

The principal proof in the inquisitorial system was the defendant's confession, which was obtained through various investigative tactics, legal and illegal. It was common for judges to use imprisonment or isolation, or even some illegal methods, such as police beatings, to force a confession.[40] Since the legality of the measures used to obtain a confession was determined by the same judges who encouraged and ordered them, there was no way for a confession to be challenged. The risk inherent in the practice of concentrating in one actor the functions investigating and controlling that investigation should be obvious.

Despite the fact that the evidence was entirely written and not presented in front of the judge in charge of determining whether the defendant was guilty or innocent, the evaluation of the evidence at trial was deemed final. A defendant could challenge a decision to an appellate court only for reasons related to the law or arbitrary interpretation; if the decision was logical under

38. COD. PROC. PEN. [CRIM. PROC. CODE] art. 25 (1981) (Arg.).

39. *Id.* at art. 27.

40. *See* Belanger, s*upra* note 3, at 70.

the rules of "reasoned judgment,"[41] appellate challenges were limited arguments regarding the interpretation of the law. That was the rule for decades until the Supreme Court of Argentina decided the case *Casal*, which ruled against that legal position.[42]

In the case *Casal*, Matías Eugenio y otro s/robo simple en grado de tentativa,[43] the Supreme Court analyzed the appellate arguments in light of the obligation imposed by the Inter-American Convention, which has been part of the Argentine constitutional block since its incorporation in the 1994 constitutional reform. The Court established that according to articles 8.2 of the American Human Rights Convention, Article 14.5 of the International Covenant on Civil and Political Rights (ICCPR), and Article 75, subparagraph 22 of the Constitution of the Republic of Argentina, the scope of appellate review must be as wide as possible within the limits of existing legislation.[44] This clear statement acknowledged a right to appellate review not constrained to issues of arbitrary decision or misinterpretation of the law; rather, the review power of appellate courts encompassed all decisions made by the judge at trial in the superior courts. The review is to include all actions and decisions taken at trial and must be, in the words of the Supreme Court, "integral." The only exception recognized by the Court relates to evidence given orally and not recorded because of the factual impossibility of its reconstruction.[45]

This decision, announced in 2005, profoundly impacted Argentina and Santa Fe. The judges handling criminal cases faced a dilemma. They could assume that their decisions were subject to a comprehensive review by a superior court or could choose not to change their practice and infringe a right that the Supreme Court had deemed fundamental. This opened up another crack in the wall protecting the status quo. Judges were able to resist, maybe because of the marginal role that trial played in the criminal process, but some alarms had begun to filter in through the still modest breaches in the judges' fortification.

A few months before, another Supreme Court decision badly injured the model of the judge that had been portrayed in criminal justice systems in

41. Joel Gonzalez Castillo, *La fundamentación de las sentencias y la sana crítica* [*The Justification of Sentences and Healthy Criticism*] REVISTA SANA CRITICA [HEALTHY CRITICISM MAGAZINE] 93, 102, 103 (2006) (discussing the standard used to assess the motivation judges offer when deciding a case).

42. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/8/2005, "Recurso de Hecho Casal, Matías Eugenio y otro s/ robo simple en grado de tentativa," La Ley [L.L.] (2005) (Arg.).

43. *Id.*

44. *Id.* at 4.

45. *See id.* at 37.

Santa Fe. Many interviewees pointed to this moment as the beginning of the recognition of the mandatory nature of the system's transformation. The case was *Llerena*, Horacio Luis s/ abuso de armas y lesiones,[46] and it was also decided in 2005.

In the *Llerena* case, the Argentine Supreme Court solved a controversy regarding whether a judge who issued rulings during the investigatory stage could be deemed impartial in deciding the case in the sentencing stage.[47] This situation occurred frequently in Santa Fe during the inquisitorial era and raised doubts about the double role of investigation and oversight. From this moment, it was no longer possible to deny that decision by an impartial judge was a guaranteed right of the defendant.

The Supreme Court recognized that the judge's impartiality must be understood from two perspectives: objective and subjective.[48] The defendant may invoke the subjective component at any time that exists a reasonable fear of partiality on the part of the judge. The Court also said fear could be inferred from a judge's acts or decisions before the sentence, despite whether personal animosity or bias of the judge can be proven.[49] If judges take investigative actions that create a reasonable objective fear in the defendant, the accused may argue that there is no certainty that the judge will be impartial in any further decision during sentencing or any other stage of the process. Actions during the investigation were deemed to have tainted the judge, who could not thereafter participate in any other part of the process without opening the door to being accused of partiality. Judges could no longer maintain their omnipotence without paying an enormous cost in terms of legitimacy and legality both locally and nationally.

The *Llerena* case was a turning point in the perception of the judge's role in the criminal process. The importance of the issue addressed in the case led to the Supreme Court's issuance in November 2005 of Acordada No. 23.[50]

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46. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2017, "*Recurso de Hecho, Llerena, Horacio Luis s/ abuso de armas y lesiones* [*Case Appeal by Llerena, Horacio Luis on abuse of weapons and injuries*]," Fallos (2005-486-36) (Arg.).

47. *Id.* at 70.

48. National Supreme Court of Justice, *supra* note 46, at 9.

49. *See id.* at 48.

50. *See* Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], Acordada No. 23/2005 (Arg.) (It refers to an administrative resolution that the Supreme Court sanctioned, and it binds all the courts in Argentina. This decision clearly depicted how important the position adopted in this matter was since they recognized the risk that the inferior Court avoided using this new holding. It is important to underline that in Argentina, the Supreme Court sentences are not directly applicable as in a common law system, and they can be eluded by inferior judges expressing the reasons for their decision. The jurisprudence of the Supreme Court is not completely

These new procedures mandated by the *Llerena* case also generated practical difficulties. The criminal justice system itself was forced to adapt existing practices and routines to avoid creating causes of action to attack convictions. The process of adapting to the new rules was imperfect and dilatory, indeed, it was often nonexistent. Thus, in 2006, an extraordinary remedy against an appellate court's decision in Venado Tuerto, Santa Fe, was conceded. The case *Dieser*, María Graciela y Fraticelli, Carlos Andrés s/ homicidio calificado por el vínculo y por alevosía (D. 81. XLI) was a clear sign that the system could not continue to operate in the same way it had in the past. The Supreme Court insisted on adherence to the reasoning in *Llerena* and invalidated the court's sentence because two out of the three judges who decided the case had previous contact with the issues and had made decisions on preliminary matters during the investigation phase.[51] Chief of Justice Argibay stated in her opinion that the sentence must be reversed because of a denial of the right to an impartial judge.[52]

In that case, and another in 2008 called *Roggiano*, Julio César y Leonardi, María del Carmen s/ exacción ilegal agravada (R. 974. XLII),[53] the Supreme Court showed the weakness of the criminal justice system in Santa Fe and the high risk of civil liberties violations. These two cases have another trait in common that helped the criticism spread beyond the spaces where it traditionally had been restrained: both suspects were judges. That fact brought media and public attention to the outcome of the trials and the resources filled by the defendant after their convictions.

One of the crimes was mediatic and was followed by the press because it was tragic. Fraticelli, a judge, and his wife were accused of murdering their daughter at their family house; they both insisted since the beginning that their daughter decided to take her own life.[54] Roggiano was also a judge who was being accused of corruption.[55] The high profile of both cases, one before the sanction of the new Code and one after, transferred the criticism and concerns from the academia and minority sectors of the judiciary to the mass

irrelevant, but since its effect is relative and only applies to the case that motivated the holding, its influence is not as significant as in a common law system where it has the status of law).

51. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Recurso de hecho deducido por la defensa de Dieser, María Graciela y Fraticelli, Carlos Andrés en la causa Dieser, María Graciela y Fraticelli, Carlos Andrés s/ homicidio calificado por el vínculo y por alevosía," Fallos (2008-81-1) (Arg.).

52. National Supreme Court of Justice, *supra* note 46, at 67-71.

53. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/8/2008, "Recurso de hecho deducido por la defensa de Julio César Rogiano en la causa Rogiano, Julio César y Leonardi, María del Carmen s/ exacción ilegal agravada," Fallos (2008-974-41) (Arg.).

54. *See also* National Supreme Court of Justice, *supra* note 53.

55. *Id.*

public. At that point, the cracks in the wall allowed us to glance at the other side, and politicians could not deny that the Supreme Court considered that the criminal justice system in Santa Fe had a "deficient procedural organization."[56]

The governmental branches of Santa Fe detected that the necessity for change was not more only part of a loud minority but a duty to conciliate the State system to the mandate of the Constitution.[57] The Governor, Jorge Obeid, was in his second period as Governor of Santa Fe after being elected again in 2003. During this second term, he tried to reform some of the most stagnant structures in the State, such as the state police force.[58] However, when it was the turn of criminal justice, the conservatives' center of power tried to postpone the discussions and changes, as well as its further implementation.[59]

It was identified that there was no more room for delays. Although, as an informant exposed, these initiatives still had to face the challenge of creating a strategy that compelled the transformation without arousing the wrath of powerful enemies: the criminal judges.[60] This can be corroborated by the fact that the Document prompted changes in the judiciary system as a whole, not just the criminal justice system.[61]

Clause 4 of the Agreement created a Commission.[62] This Reform Commission was formed for representatives of different sectors and interests and included the three powers of the State and employees, lawyers, and unions, among others.[63] There was a group that stood out composed of the

56. *See* National Supreme Court of Justice, *supra* note 46, at 9.

57. *See* Acuerdo hacia un plan estratégico del Estado Provincial para la justicia Santafesina [Agreement towards a strategic plan of the Provincial State for Sante Fe Justice], GOBIERNO DE SANTA FE [SANTA FE GOV'T], (May 10, 2006) (Arg.) [hereinafter Acuerdo] (This acknowledgement was reflected in the Agreement signed by the highest authorities of the three branches, executive, legislative, and judicial, in May 10, 2006).

58. *See* Provincial Law No. 12521/2006, Apr. 18, 2006 (Arg.) (This law reformed the entire internal organization of the state police); *see also* Provincial Law 12333/2004, Sept. 2, 2004 (Arg.) (This law created a new Public Safety Institute which replaced the former Police Academy. This new autonomous actor has been in charge of the education of the state police prospect since then); *see also* Eduardo Estevez & Pedro L. Favorito, *Reforma policial en Santa Fe, Argentina: contextos, oscilaciones y desafios del proceso* [*Police reform in Santa Fe, Argentina: contexts, oscillations and challenges of the process*] 6 REVISTA DE ESTUDIOS EN SEGURIDAD INTERNACIONAL [JOURNAL OF INTERNATIONAL SECURITY STUDIES] 139 (2020).

59. *See* Emerio Agretti, *Bassó se resiste a perder poder* [*Bassó resists losing power*], EL LITORAL [THE COASTLINE] (May 6, 2010), https://www.ellitoral.com/politica/basso-resiste-perder-poder_0_3cdeU1SCov.html.

60. *See Institutional Life of Santa Fe*, *supra* note 21.

61. *See* Acuerdo, *supra* note 57.

62. *See id.*

63. *See* Julieta Taboga, Rediseñando el campo de la justicia penal. Una exploración sobre las transformaciones del proceso penal en la provincia de Santa Fe [Redesigning the field of criminal

representatives of the School of Law. Many of them were the idealistic young professionals and students of the previous attempt who kept defending their ideas and finally found a space to change a system they had criticized for more than ten years. They had sufficient technical knowledge, and many were important figures in the criminal justice system at that moment. Their voices were crucial in the craft of the new Code, which was even more ambitious and extended than the one proposed in 1993.

Despite the fact that the framers were now experienced professionals, and the concerns were extended beyond the Universities, some parts of the judicial power still resisted any change. These sectors tried to use their influence to prevent the politicians from passing any law that may reduce their power. The reformers had to carry the burden of being considered naive, inexpert, or even traitors. The weight of the burden at this time, for the reason exposed and the trends, was significantly slighter.

During the interviews with some of the reformers, they expressed that they felt an aggressive and negative attitude towards them from part of the judiciary ecosystem, and from the judges in particular. They remember being careful in their expression and criticism, especially in public, to avoid disconformity. As part of these cautious tactics, they posed their disapproval of the system instead of the actor. They repeated on every occasion that they were asked that what had to be improved was the system rather than the performance of the judicial actors, including the judges.

The part of the judiciary that rejected the reform efforts was still active at the time and conserved a significant power quota. Even in his decision to create the Reform Commission, the Governor had to deal with opposing interests at the time. In that context, he made some decisions that proved he recognized the challenges of the scenario.

Jorge Obeid stated he intended to reform the entire judicial system,[64] not just the criminal one. With that move, he could disguise his intentions and avoid the reaction of the criminal judges. The actualization of the entire system would be better tolerated by the judges, who could feel that this action

justice. An exploration of the transformations of the criminal process in the province of Santa Fe] (Nov. 2021) (M.A. thesis, National University of the Littoral) (on file with the National University of the Littoral) (To learn about the work of the Reform Commission, as well as the legislative debate in this regard).

64. Jorge A. Obeid, *Plan Estratégico del Estado Provincial para la Justicia santafesina* [Provincial State Strategic Plan for the Santa Fe Justice] 44 (2006) (the main objective of the Strategic Plan was "to achieve a modernization of judicial processes" and not only the criminal justice system. The Plan, jointly signed by the Supreme Court of Santa Fe, was not directed to criminal justice reform, even though the reformers said, and the historical context and subsequent events confirmed, it was its main objective. This Governor´s decision indicates the relevance and power that the criminal judges had at the time, and his attempt to carefully skip any political action could be interpreted as a direct criticism of their performance).

was not directed toward the criminal justice system but the whole system. He also could shade the link between the Supreme Court sentences and the purpose of the reform. In the interviews, the reformers recognized this strategy as a valid political move that gave them more freedom to work outside the resistance of the criminal judges.

Despite his strategy, an informant also added, the Governor was still divided. An important part of his cabinet advised him against the reform. The reformers we interviewed highlighted that the status quo had many defenders during those days. The main difference was the external pressure generated by the Supreme Court decision and an 'ambient' of change throughout Latin America.[65] In that context, the Governor also decided to pay attention to the other side of the wall. Those who had been defending these ideas for years finally had the chance to express their concerns and propose the reform of the Code as the solution to many of them. This version won, and the Governor proposed the bill to the Legislature, which approved the proposal and turned it into law on the 31st of August 2007.[66]

Santa Fe, the last province to reform its criminal procedure, finally had a new legal framework. A new set of questions was opened: Is it enough to change the law to change a system? Santa Fe's experience may suggest a strong no. The sanction of a new Code was deemed the end of a longstanding process. History demonstrated that it was, in fact, the beginning of a new process until the reform was applied. The wall collapsed, but the rubble still needed to be removed to be able to construct again.

C. Local Actor Resistance: The Judge's Attitude and Professional Judging

As a result of the events explained, Santa Fe had a new Code that promised to change the criminal justice system permanently. On its face, the reform seemed to suggest that the criminal judges had lost the pulse and accepted to share the stage. Hence, it is important to scrutinize if the modification of the legal structure impacted how the judges perceived themselves and their general attitude regarding the changes and the system in general. Perhaps in this exploration, we can find some elements to explain the seven years of delay from the legal transformation to its effective implementation and the decision not to include an Evidence Code.

When we study the letter of the reformed Code, we find a trait that stands out from the rest and that is not simple to reconcile with the demands of an accusatorial system: professional judging. Criminal judges conserved the power to decide who is guilty or innocent.

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65. *See* Langer, *supra* note 1.

66. See Law No. 12734, Aug. 31, 2007, B.O. (Arg.).

This trait of the pretended reform can be understood as an attempt by the judiciary to remain relevant. The criminal judges relinquished their power to investigate with the demand to preserve the centrality through the judging function. Their roles would be focused according to the new law on judging and controlling, which turns them into key players.

As we described, the idea that outside forces were an indispensable step to reform can be proven. Judges who opposed those changes may have pushed back to avoid losing more power than strictly necessary. The practices we will examine in section III corroborate this premise. Many criminal judges witnessed the transformation from their benches and decided to keep working as if the changes had not happened.

Maintaining professional judging has brought another consequence central to our proposed analysis. Conserving the judges' power to decide would, by definition, refuse the existence of a jury. By denying jury trials, the odds of an Evidence Code were reduced. Moreover, judges were only willing to renounce their investigation power to respond to the legal pressure to change. If the judges have the power to control and accept the evidence for the trials without any normativity constraint, they can maintain indirect control over the investigation.

Even though modernity brought novel dichotomies, the tension between inquisitorial systems and the jury was present in the formation of Argentina as a nation.[67] The proof can be seen in the framers' decision to include jury trials in the first Argentinian Constitution in 1853 is proof of this. Santa Fe passed a law to implement jury trials in 2024, almost 171 years after the creation of the institutional debt from the Argentinian framers.[68]

The presence of powerful judges is an obstacle to the creation of jury trials. Moreover, it generally interferes with the normal function of the accusatorial and adversarial systems. Given the power they have accrued for years, the judges' resistance is a logical hardship in Santa Fe's transformation process and in improving its function by adding legal advances such as a Code of Evidence.

When we talked with some relevant actors in that process, they said the reform was not perfect, but it was the only possible one. Jury trials were perceived as an effort that might awaken powerful resistance. The reformer opponents' position was clear: bring Santa Fe's legal system in line with

67. *See* Alberto M. Binder, *La fuerza de la Inquisición y la debilidad de la República,* Política Criminal Bonaerense [The Strength of the Inquisition and the Weakness of the Republic], Política Criminal Bonaerense [Buenos Aires Criminal Policy], 2 (2003).

68. Andres Harfuch & Juan S. Lloret, *The Dawn of the Civil Jury in Argentina*, CIVIL JURY PROJECT (2020), https://civiljuryproject.law.nyu.edu/the-dawn-of-the-civil-jury-in-argentina/.

constitutional minimum standards without overly altering the power dynamics that governed the criminal judicial system for decades.

Another aspect of the different judging mechanisms can be used to explain the possibility of judges resisting the implementation of jury trials and of politicians accepting that limit. Every judicial decision impacts the community where the conflict that triggers the judicial response arises. Furthermore, the State received the conflict from a member of one of the community's groups,[69] who decided, voluntarily or compulsively, to give it with the expectation that the State's actor would repair their victimized interest. Consequently, every judicial decision has a symbolic effect traditionally related to legitimacy.[70] The person in charge of sentencing in a judicial process has a major impact on the legitimacy of the judicial power and the State.

From the perspective of many historical scholars, the legitimacy of a decision in the context of professional judging is impossible.[71] Montesquieu expressed fiery criticism of the professional judge, whom he considered could easily turn into a despot.[72] As Lettow Lerner wrote, this French author stated: "In republics, the people did the real judging, *and professional judges had very little discretion."*[73] Tocqueville was a defender of the jury trial, especially in criminal cases, and he said that the jurors were, in fact, the real judges.[74] The paradox is that following Professor Lettow Lerner's ideas both authors did not undermine the role of professional judges but created the condition to strengthen their relevance in a republic.[75] By losing the ability to decide the outcome of a trial, judges enhance their power to control the legality of the process and the actions of the other governmental branches.

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69. *See* ZYGMUNT BAUMAN, COMUNIDAD: EN BUSCA DE SEGURIDAD EN UN MUNDO HOSTIL [COMMUNITY: IN SEARCH OF SECURITY IN A HOSTEL WORLD], 19 (2003) (the complexity of modern societies impedes the use of the traditional concept of community, which depicts it as a homogeneous group with common viewpoints and values. It has been said that current communities are composed of many groups in dispute. For the purpose of our explanation, it is enough to say that the individual who renounces their conflict cannot be directly included in a group traditionally referred to as society. We consider that the idea of a multiplicity of communities within a large group is closer to being able to explain the social dynamics of modern communities). *Id.* at 52, 137.

70. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance,* 23 WILEY LAW & SOC'Y REV. 469, 487-489 (1989).

71. Renee L. Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 11, 12 (2020).

72. *See* Stephen C. Thaman, Should Criminal Juries Give Reasons for Their Verdicts: *The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium,* 86 CHI. KENT L. REV. 613, 616 (2011).

73. Lerner, *supra* note 71, at 12.

74. *Id.* at 40.

75. *Id.*

When judges accept and encourage jury trials, they can focus on judging legality and upholding liberty. This acceptance, far from reducing their power, makes them a permanent and central power in the State as a political device. The demeanor of the judge in Santa Fe conveyed the impression of a failure to consider those potential benefits while evaluating the possible impacts of the reform.

During the Enlightenment, the Italian school of thought agreed with the ideas of the French Scholars. Authors such as Cesare Becaria, and especially Gaetano Filangieri, were also against professional judges and defended the notion of restricted powers.[76] They shared with their French peers a profound distrust of the judiciary and believed in the importance of designing strict controls. The judges were attached to the letter of the law; neither power nor discretion was necessary for this ideal model of the judge. As Montesquieu famously established, the judges were, ¨the mouth which pronounces the words of the law."[77]

These ideas spread far and wide in Europe during the nineteenth century and developed a model of judges with severe limitations.[78] This increasing distrust destroyed the power of the judge to control the validity and rationality of the legislative power through superior values, traditionally included in natural law. The idea of a wise 'savior' was displaced by the one of a vicious threat who could turn into a dictator if the procedure gave them a chance. The 'mechanistic' approach[79] of the French School created a legitimacy problem: Who will be impartial and generous enough not to be corrupted by the exercise of power? If those who historically had assumed the function of judging were now a danger to the republic, it was mandatory to shift that burden to other shoulders. The answer was logical: those shoulders must be of the citizens who recently had received their freedom. At that moment, jury trials were introduced in Europe, first in France and then in many major countries.[80]

The jury trial is not a long-standing tradition in European countries, as it is in countries of common law, like England and the United States of America. The extension of its usage varies between these two main legal traditions: Roman law and Common law. However, after the Revolution, France included jury trials in 1791, followed by other European countries such as Germany (1871) and Spain (1888).[81] Only two years after adopting

76. *See* Thaman, *supra* note 72, at 613-16.
77. *Id.* at 616.
78. *See* Lerner, *supra* note 71, at 4.
79. *See* Thaman, *supra* note 72, at 616.
80. *Id.* at 615.
81. *Id.* at 616 n.21.

the first ten amendments in the US Constitution, based on Mason's Virginia Declaration of Rights, the Gallic country also incorporated jury trials.[82] Notwithstanding, the jury trial established in the US Sixth Amendment is different in intensity and extension; in Europe, jury trials were, and still are, reserved for particularly heinous crimes, whereas in the US, the text of the Bill of Rights does not make any distinction.

As a common trait, despite the historical and political differences, both countries were concerned about the legality and legitimacy of the judging process. A newborn country claiming its independence and one experiencing its freedom after years of monarchical oppression concurred that jury trial was the best legal instrument to protect and enhance the legitimacy of the judging process.

Hundreds of years later, we will see that expectation remains in politicians' minds, which recurred to reforms of the criminal justice systems to recover public trust and legitimacy. Jury trials are still an idea, not a reality, that professional politicians in Santa Fe have used countless opportunities in the past and today. Politics in Santa Fe uses the criminal justice system to create a culprit for the recurrent crisis in the public safety domain; changes are cosmetic and hysterical and happen at the level of discourses that are not related to true intentions of reform, nor even improvements of the systems. Thus, the difference is that French Revolutionaries and US framers were making decisions to design the structure of their future nations. These processes required deciding how society would convict the individuals accused of committing crimes, while politicians in Santa Fe, as in many other provinces, states and nations, are usually focused on their self-interests.

The first Constitution of Argentina was written in this particular context where important nations were making integral decisions on the judging system that would apply. The sources of this first Constitution have been the subject of heated discussion.[83] For some scholars, it was an adapted copy of the Constitution of the United States; others have expressed that the Constitution reflected the perception and values of some parts of Argentina's society, and the influence of the US Constitution should not lead us to consider it a copy but a legitimate local creation.[84] The European sources are usually deemed minor influences, although the practice and constitutional discussions during the last century have shown that they are also used to

82. *Id.*

83. Juan M. Morocoa, *"Las Fuentes de la Constitución Nacional" como "Fuente" de Disputa (Personal y No) Académica ['The Source of the National Constitution' as a 'Source' of Dispute]*, ACADEMIA: REVISTA SOBRE ENSEÑANZA DEL DERECHO [ACADEMIA: MAGAZINE ON LAW TEACHING], 59 (2014).

84. *Id.* at 67-72.

understand the limits of the Argentinian Constitution.[85] The mandatory character of the jury trial in the first Constitution can be read as a trait imported from the common law. However, there are alternative explanations that also acknowledge European influence.[86]

Beyond any controversy, what was clear was the distrust of the judge expressed in the Constitution and the fact that in the dichotomy between inquisitor and jury, the framers' election was for the last. The term 'jury' was included three times in the original text (art. 12, art. 115, art. 118).[87] Article 24 did not give any room for misunderstandings and states: "Congress shall promote the reform of the existing law in all its branches and shall establish the jury trial."[88]

Santa Fe had previously sanctioned a statute that regulated the primogenial structure of the State in 1819 and a Constitution in 1841.[89] After the first National Constitution, all the states that recognized the nation's existence had to adapt their constitutional texts to the recently created Confederation. This obligation was expressly included in Article 5 of the National Constitution, and Santa Fe fulfilled its duty in 1856.[90] The first Constitution of Santa Fe respected the key values of the latest legal regime, but using the range of discretion that the National Constitution reserved for the States did not include any particular precept related to jury trials. Article 9 of the Constitution of Santa Fe just established that for criminal process, the law shall "tend to institute an oral and public trial;" nine reforms later (1863, 1872, 1883, 1890, 1900, 1907, 1921, 1949, and 1962) the text remains the same.[91]

Following the evolution of Santa Fe's Constitution, we can determine that this State was less open than the national level in recognizing the importance of jury trials. Even though jury trials have become a duty for the Confederation's State since its inclusion in the National Constitution, Santa Fe was reluctant, and still is, to expressly include it in its Constitution. This historical attitude has been a platform judges used to resist change and claim their centrality in the criminal justice system. The binding force of the

85. *Id.* at 69-72.

86. *See* Morocoa, *supra* note 83; *see* Thaman, *supra* note 72, at 615.

87. Arts. 12, 115, 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

88. *Id.* at art. 24.

89. Pablo A. Boasso, *La Constitución Santafesina de 1921. Un Conflicto Institucional Olvidado* [The Santafesina Constitution of 1921: A Forgotten Institutional Conflict] 7 IUSHISTORIA INVESTIGACIONES 30, 31 (2010) (The Province of Santa Fe has been one of the most prolific states in Argentina in terms of constitutional texts. By 1856, Santa Fe already had the provisory Statute, adopted in 1819, and the First State Constitution, adopted in 1841).

90. *See id.* at 31.

91. PROVINCE OF SANTA FE [CONSTITUTION], Apr. 14, 1962, art. 9 (Arg.).

National Constitution text has not been enough to alter the dynamics of power in Santa Fe, even more so when the Federal system itself has not been able yet to incorporate jury trials in its procedures.

Despite the frenetic rhythm that Santa Fe experienced during the first years after the creation of the Confederation, it has kept its Constitution the same since 1962. The text of the Constitution of the State, where the first National Constitution and its last Reform (1994) occurred, has stayed the same for the last sixty-two years. In the same period, the neighboring State, Cordoba, which is similar in territory, population, and economy, reformed its Constitution two times in 1987 and 2001.[92] Cordoba also included jury trials since its first constitutional text, Provisory Reglament, in 1821; its existing law established in Article 162 that ¨the law shall determine the cases in which tribunals are also integrated with juries."[93] Cordoba is known in Argentina as the State with the strongest accusatorial tradition and the first to include jury trials in 2004 through law 9182/04.[94]

From this historical analysis, we can conclude that a state's tradition and culture affect transformation processes. The accumulation of power in the criminal judge's hand in Santa Fe found a tradition of disregard for popular participation in judicial procedures that facilitated it. On the contrary, Cordoba had a genetic mark created by the importance that the framers recognized in the origins of the State.[95] The Federal Constitution bound both states since its sanction to implement jury trials, but they translated this mandate differently according to the viewpoints of the local actors. It might be argued that the pressures and resistances within the boundaries of the States are as important as the legal mandate and design at both federal and State levels.

Suppose we accept the veracity of Enlightenment ideas about the professional judge's decision as impossible to deserve legitimacy, and Santa Fe has conserved that system until today. Assuming both premises are truthful would lead us to question why legitimacy was not a social concern for decades. The reasons seem to come from common sense. It is impossible to control and assess a process that has always been strange and distant. Citizens had never been part of the criminal process in Santa Fe, and in the best scenario, only were informed of the advances in procedures that move

92. PROVINCE OF CORDOBA [CONSTITUTION], Sept. 14, 2001, art. 12, 15 (2001) (Arg.).

93. *Id.* at art. 162.

94. Ley No. 9182, 22 Sept. 2004, Gobierno de la Provincia de Córdoba [Gov't of the Province of Cordoba] (Arg.).

95. *See* MATÍAS ROSSO, CODIFICANDO EL DERECHO DESDE LA BASE: EL CÓDIGO PENAL DE LA PROVINCIA DE CÓRDOBA EN LA GÉNESIS DE LA CODIFICACIÓN NACIONAL [CODING THE LAW FROM THE BASE: THE CRIMINAL CODE OF THE PROVINCE OF CORDOBA IN THE GENESIS OF NATIONAL CODIFICATION], (2022).

forward without their participation. The power of the criminal judges increased because of the secrecy and the closeness.

Since the beginning of Santa Fe as a province, criminal procedures had been written and private. The judges used secrecy to expand their discretion. In many cases, their courts were realms in which their owners, the judges, had the power of decision that was difficult to accept in a republic. Montesquieu's concerns could be confirmed in the criminal judges' demeanor for over a century.

As we highlighted previously, even if the Constitution of Santa Fe has demanded since its first text that criminal procedure be public and oral, it was not until recently that those mandates were followed. The culture, practices, and perception regarding the role of the judge in criminal procedures in Santa Fe were born entangled with privacy, secrecy, and the absolute lack of any instance of accountability. This model, which recently started to be disputed for the ideas brought by the reform, has deeper roots in Santa Fe's history. This deep-rooted trajectory partly explains the strength and virulence of the judges' resistance under analysis in this section.

Thus, the judge's attitude was not only the resistance to losing their privileges and power but also a historical defense of this elite group. Judges were able to accumulate power without having to face the claims of the citizens. The shadows were a favorable environment for this process and eschewed social criticism that came from an evaluation of their performances. The lack of accountability was a consequence of the criminal procedure design. All these circumstances played in favor of the judges, who did not have to deal with social pressure because society was not invited to be part of the process.

These presumptions are corroborated in the interviews we conducted. All of the interviewees were profoundly critical of the previous criminal justice system in Santa Fe. Their critique was not only of the systematic violation of civil liberties but also of its evident inefficiency. According to the voice of a former judge in Santa Fe, the inquisitorial system was a 'machinery of impunity.' This characteristic was noticeable for any objective individual with access to the criminal procedure system. Consequently, the fact that until the outside pressure broke the status quo, the inefficiency of the criminal justice system in Santa Fe was not part, or at least as firm as it is today, of the public concerns reveals that citizens had no access to information or to control the criminal process.

The inquisitor mask permitted the judges not to see the citizens in the eyes and created a distance from them. This separation over the years created a perception of a judge without almost any limit within their courts. Moreover, it erased any instances of control and accountability and turned

the public into mere bystanders of procedures solved in the darkness of the judge's chambers. The concern of how legitimate their actions were was outside the center of the judges' interest. They did not sense any social pressure in the outcome of the procedure, which usually took several years, because the citizens were not invited to their realms; social pressure was a dynamic of the traditional politics in which they were not involved.

In the transition to the new formal model, the judges disputed and conserved the ability to judge. Politicians introduced the changes as a result of a negotiation with this perpetual power in the State. The reform adapted the legal structure, but many judges were convinced they would not need to alter their practices and daily interactions. Even if the judges conserved the power related to professional judging, the reform deployed a myriad of modifications that would change how they would interact with the community in the years to come. Inquisitors renounced their masks and had to deal with social pressure for the first time; publicity replaced secrecy and brought the discussion regarding legitimacy. It was the beginning of the end of the total control of the judges over the penal system.

D. Implementing the Code and The Absence of Evidence Code

Even after the new Criminal Procedure Code in Santa Fe was sanctioned, criminal judges and the judiciary branch remained powerful actors in the political field. The sanction of the Code was far from guaranteeing the system's actual change. Therefore, the Code had to be limited and negotiated with them to avoid the complete failure of the reform that had happened in previous attempts. This particularity generated a series of effects, some of which are counterintuitive according to the continental legal tradition of the province. Among the most evident is the absolute absence of a Code of Evidence.

In December 2007, a new governor was elected in Santa Fe.[96] Hermes Binner, the former Mayor of Rosario, assumed the challenge of being governor and the burden of turning the reform into reality. Rapidly, he could confirm that this task would be challenging. He found an active opponent in the General Attorney, designated by Obeid in the last year of his governorship.[97] Agustín Bassó was appointed General Attorney in October

96. *Hermes Binner Sworn in as Governor of Santa Fe*, SOC. INT'L (Dec. 11, 2007), https://www.socialistinternational.org/news/press-releases/hermes-binner-sworn-in-as-governor-of-santa-fe-1253/.

97. *See Binner estuvo en la Casa Rosada y elogió a Kirchner* [Binner was at the Casa Rosada and Praised Kirchner], LA NACION (Sept. 12, 2007), https://www.lanacion.com.ar/politica/binner-estuvo-en-la-casa-rosada-y-elogio-a-kirchner-nid943324/.

2007 after the general elections by the losing party.[98] He was intensely criticized because of his public activism against judicial reforms.[99] He was a judge in the Criminal Court of Appeals in Santa Fe and the President of the Judge Association in Santa Fe. His loyalties were pristine.[100] He tried to minimize these criticisms when he took office, but his conduct during the following years showed the concerns were well-oriented.

This administration developed a plan to implement the reform and adapt the judicial system to the new administration of justice requirements. This plan included three stages and was approved by the Legislature under the law N° 12.734.[101] According to this program, in 2009, the government sent five bills to create new institutions and to regulate the transition. Three of them were unanimously approved by the Legislature.[102] The Prosecution Office and Public Defense appeared in Santa Fe, established by the law N° 13.013 and 13.014, respectively.[103]

The governmental attitude during this period (2007-2014) was unequivocal. Binner's government pushed many bills that were necessary to implement the new criminal justice system.[104] The governor chose Hector Superti to be the Minister of Justice during his mandate.[105] He was a lawyer

98. *See* Falleció Agustín Bassó [Agustin Basso Passed Away], UNO SANTA FE (Mar. 27, 2012), https://www.unosantafe.com.ar/santa-fe/fallecio-agustin-basso-n2146617.html.

99. *See La Corte rechazó un planteo del procurador contra la reforma penal* [The Court Rejected a Claim by Attorney Against the Penal Reform], LA CAPITAL (Aug. 12, 2010), https://www.lacapital.com.ar/edicion-impresa/la-corte-rechazoacute-un-planteo-del-procurador-contra-la-reforma-penal-n749411.html.

100. *See Porque llueven impugnaciones* [*Because it's Raining Challenges*], ROSARIO 12 (Sept. 20, 2007), https://www.pagina12.com.ar/diario/suplementos/rosario/10-10328-2007-09-20.html (When the Bicameral Committee was about to decide Basso´s appointment, a scandal occurred. The Judges Association in Santa Fe, presided by the candidate, organized a party. According to the attendees, in one moment the entire group started to sing ¨Resisteré´, a song that could be interpreted as an ironic demeanor. The attitude of Basso was a provocation and a display of the extent and source of his power).

101. Cradle of the National Constitution, Res. N. 12,734 (2013).

102. *See id.* at 9.

103. Creación de Cargos, Res. N. 13.013, 13014 (2018).

104. *See Superti: "Avanzamos hacia la reforma judicial" en Santa Fe* [Superti: "We are moving towards judicial reform" in Santa Fe], LA CAPITAL (Jan. 30, 2008), https://www.lacapital.com.ar/politica/superti-avanzamos-la-reforma-judicial-santa-fe-n276692.html; *see also Binner, contra el procurador Bassó por trabar la reforma judicial* [Binner, against Attorney General Bassó for blocking judicial reform], ROSARIO 3 (May 6, 2010), https://www.rosario3.com/noticias/Binner-contra-el-procurador-Basso-por-trabar-la-reforma-judicial-20100506-0022.html.

105. *Binner: Estamos Preocupados, los delincuentes nos conocen y nosotros no Podemos identificarlos* [*We are worried, the criminals know us and we cannot identify them*], UNO SANTE FE (Aug. 28, 2015), https://www.unosantafe.com.ar/politica/binner-estamos-preocupados-los-delincuentes-nos-conocen-y-nosotros-no-podemos-identificarlos-n2056469.html.

who had defended many high-profile cases, including the Fraticelli case.[106] He also had discussions and polemics with the General Attorney with public expressions throughout his term as Minister.[107]

This conflict escalated to reach its paroxysm in the General Attorney's decision to attack the recently passed laws because he considered them unconstitutional. In 2010, in a divided decision, the Supreme Court of Santa Fe rejected the petition of the General Attorney.[108] The Chiefs of Justice used legalese and technicalities to avoid expressing their ideas in a manner that would have been hard to avoid being considered political.[109] The two judges from Santa Fe, Chief Gutierrez and Chief Spuler, voted to accept the petition.[110] At the same time, the other four from Rosario, Chief Falistocco, Chief Netri, Chief Erbetta, and Chief Gastaldi, opted for the rejection.[111] One of the interviewees expressed that the perception of the legal community was that the South fought for reform, and the North resisted. The division in this essential dispute appears to match that idea. The composition of the Court remains untouched until today, another demonstration of the parsimonious pace of institutional evolution in Santa Fe.

The legislation survived, and the reform process received the legal support that the context demanded. Basso´s attempt was the most evident, but parallel actions were deployed to undermine the strength and viability of the reform. This resistance is one of the reasons that explains why a Code of Evidence was not part of the original project, even in the context where evidentiary concerns were a lateral issue and even, for most actors involved, not an issue at all. Similar to the situation with jury trials, if proposed, a Code of Evidence might be seen as the political branch trying to gain more power that the judges were willing to concede. The priority was centered on other traits, such as publicity and orality, which were more connected with reshaping investigative powers. The negotiations between all the actors had to deal with the judges who imposed limits with an iron fist. This pressure

106. *See "El caso Natalia Fraticelli", un documental para recordar el difícil camino a la verdad* [*'The Natalia Fraticelli Case.' A Documentary to Remember the Difficult Road to the Truth*], LA CAPITAL (Dec. 29, 2023), https://www.lacapital.com.ar/zoom/el-caso-natalia-fraticelli-un-documental-recordar-el-dificil-camino-la-verdad-n10110176.html.

107. *See Superti cruzó a Bassó por el control de la corrupción policial* [*Superti Crossed Basso for the Control of Police Corruption*], LA CAPITAL (July 14, 2009), https://www.lacapital.com.ar/policiales/superti-cruzoacute-bassoacute-el-control-la-corrupcioacuten-policial-n325034.html.

108. The Court Rejected a Claim by Attorney Against the Reform Penal, *supra* note 99.

109. *See id.*

110. *Id.*

111. *Id.*

was a factor, but we suspect there are other more relevant reasons that are worth analyzing.

1. Contrary to Tradition: The Missing Code

The Congress of the United States enacted the Federal Rules of Evidence on January 2, 1975.[112] It was not until the sixties that Congress began to consider codifying these rules; before that, the development of these rules followed the traditional common law process and was reserved for Courts.[113] Even though the Supreme Court of the United States expressed the first concerns and decided to create an advisory committee to systematize previous rules, Congress approved the Federal Rules of Evidence.[114]

Following Merrit and Simmons' ideas, the legitimacy crisis brought by Watergate was the main reason Congress decided to become more active in an area that traditionally had been deferred to the Courts.[115] After they received the first Draft in 1972, Congress worked for three years until its final enactment and introduced many changes.[116] These rules govern one of the most significant institutions in the US democracy: trials.

The existence of a Code of any type in a legal system rooted in the common law tradition is, a priori, unexpected. A Code is a manifest characteristic of a statutory system, often a philosophical and practical antagonist of the common law. In a schematic form, the differences between these two systems can be summed up with the words of Hodge, who said that in a statutory system, we "interpret(ed) a code to develop the law,"[117] instead in "common law judges develop the law which their predecessors have made."[118] Thus, this basic distinction has an impact in multiple dimensions, such as how the law evolves throughout time and the effect that a judicial decision has. Moreover, and besides the context where it was passed, the Code of Evidence was a *rara avis*, more typical of a statutory system that one vertebrated by common law practices, or expressed differently: "*Federal Rules of Evidence constituted a rather anomalous intervention at the time of their enactment*."[119]

112. FED. R. EVID. (1975).

113. *See* DEBORAH J. MERRITT & RIC. SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 21 (5th ed. 2022).

114. *Id.* at 21-22.

115. *Id.* at 21.

116. *Id.*

117. *See* Lord Hodge, *The Scope of Judicial Law-Making in the Common Law Tradition*, RABEL J. COMPAR. INT'L. PRIVATE L. 211, 211 (2020).

118. *Id.*

119. G. Alexander Nunn, *The Living Rules of Evidence,* 170 U. PA. L. REV. 937, 948 (2022).

The rationale behind the US Code of Evidence is, on the contrary, more concordant with the legal institutions and practices found in that country in the recent past. We cannot explain the rules of evidence without pointing out their manifest relation to jury trials.[120] The United States Supreme Court decided to create the committee when Congress had yet to show any particular interest in this regard. Afterward, Congress discovered the developments of the Committee, integrated by prestigious professionals, and decided to intervene.[121] The SCOTUS' previous decision demonstrates a conviction of the need for standardized rules in the US territory and that a set of rules—probably not a Code, perhaps just guidelines—could be a useful instrument for that objective.

Juries have not remained unchanged since their origin as a judging mechanism. Since jurors have been confined to passive evaluative functions, the quality of information and how it is presented to them has become a central concern. Rules of Evidence emerged to guarantee that the jury´s decision relied on a proper and lawful basis.[122] Common law had many developments by the time the Code of Evidence was passed, many of which were included in the text.

However, when we focus on juries from this perspective, there is another level of analysis. Two main values appear at the core of the Code: justice and legitimacy; as a dynamic process, the interaction between these values is complex, and they overlap more than once. In our attempt to assess the rationale behind the Code, we will undertake a schematic approach that will omit aspects but underscore the fundamental purpose. First, the value of justice is protected when the rules determine the information and evidence that can be presented with the pretension that the jurors based their decision on what happened during the trial; this ideal of justice is designed to favor the defendants, who deserved to be judged by the action because they are accused and not because of their entire life or how likable they are as a person. On the other side, legitimacy is worried about protecting the jury as an institution and their decision's effect on the community they represent. The Rules of Evidence shield the juror from irrelevant, unreliable, and prejudicial information[123] and assure and enhance its legitimacy and authoritativeness.[124] Beyond which value the reader may be tempted to

120. *Id.* at 951, 952.

121. *Id.* at 951—57.

122. *See id.* at 952.

123. Christopher Robertson & Michael E. Shammas, The *Jury Trial Reinvented.* 9 TEX. A&M L. REV. 109, 112 (2021).

124. Nunn, *supra* note 119, at 958-59, 990; *compare* Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57 (1993) (The legitimacy of jury trials has been the subject of debate. The

endorse, we arrive at the same conclusion from these two alternative avenues: one of the main objectives of Rules of Evidence is to protect the jury from misleading information.[125]

Argentina, and consequently Santa Fe, has a legal tradition connected with continental law, which is usually regarded as a statutory system. This article does not attempt to distinguish the traits in the Argentinian legal system that may sustain that presumption but emphasizes that Argentina and its states have a well-established tradition in codification processes. The refusal to concede judges' law-making powers demands that legislative authorities create the law that will be used to address the issues presented in front of the judiciary. Also, the effect of the judicial sentences is deemed relative and only applies to the parties in the controversy. These two characteristics are enough to stress the importance of Codes and positive law in Argentina.

The tendency of the Argentinian politicians, and also some scholars and activists, to view law as a transformative process and excessively trust the law's ability to solve complex issues is often criticized. Some legal specialists call this propensity normative fetichism.[126] It is striking that the evidentiary rules have not been affected by this fever in Argentina or Santa Fe. The lack of systematized evidentiary rules deserves our attention because it goes against the hegemonic processes in the field of legal development.

The comparative approach is particularly convenient to understand why this happened. We have a common law system that recurs to a Code of Evidence and a statutory system that refuses positive law. This common anomaly has something to teach us about the codification process, both in common law and continental law countries.

When we scrutinized the texts of the criminal procedures reform in Santa Fe, we noticed two significant absences: jury trials and a code of evidence. To the causes that we proposed to explain this lack, we could add that if jury trials were not part of the reform, the lack of a code of evidence is a consequence of the intimate relationship between both we found in the US scenario. However, that may not be the sole reason in Santa Fe, and we were able to identify other relevant factors to decipher these vacancies.

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discussions are wide and shed light on different aspects of this issue. For instance, the limits of juries' discretionary power and the refusal to accept the impeachment of their decision by means of an evidentiary rule are allocated in this field of discussion. Many aspects must be considered in defending jury trials' decisions' legitimacy, even if we accept that evidentiary rules are valid mechanisms).

125. *See* Robertson, *supra* note 123, at 160.

126. *See* Garzón Buenaventura, *Globalización del derecho, fetichismo legal: El velo de los derechos humanos* [Globalization of Law, Legal Fetishism: The Veil of Human Rights], VERVA IURIS 169, 169-81 (2013).

The Supreme Court of Santa Fe is traditionally a conservative institution. It often confirms its hesitancy to embrace radical swiftness in law interpretation. Its attitude toward jurisprudential change has been moderate, and it usually waits until the Supreme Court of Argentina alters its precedents to subscribe to the new holding passively. Because of that, Santa Fe did not have significant jurisprudential developments regarding evidentiary rules at the moment of the discussion about the new system, and this subject was not part of the criticism that the criminal justice systems received from external powers. The complete silence of the courts in Santa Fe about the rules of evidence exposes this reflection's peripheric position for years. The Supreme Court of Santa Fe´s position leads to an emptiness of precedents. The starter point was quite different from the codification process in the United States during the sixties.

2. Flexibility Defenders v. Legal Certainty Defenders

Another aspect to consider in understanding why an Evidence Code was not part of the criminal justice system reform is whether the evidentiary rules were part of the proponents' ideology. As we described, the proponents can be divided into two spheres of influence: first the legal santafesino experts, who were mostly associated with Law Schools, and then there were the outsider NGOs and experts who had advocated for these reforms in many Latino-American countries since the beginning of the century.[127] During the interviews with representatives of both groups, the answers were ambiguous. In no case was this legal debate solved entirely, and all the interviewees expressed that it still generates an exchange of ideas between those who believe a code is necessary and those who do not. If this controversy is still vivacious today, it is highly unlikely to have been resolved during the discussion on the criminal prosecution system.

In the voices of some of the proponents, evidentiary rules did not garner unanimous support within the group.[128] Other ideas, such as orality or publicity, occupied the center and were defended by the entire group without hesitation.[129] Even those who thought that was relevant seemed not to be against the idea of leaving its inclusion to a second-generation reform.[130] Despite whether it was because they thought evidence rules were unnecessary or could wait, it is evident that they considered the discussion regarding those a cost they willingly paid to make the reform possible.

127. *See* Langer, *supra* note 1 (highlighting the influence of the Southern activist expert network in this process).

128. *See id.* at 663-65.

129. *See id.* at 667.

130. *Id.*

Ironically, in this matter, some reformers agreed with the opponents of the reform, although for different reasons.

The relevant NGOs who advised the reformers and governments during this transition phase have differing views about the importance of the rules of evidence. In dialogue with a representative of one of the most influential organizations, we could acknowledge that different ideas exist even today. They were firm in the idea that the reforms usually include inconclusive aspects and that progress is not a mechanical outcome of the legal transformation. In this line, they defend the reforms from a practical approach. The reform is usually the possible reform and not the ideal, notwithstanding that the imperfection should not taint the advances and the potential of further changes.

These arguments appear on different occasions during our interviews and are still used to assess the modifications happening today in Santa Fe. The sequence can be explained as circular. Politicians have an agenda of concerns that open the door to transformations; those changes boost actions over which they lose control and, eventually, may generate opportunities in the future. The radical modifications are hard to withdraw, and despite the possible setbacks, the starting point for subsequent developments is always more advanced than the position before they occurred. This view better reflects the attitude of some NGOs with vast expertise in the reform processes. On the contrary, local judicial actors tend to be more dramatic and read every politician's attempt to modify the criminal procedure as a catastrophic counter-reform.

This disparity in criteria regarding Codes of Evidence can be traced to today's discussion in Santa Fe. In many interviews, relevant judicial actors recognized the importance of a systemic development of rules as included in the Federal Code of Evidence in the United States. Others were hesitant and insisted on the argument of flexibility.

For analytical purposes, we propose the existence of two groups that reflect these majoritarian trends. First, those who defend the idea of flexibility as an essential characteristic of the accusatorial system and, consequently, reject Codes of Evidence because they picture them as a rigid construction; we will call them the flexibility defenders. On the opposite side of the spectrum are those who consider Codes of Evidence are indispensable because they provide legal certainty. In these actors' minds, a Code of Evidence would solve many of the problems the criminal justice system faces in Santa Fe nowadays; we will define them as legal certainty defenders.

Both groups currently have representatives in Santa Fe and were present at the first discussions before the new Code was sanctioned. The tension

between these two conceptions can reveal more elements to explain why a Code of Evidence was not part of the first reforms' wave in Santa Fe.[131]

The Flexibility Defenders, who seem to be significantly fewer today than when the system was changed, defend the idea of flexibility from the 'ought to be.'[132] They consider that one of the most prominent attributes of an adversarial and accusatorial criminal justice system is its ability to adapt and not to create iron rules. They were afraid to abandon a system where the prosecutors and defenders had a very limited range of action and to enter into a new one that would limit them with rigid rules. This idealistic conception and this fear led them to reject any rules that may be translated rigidly.

In addition, flexibility defenders were experts and scholars whose convictions were forged in dialogue with theory. Most had no previous practical experience as active actors in an accusatorial system. This lack of expertise contributed to the reaction from the 'ought to be' and enforced their certitude in need for a wide range of action for the new actors. They conceive a Code of Evidence as an obstacle in an accusatorial system's natural flow of work, in which, supposedly, the issues must be 'solved at hearings.'

Another clear indicator of this theoretical conception based on the 'ought to be' can be identified in the evidentiary rules included in the Code and its reforms. Those deemed rules often confuse evidentiary rules with litigation guidelines not directly related to the evidence but to the judge. When we talk about regulations to protect the quality of the information, they are related to the evidence we permit to be presented in front of a jury. The litigation rules, such as avoiding overabundance of evidence, when not directed to that objective, do not have reason to exist. The judge should assess when the evidence is sufficient, repetitive, or excessive without being bound by a code if their decision is influenced by factors other than the quality of the information gathered, such as procedural efficiency. At least, this is what is supposed to happen, but it is not always the case, as we will be able to prove in Santa Fe.

The legal certainty Defenders were a minority in the group of reformers. During our interviews, we identified an increasing tendency to highlight the importance of a system of evidentiary rules in the opinion of the actors. This raise is particularly distinctive in public defense, although many prosecutors have started to agree with the relevance of the discussion. The arguments are

131. We must comprehend the system of ideas that sustain both perspectives. The discoveries that we could infer from the interviews are limited but are a first contribution to this challenge; many of the reconstructions provided below will require further explorations to be proven as veridic, being, for now, explanatory hypotheses.

132. *See* Robert S. Summers, "'*Is' and 'Ought' in Legal Philosophy,* CORNELL L. FAC. PUBL'N**.** 157 (1963).

slightly different yet equal in the usage and contribution that the presence of these rules may generate in the system. Public Defenders and Prosecutors concur that a Code of Evidence would elevate the standard of certainty within the system.

Public Defenders who subscribe to the necessity of a Code of Evidence consider it a means to reduce the number of hearings in which they discuss the same issues. If they had clear guidelines, they would focus their arguments and efforts on examining the cases' particularities and not on repeating arguments denied by judges in many cases. Many even argue that a Code of Evidence would be an efficient measure to reduce the judges' range of discretion that, according to their opinions, tends to benefit prosecutorial perspectives. This mechanical repetition of hearings and discussions is a main aspect of the dynamics of the criminal procedures in Santa Fe, the terms of which will be explained in the next section.

Prosecutors' defense of a Code of Evidence is centered on a most traditional validation of this legal instrument. In designing a case theory, being positive about what proof will be accepted is indispensable. If the system does not provide that certainty, then prosecutors' performance may be affected because they have to improvise or assume risk at trial instances. These arguments are the same as those of US scholars and lawyers with trial experience who have been offering to defend the existence of this type of legislation. Legal Certainty is intrinsic to the design of a case theory. Prosecutors' function demands a guarantee that key evidence will be accepted. Otherwise, all the case theories may collapse before being presented to a jury or a professional judge.

During the last ten years, prosecutors have not actively claimed this lack of certainty, perhaps because legal practice shows that almost all the proof offered during an intermediate stage in Santa Fe is accepted.[133] If many case theories had collapsed during the trial due to the rejection of central evidence, their views may have differed.

Many prosecutors defend these ideas from a theoretical perspective. They acknowledge the importance of legal certainty in designing a case

133. See Mauricio Duce Julio, *Acerca de la necesidad de fortalecer el rol de control de admisibilidad probatoria de la audiencia intermedia* [*About the need to strengthen the role of controlling evidentiary admissibility of the intermediate hearing*], CRIM. JUST. NETWORK (Oct. 1, 2018), https://www.criminaljusticenetwork.eu/en/post/acerca-de-la-necesidad-de-fortalecer-el-rol-de-control-de-admisibilidad-probatoria-de-la-audiencia-intermedia?out=print (This assumption is not exclusive of Santa Fe. Many scholars have been waning about the failure of the institutional purposes of intermediate hearing in their role of verifying the admissibility of evidence. The author argues that having specific rules will enable judges to improve their decision-making and provide a legal foundation for excluding certain charge evidence. This perspective highlights the significance of evidentiary rules, even if they do not form a comprehensive code of evidence).

theory, even though they do not usually suffer any mishaps in their strategies due to the lenient judges' attitude. Many others adopt a more practical approach. They also admit to the excessive number of hearings they have to be involved in and deem the Code of Evidence a form to solve the repetitive issues raised by the Defense. The Code of Evidence, different from that of the Defense, would be a valid effort to allow them to concentrate scarce resources in preparing relevant hearings.

We have offered a series of explanations that tried to contribute to answering the question about why Santa Fe, like many other States and Nations that have reformed their criminal justice system in the last decades, has not included a Code of Evidence in its reform process. We included historical, practical, and political reasons aligned with that purpose. We argued that the absence of a Code of Evidence in Santa Fe can be explained because of: 1) the lack of historical tradition in Santa Fe regarding jury trials and the intimate relation between jury trials and rules of evidence, 2) the negotiation process between criminal judges and politicians, and the rejection of criminal judges on losing more power than is strictly necessary in the reforms; 3) and the lack of agreement on the importance of the Codes of Evidence among the reformers and, consequently, the lateral character it had in the reformist ideology.

These proposed causes, notwithstanding the existence of others, are not intended to be a total explanation of the absence of an Evidence Code in Santa Fe. They are still an analytical effort to fill a void in the reflections of the criminal procedures transformation that occurred in the last decades in many countries throughout Latin America. We constructed a system of ideas applied to Santa Fe that pretended to be the first step in discovering why legal systems with profound continental legal traditions have refused to include Codes of Evidence in their reformer processes.

3. Diluted Codification

The transition from an Inquisitorial system to an Accusatorial one did not bring the sanction and implementation of a Code of Evidence in Santa Fe. Nevertheless, that did not imply that no rules of evidence were created and applied since then. The thunderous silence regarding evidentiary rules is not absolute as will be shown when we analyze the text of the Criminal Procedure Code passed in 2007 and its subsequent amendments. Instead of a corpus of law that included a comprehensive system for validating and including relevant evidence during trials, the inclusion of evidentiary rules was through a diluted codification.

Diluted Codification occurs when evidentiary rules are incorporated into a code or statute whose main objective is to regulate the entire criminal

procedure, not the evidentiary subsystem. In that way, the rules of evidence do not create an independent system but are widespread throughout the criminal procedure code's text. This type of codification increases the risk of errors and inconsistencies since it is not the result of an autonomous and systematic study of the problem of evidence in criminal trials.

This process can be detected in Santa Fe, a state that, as we have said, conserved professional judging and rejected jury trials until recently. The original Criminal Procedure Code contains some evidentiary rules and others related to litigation, which leads us to interrogate why they were added if there was no expectation of implementing jury trials. If the rules of evidence were born attached to the concern about the quality of the information that could be presented in front of juries, why would a criminal justice system that did not create this judging system be interested in including evidentiary rules? We can provide some reasons deducted from the interviews and the discourses made during the reform.

First, this diluted attempt can be considered a consequence of the mechanical translation of the accusatorial process's characteristics by local scholars and specialists with no practical experience in trials. The 'ought to be' request that the ´hearings´ as the natural spaces to solve controversies be organized by rules despite their rationality or adaptation to the dynamics of the process in Santa Fe.

The decision to include rules concerning the interrogations of witnesses, experts, and the defendant exemplifies this explanatory proposal. Some reformers seem to have thought that an adversarial criminal justice system must forbid leading and captious questions even if the reasons for their existence are not presented in the proceeding.

That is exactly what Article 325 bis of the Santa Fe Criminal Procedure Code,[134] introduced in a subsequent reform in 2014 before the actual implementation of the new criminal justice system,[135] establishes. This Article expresses:

> In their cross-examination, the parties who have presented a witness or expert may not formulate their questions in such a way as to suggest the answer. During cross-examination, the parties may confront the expert or witness with their own or other versions of the facts presented at trial. In no case shall deceptive questions, those aimed at illegitimately coercing the witness or expert, or those which

134. *See* Law No. 12734, *supra* note 66.

135. This inclusion was after the events concerning the legality of the implementing law for the new criminal justice system. The resistance of the judges, represented by the attitude of the former General Attorney Bassó, was more than clear. The decision to include this article, among other rules, found that political context as a platform. It can be interpreted as another indicator of how much relevance the referred tension had in the Santa Fe reform process.

> were the witness or expert, nor those that are formulated in terms that are unclear to them.[136]

These provisions seem consistent with those included in Rule 611 in the Federal Code of Evidence in the United States.[137] They have, notwithstanding, a major difference. In the U.S., the judge decided an objection considering the possible impact the information may have on the understanding and assessment of the jurors; whereas in Santa Fe, who is intended to be protected from the confusing or improper content of the answer and who evaluate if it is a proper question when challenged by an objection are the same person: the professional judge.

The mere existence of the banned leading question, as the Federal Rules of Evidence teaches us, is related to defending the legitimate source of information, the witnesses, and allowing them to use their voices while giving the judges the general power to control how they are examined.[138] It is clear, then, that the judges are the referees of questions that look for information that does not have them as the recipient of its convincing potential. Jurors are the ones who are trying to be protected by the U.S. Code of Evidence due to their lack of knowledge of litigation techniques and substantive law. Jurors are subject to protection through the actions of the judges, who are the experts and the keepers of the trial's legality.

These assertions lead us to questions regarding these rules to determine how to introduce information to a trial in a system with professional judging. Is it needed or desirable, in professional judging systems, including rules against leading questions? How do these rules work in a context where the expert who defines whether a question is admissible is the same who is sought to be convinced by the expected answer? Are professional judges who decide if a question is leading, captious, or cumulative, considering how it may impact their perception of the events? Are professional judges following these guidelines to protect themselves from the poor quality of information that can be gathered if these types of interrogations are allowed? All these questions underline the inconsistency in including these rules in a system that maintains professional judgment as the mechanism to rule cases, even more so if the tribunal is unipersonal.

It may be said that Article 111 of the Santa Fe Criminal Procedure Code includes a general ban to prevent parties from badgering or confusing a witness independently of who receives the information produced in the trial.[139] Even if this explanation may be plausible, it does not solve our

136. Law No. 12734, *supra* note 66, art. 325.

137. FED. R. EVID. 611.

138. *Id.*

139. *See* MERRITT, *supra* note 113.

underlined structural problems in the design of the question-objection system.

This direct translation of characteristics that some reformers had intuited as identitarian is one of many reasons for the diluted codification. The interviewees expressed two other lines of thought to explain it. Even more, many of them were aware of the incongruences that represent the inclusion of this type of rule in a Criminal Procedure Code.

The reformed Santa Fe Criminal Procedure Code of 2007 includes the word jury five times.[140] Article 4, when establishing the system of judging, expresses: "In appropriate cases, the composition of the jury shall be governed by the rules established by a special law."[141] While Article 44 defines: "when the Trial by Jury is authorized, a law shall determine the form in which the Juries shall be integrated into the College, their characteristics, the requirements for summoning them and the effective date of this form of trial."[142] This inclusion indicates other reasons for this diluted codification, which the interviewees labeled as an incomplete reform. According to this view, including this kind of rule opens doors to revisiting the provision of the Criminal Procedure Code in the future as soon as the new system takes off.

At the time, many reformers thought that the Code was a first step and that the intention to move forward too deep or too far could hurt the viability of the recently born reform. The evidentiary rules and those related to litigation were a future bet, a conquered land that would make it easier to transition to the next expected transformations. Notwithstanding, the following years showed that this optimism was exaggerated, and many of the amendments to the system were regressive instead of progressive. Nevertheless, those dispositions resisted all the changes and are alive in the current Code. In 2024, jury trials will be a reality for some crimes in Santa Fe, and we will have the opportunity to evaluate if those antique pretensions have any degree of rationality or were a sign of reformers' excessive faith in the future.

Lastly, we distinguish another reason not related to the abstract design but to practical concerns for some parts of the reformist spectrum. Some reformers were worried about the attitude and behavior criminal judges would adopt when the system started to operate. This explanation is not only logical but also helpful in explaining the inclusion of some rules that may be deemed as litigation rules rather than evidentiary. We have provided enough analytical elements and examples in this text to demonstrate that their concerns were valid.

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140. Law No. 12734, *supra* note 66.

141. *Id.* at art. 4.

142. *Id.* at art. 44.

The general power to govern the trial conceded to judges in an accusatorial system entails two requirements: 1) profound knowledge about the practices and rules of an accusatorial system, and 2) a high ethical and professional commitment to the core values of the accusatorial and adversarial conflict-solution system. The criminal judges in Santa Fe, who mostly were criminal judges in the system about to be abandoned, lacked both. The reformers appeared to believe that including evidentiary guidelines in the Code, despite its incongruence, would be a strategy to allocate some decisions beyond the discretionary scope of the judges. Including these rules in the Criminal Procedure Code made some of the judges' duties mandatory and did not rely on their good criteria for their application. It was an action that tried to deactivate some of the possible future boycotts, even if its price was to include some rules that were not specific to this type of legal instrument.

In this subsection, we proposed three possible explanations for the diluted codification process in Santa Fe. They are ingrained in a particular constellation of power, although they are a sample of how this phenomenon occurs. The emergence and development of ideas are usually connected with many causes. By analyzing the process of the diluted inclusion of rules of evidence in a system that conserves professional judging, we can assert that incongruences are not different.

III. THE ABSENCE IN PRACTICE: EFFECTS AND OTHER REASONS OF THE LACK OF AN EVIDENTIARY CODE

Until now, we have focused on explaining the arduous process of creating the formal design of the new criminal procedure system in Santa Fe and why it did not incorporate an Evidence Code. This section will focus on how the letter of the Criminal Procedure Code was translated into concrete actions by the judicial actors. Assessing the criminal justice system in Santa Fe from the perspective of the practices and routines of the members that composed it would permit us to eschew the legal discussion and enter into a practical dimension. It will be a valid attempt to settle how far the concrete practices are from the original promise that constitutes the manifest intentions of the reform.

Most studies and explorations concerning the transformation from inquisitorial to accusatorial systems are heavily directed at how their changes occurred from a legal perspective. Much less of them analyze those

processes' impact on the dynamics and interactions within the systems.[143] This part of the exploration pretends to be included in the latest group.

It analyzes the concrete effects of a reformed system's lack of an evidentiary code. The practices create opportunities or barriers for the future. The dynamics within the systems may be the same as the initial ideas and expectations that the reformers had before the changes occurred, although there is a chance that practices do not reflect those expectations. Moreover, it will explore how those practices influenced the judicial actors' attitudes and opinions regarding evidentiary rules. The political control over the criminal justice system has been strengthened since the reform and has lateralized technical initiatives regarding the criminal process, as may be considered the Evidence Rules.

It is worth noting that the analysis of the selected accusatorial dynamics of the criminal procedure in Santa Fe will try to avert, whenever possible, any temptation to compare it with the previous inquisitorial system. I do not challenge to any extent the idea that the accusatorial system is better than the inquisitorial in virtually any regard. Unquestionably, the accusatorial system was an advance, to the same extent that it is certain that it is far from its original promises and has some sonorous debts.

After ten years of implementing the accusatorial system in Santa Fe, it is time to evaluate it on its own merits rather than for the advancements, real or promised, compared with its predecessor. Even more, it is time to stop labelling it as new and start considering it as existing laws that will rule criminal procedure at the state level. From this switch, we will finally be free to discuss the accusatorial system without being compelled to refer to the past. When we stop concentrating our efforts on the abuses and failures of the past, perhaps we will be in a better position to understand and reduce the abuses and failures of the present.

The implementation of a new criminal justice system has some distinguished notes. First, the new system's rules pretend to regulate a field other norms have governed for decades. Second, many of the actors of the abandoned system remain in the reformed. Third, the system operates in dialogue with a society that changes and is influenced by the system transformation and vice versa. All these dimensions should be integrated into

143. *See* Maximo Sozzo & Maialén Somaglia, *Prisión preventiva y reforma de la justicia penal. Una exploración sociológica sobre el caso de la Provincia de Santa Fe* [*Pretrial Detention and Criminal Justice Reform: A Sociological Exploration of the Case of the Province of Santa Fe*], 17 DERECHO Y CIENCIAS SOCIALES [LAW AND SOCIAL SCIENCES] **7,** 7-43 (2017); *see also* Mariano Gutierrez, *Acusatorio y punitivismo: la triste historia de nuestras victorias garantistas (parte 1)* [*Accustary and Puntivism: The Sad Story of Our Guarantee Victories*], 4 RECISTA DE DERECHO PENAL Y CRIMINOLOGÍA [J. CRIM. L. & CRIM.] 70, 70-84 (2014).

any analysis that pretends to comprehend the origins and practice of the dynamics that a reform process mobilizes.

Even though a comprehensive analysis of the reformed system may be deemed necessary, our approach is less ambitious. This section delves into the dynamics that the criminal law system in Santa Fe has developed over the last ten years, which can be explained by the lack of a clear and complete evidentiary subsystem. The selected practices will be understood through that lens: the lack of an evidence code in Santa Fe. Furthermore, it offers explanations about how these practices facilitate or block a future Evidence Code. The system has displayed many other outcomes and mechanics that deserve equal time for study. This proposal pretends to contribute an explanation on a small part of the problems that need others' voices to be even pointed out.

A. Case by Case: Lack of Certainty for the Judicial Actors

Some of the most energetic defenses of the need for an Evidence Code are related to its capacity to provide certainty. This is a logical consequence of the professional design of a case theory. The litigators must know if the evidence they would use will be accepted or rejected for a trial. If no clear rules are available to assess the relevance and legality of evidence when a litigant is designing the case theory, this theory has a structural weakness.

This approach can yield ideas essential to understanding evidentiary reasoning. First, the Code of Evidence is a legal discussion and has several deep practical outcomes. Second, the rules of evidence are intrinsically connected to the trial, even to its initial steps. Consequently, reforming the procedure also implies reforming the evidentiary subsystem and vice versa.

The fates of the criminal procedure and its subsystems, apparently, cannot be separated. But, if that is the case, how is it possible that a criminal justice system that pretends to be accusatorial renounces to create systemic rules related to the evidence that can be used in a trial? Even more, how is it possible that the new criminal justice system does not include any attempt to establish clear and holistic mechanisms to incorporate evidence? Those are aspects that must be addressed to understand any reform process. Moreover, the structural weakness that the lack of evidentiary rules creates in systems significantly impacts the practices of the system's actors.

The existence of previous and clear rules reduces the discretion of those in charge of making decisions regarding evidence. The parties are who proposed the evidence to the judges, and in order to decide what evidence they present they have a wide range of discretion. The evidence proposed by the parties is weighted and admitted by judges, who can decide according to

their own criteria when they are asked.[144] The criminal judges in Santa Fe decide the issues related to evidence in every case on its own merits. There are no objective rules that constrain their power. Because of that, the judges can decide differently in similar situations without further explanations by not being attached to legal standard nor previous judicial decisions.

As I stated to explain other judges' resistances, the judges are powerful actors who try to keep as much power as possible in legal criminal justice systems with professional judging. Unsurprisingly, the criminal judges were not among the defenders of the need for an Evidence Code in Santa Fe in the same manner that they were not regarding jury trials. They were also unwilling to renounce the power to control the evidence that can be used at trial. This intention is one of the reasons for the absence of a systemic approach to evidentiary reflections at the moment of the system's design.

The attitudes of other actors in the criminal justice system are different. Prosecutors and Criminal Defenders are in charge of gathering the evidence presented before the judges. They are the direct victims of the criminal justice system's weakness created by the absence of certainty. As the situations where the judges used—and abused—this power regarding evidence became more frequent; these other actors began to acknowledge the relevance of objective and clear evidentiary rules.

Initially, the framers' lack of litigation experience led to an idea central in the reform: hearings are preferable to rigid rules. The reformers thought that a new system must be dynamic and quick. They believed that rigid evidentiary rules may stiffen the new system as much as the previous one. They assessed that it is more important to foster oral discussions than rules that may set clear limits for the judicial actors' practices. Time has proved that the hearings are not always a symbol of dynamism but of bureaucracy. The repetition of hearings that turned formalistic is an obstacle rather than a mechanism to guarantee the expected promptness.

144. *See* JORDI FERRER BELTRAN, MANUAL DE RAZONAMIENTO PROBATORIO [EVIDENTIAL REASONING MANUAL] (2023) (Arg.) (The judges' discretion regarding the admission of evidence depends on the clarity of the rules they must follow when making their decisions. This discretion is broad when the law does not provide clear standards. The jurisdiction is responsible for admitting evidence, and it has been established that, due to the principle of freedom of evidence, there are few circumstances under which a judge can reject evidence, such as when it is obtained through illegal means. However, the absence of clear rules severely limits the parties' ability to propose evidence, as they cannot determine which evidence will be accepted. In Santa Fe, the criteria for admitting a piece of evidence is that it must be related, either directly or indirectly, to what the party is trying to prove (Article 159, second par., Santa Fe Criminal Procedure Code). There is not a clear concept of relevance in the Code. Whether a piece of evidence is related or not to a fact is highly subjective, even more so without any other rule. As a general rule, greater indeterminacy in evidence law leads to broader judicial discretion and reduced legal certainty for the parties involved).

After a few years, the attitudes and opinions of the parties seem to be different. Many of my informants, especially criminal defenders, are demanding clear rules that can be used to anticipate the judges' decisions during trials. The discretion regarding evidence during trials is a source of instability and potential injustices. The parties at trial cannot be sure what evidence they will be authorized to use. They are forced to face uncertainty and base their strategies on predictions based on the judge's temper or previous decisions that can be changed without further explanation.

In the interviews, the defenders declared the importance and necessity of creating a system that provides predictability. The criminal defenders stated that judges have a clear tendency to accept all the evidence the prosecutors offer. This appears to be subscribed to by the fact that the interviewed prosecutors did not stress the lack of evidence rules as the most relevant issue in the criminal justice system. However, some interviewed prosecutors recognized the need because of the economy of effort, as I will explain below.

There is another aspect of the system that propels the situation that the legal certainty defender criticizes. The design of the system, divided into three stages, generates that the judge who decides the admission of the evidence is not the same as who decides during the trial. The trial in Santa Fe is split into three stages: initial, intermediate, and trial. It is during the intermediate stages that the evidence is offered and admitted. That is why the trial judge, who lately decides the case, has a constrained range of control over the evidence the parties pretend to use.

The judges have been facing increasing social pressure that influences their perception of themselves and how they perform their functions. The change in the criminal justice system shortened the distance from the community, which claims more activity and efficiency. These expectations are related to the increasing tendency to judicial politicization and are usually understood as an excuse for more punitive decisions.

It is in that context that occurs what the defenders almost unanimously denounce. According to their perception, the judge often admitted all the evidence offered by the prosecutors. This may be explained by the pursuit of the judges to reduce the risk of decision-making and the tendency to align their decisions to the punitive expectations of society. At least two reasons permit the judge who acts during the intermediate stage to act this way. First, they consider that admission is different than presentation; in other words, they may argue that admitting a piece of evidence differs from effectively incorporating it since the intermediate stage is a preparation instance, not the trial itself. Secondly, the evidence they admitted would not be directed to a jury but to a professional judge. The judge may argue that they rely on the

ability and legal knowledge of the trial judge to discard evidence that may be improper or overabundant. Through these arguments, they can justify their actions. If we assume that this criticism is true, the purpose of the intermediate would be completely distorted.

In any case, many judicial actors share this perception. This presumption is the argumental base for the certainty defenders who believe that an evidentiary rules system can constrain the judge's power during the intermediate stage. By reducing the judge's discretion regarding evidence, the parties could anticipate the evidence that can be used at trial. The certainty defenders sustain that objective rules are mandatory in a context where the alleged control that the judge must do at the intermediate stage is failing. From their perspective, the evidentiary rules will provide certainty and legality to the process**.**

Some reformers believed that oral hearings are where all the controversies must be solved in an accusatorial system. Following their reasoning, creating an evidentiary subsystem would create an excessive rigidity that should be prevented. The way the Santafesino criminal justice system functioned during the last ten years demonstrates that the latent function was to relax the standards for admitting evidence to the trials. The apparent flexibility that emerged from relying on the intermediate judges to control the evidence and admit only the relevant and necessary proof turned into an excuse for the judge to avoid their responsibility. The intermediate judges often fail to address their duties of control. Their failure can be explained mostly by the separation between intermediate and trial judges and the judges' permeability to external pressure.

Moreover, increasing celerity to judges was deemed one of the manifest functions of the reform. The reformers also believed that solving the issues at hearings would provide more dynamism to the entire system. The improvement in terms of time remains a promise far from being a reality. The usual total admission of the charge evidence put the defenders in the position to appeal that decision. The defenders must challenge the decision of the intermediate judge because, legally, it is during that stage when they must prevent the incorporation of evidence. The appeals delay the trials because a trial cannot begin until the judicial decision regarding the evidence is firm. The intermediate judges' attitude severely impacts the time to solve the minority of cases that actually reach trials.

Certainty defenders strongly believe that evidentiary rules would reduce the intermediate judges' tendency to accept all the charge evidence. Looking at judicial systems with established rules of evidence, we can see the logic in this belief. If parties have procedures to challenge evidence, judges would be required to carefully consider their requests and decide which evidence is

relevant to the trial. Fulfilling their duties in handling evidence could reduce the number of appeals and disputes. In the long term, trial processing time would also be reduced.

The ideas of the certainty defenders are reasonable. The excessive margin of interpretation for the judges again creates more issues than it solves. To the lack of clear and objective evidence rules, a deeper problem must be added: it is not clear who the evidence's admission process is trying to protect. As I highlighted above, the intermediate judges are making decisions for another judge rather than for a jury. In the United States, the decision of the trial judge, who is the same who decides everything regarding evidence, is centered on protecting the jury. This difference is essential. There is no chance to evaluate the evidence in the American trial again before it is presented. The evidence is presented to the jury as soon as the trial judge decides. On the contrary, the decision of an intermediate judge is directed to another judge. There is a second informal chance to assess the evidence by the trial judge.

The opportunity for this second *de facto* assessment and the intermediate judge's lenient attitude affect decisions beyond the trial. The investigation is less profound, and the evidence is weaker when the investigators have as a starting point the presumption that all the charge evidence gathered is highly likely to be admitted. Also, without clear rules, there is the chance that among the evidence admitted, there may be evidence that affects fundamental rights, such as those focused on the defendant's person instead of the investigated event.

The dynamics exposed in this section suggest the usefulness of an evidentiary code in a criminal justice system where the power to judge remains in professional judges. Even more, in those criminal justice systems that separate the intermediate and trial stages, the admittance of evidence is in charge of a judge different from the trial judge. Creating a clear evidentiary subsystem could also reduce the processing time and improve the quality of the investigations. The parties could be in a position to anticipate which evidence would be accepted with a higher level of certainty. Both prosecutors and defenders could focus their discussions on what deserves to be disputed instead of the changeable intermediate judges' opinion. At least until this point in Santa Fe, the flexibility appears to be used by the judges to defend themselves instead of the efficiency of the criminal justice system. Perhaps it is time to provide the certainty that the criminal justice actors have been claiming.

B. Waste of Resources: The Bureaucracy of Repetition

The reformed criminal justice system promised to be less formalistic. The orality in accusatorial systems would foster dynamism and parties' initiative. Prosecutors and defenders could express their position in the hearing and be heard directly by a judge, who could decide at the moment. The manifest function of the reform was to increase the efficiency of the criminal justice system while enhancing the respect for the fundamental rights of the defendants. The reality suggests that the duties of the parties created by their standards forced the systemic repetitions of practices. The repetition of discussions, reviews, and legal challenges, even when the parties know that their petitions will fail, creates a bureaucracy. The slowness of the bureaucracy is the opposite of what the reformers assured the criminal justice system would be.

Oral hearings and trials, even if governed by rules and statutes, are considered vibrant instances of discussions. It is during these that advocacy skills are displayed. Every party plays its cards and exposes its arguments. The oral exchanges and the direct interaction among the different actors seem to prevent bureaucratization. However, according to the interviewees' voices, they perceive an increasing tendency to a formalistic and formulaic repetition of discussions and issues during the hearings and trials. This perception invites us to understand the origin of its existence.

The Public Defense defends most of the criminal defendants in Santa Fe. Thus, the activities of this Office affect how the system functions. The strategies of the public defender are tied to general directives and standards. Trial advocates usually develop their strategy considering their clients' best interests. From a private perspective, the ultimate mandate comes from the interest of the individual the attorney is defending. The only limits private attorneys find are the law and the ethics of the legal profession. The situation becomes more complex for public defenders since they are also part of the state.

The Standards for the Public Defense[145] in Santa Fe constitute a source of duties for public defenders. Usually, they have to act according to these guidelines, even if they do not consider that they are implementing the best legal strategy. The Public Defense Office has a double role in democratic societies. This public institution must conciliate the client's interests with the interests of the society. The Standards tried to guarantee that the public defenders do not set aside this second aspect in designing trial strategies.

145. *See* Cuna de la Constitución Nacional, June 19, 2015, Res, No. 0057 (There are several internal resolutions that establish guidelines and standards).

From a practical analysis, these obligations are translating into a great number of appeals. The public defenders recognize that they appeal decisions even without the conviction that it is necessary. The public defenders attack judge decisions because, in many cases, they are forced to act according to the standards. The cumulative number of appeals creates a docket in the Courts of Appeals, which must intervene in resolving issues that are not only trivial but repetitive.

The requirement to follow rigid standards is the opposite of creative and professional lawyering activity. The mere existence of obligations for public defenders significantly reduced their discretion. If the discretion and freedom to design a legal strategy are decreased, the dynamism that the reformers expected from the oral hearings is blocked. When the judicial actors must apply general directives to solve the cases, that action creates the foundations for further bureaucratization. Bureaucratization appears when the general rule is activated, regardless of the particularities of the case. The irreflexive repetition of practices by the actors generates a system in which the replication of conducts is not directed to obtain different outcomes but to show the act itself. In a formalistic and bureaucratic procedure, what is tried to prove is the existence of the process itself instead of the substance of the investigation. In other words, the mechanics of the reformed process came to change.

The judge's power during the inquisitorial era relegated the position of the prosecutors and defenders.[146] Both prosecutors and defenders had a narrow range of action. The judge exercised monopolistic control over the criminal process.[147] The criminal justice systems' reforms would allegedly change the prosecutors' and defenders' roles. They would pass from a formal role to a more active and determined one. The repetition imposed by the standards and formal obligations blocks these changes. The proneness to bureaucratic activities construct a procedure that reminds the previous in its formalistic performance.

In Santa Fe, the Public Defense Office set its minimal standards according to Resolution N°57/15.[148] Among relevant rules, this legal instrument creates the general strategy for appeals. The resolution establishes that every Public Defender must appeal a judicial decision that "affects the defendants' interest."[149] During the intermediate stage, public defenders can

146. *Id.*

147. *See* Rodrigo de la Barra, *Sistema Inquisitivo versus Adversarial; Cultura Legal y Perspectivas de la Reforma Procesal en Chile* [*Inquisitive versus Adversarial System; Legal Culture and Perspectives of Procedural Reform in Chile*], 5 LUX ET PRAXIS 139 (1999).

148. *See* Sozzo, *supra* note 143.

149. *Id.*

resist the admission of evidence. If the intermediate judge admits the evidence and denies the defense's arguments, the public defenders cannot wait another moment to insist. They must appeal the decision according to the rules included in the Resolution. This trap is a logical consequence of the fact that if defense attorneys challenge the inclusion of evidence, it is because they believe it affects the defendant's interest. If the judge decides its inclusion, the defendant's interest is hurt, and an appeal is due.

There is only one exception to this general rule: the express denial of the defendant to appeal. This opposition rarely happens since the evidentiary analysis is a technical assessment usually performed by the attorney. The general rule turns the appeal into a mechanical spasm. The flexibility, creativity, and dynamism are asphyxiated by the duty to follow a rigid procedure. Public Defenders became what they tried to avoid with the new system. They turn into formal defenders, following procedures just to fulfill obligations.

It is true that there are other stages where the parties can claim a wide range of discretion. The negotiations that lead to plea bargains occur outside the courts. The plea bargain is the mechanism through which most cases are solved. This is not unexpected since it is a phenomenon that can also be found in criminal justice systems with deep accusatorial traditions, such as the United States.[150] According to a report,[151] in 2019, in the state of New York, less than three percent of the criminal cases were solved in trials. That means more than nine out of ten convictions were reached in negotiations that ended in plea bargains. The same tendency exists in Santa Fe. By 2023, plea bargains were the legal instruments used in 91% of criminal cases in that Argentinian state.[152] Beyond the reasons that may explain this commonality, what is evident is that the trial has become an exception in Santa Fe, similar to what happened in the United States.

The exceptionality of the trials in accusatorial systems may indicate that the repetition of practice and its pressure on bureaucratization are marginal issues. However, there is a reason why the prosecutors and the defenders pointed them out, even with their marginal statistical influence: hearings are time-consuming. Both parties agree that repeating pointless hearings affects the time spent on other activities, such as investigating and negotiating. When

150. *See* Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L. J., at 1, 1-27 (2004) (discussing plea bargain negotiations).

151. *See* THEA JOHNSON, PLEA BARGAIN TASK FORCE: AMERICAN BAR ASSOCIATION (2019).

152. Maximo Langer & Maximo Sozzo, Plea Bargaining in Latin America, *in* RESEARCH HANDBOOK OF PLEA BARGAINING 1, 48-49 (Maximo Langer ed., 2023).

a party appeals a decision because it is forced to do it, a hearing must take place. In that judicial instance, the party who appeals, the counterpart, and a judge are necessarily involved.

Consequently, as stated, the lack of evidentiary rules gives judges a wide range of discretion. Rigid guidelines force the parties to challenge the excesses even if they are not certain they will succeed or that it is the best legal strategy. These two circumstances push the repetition of parties' actions. Lastly, repetition detached from any legal strategy or advocate creativeness propels the bureaucratization that the parties criticize. Even if not as common as the plea bargains, on every hearing to prepare a trial, even if it is not celebrated, the judge's decision is highly likely to be challenged by a party. That repetition, in part facilitated by the absence of evidentiary rules, consumes a scarce resource: the time of the judicial actors.

Implementing rules of Evidence could save time. Providing clear rules to the parties to assess the judges' decisions can also avoid the repetition of appeals. The judicial actors could avoid wasting time and resources in formalistic instances. Limiting the judges' discretion would significantly reduce the number of appeals. Even with rigid standards, the public defenders would not have to appeal because the decision is sustained in the law and not in the judge's personal assessment. Many discussions that burst on every intermediate hearing would be easily solved by applying the evidentiary law. The parties could focus their efforts on more complex and challenging activities, such as investigating and preparing trials, instead of being in hearings where all the parties can predict the outcome. The presence of an evidentiary subsystem would resolve these unnecessary discussions once and for all. It would be clear and predictable which evidence the parties can use and the trial preparation will be centered on the creative and proactive roles of the attorneys instead of the stubborn discussion regarding peripheric issues forced by rigid standards and legal duties.

C. The Politicization of the Criminal Justice System in Recurrent Contexts of Crisis

As I described in the previous section, the political context is essential to understanding the criminal justice system reform in Santa Fe. In addition to the internal and external pressure to change, the political needs of the moment must be added. Even though the reform had been started before, its

actual implementation occurred amid a political crisis conveyed by the peak number of homicides since the return of democracy.[153]

The criminal justice system had this genetic mark since its implementation. As the criminal judges' power decreased, the politicians' political control over the judicial branch increased. Since the start, the politicians have sent a clear message: the criminal judicial system is a part of ensuring public safety. [154] In that sense, when the societal pressure to resolve this matter grows, politicians often recur to enact bills to change the criminal justice system.

This process has been defined as "penal populism".[155] According to this author, politicians displace the experts' opinions and create solutions in dialogue with what they consider the community expects. Professional politicians craft proposals that profoundly impact criminal justice systems, often without even interacting with the judicial actors. They also prioritize common sense over technical knowledge and make promises with policies that cannot fulfill them.

The criminal phenomenon is a complex subject that requires experts to analyze its causes and particularities. It also requires a comprehensive diagnosis to plan and deploy public policies that allow the state to tackle some of its effects. Politicians are usually not experts in criminology or law; consequently, the solutions they conceive are often spectacular rather than accurate.[156] Regarding crime, political initiatives are generally more focused on sending messages to society than addressing the issue realistically and professionally. When the expert knowledge is disregarded, the pretended solutions are not tailored and create societal expectations that cannot be fulfilled. Law-makers rely on social prejudices and moral panics[157] rather than on a reliable understanding of the sources and dynamics of criminality. Society witnesses the repetition of political actions that dialogue with deep stereotypes and ignite negative emotions. Penal populism, consequently, tends to aggravate the legitimacy crisis instead of alleviating it.

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153. *See* ANNUAL REPORT HOMICIDE: PROVINCE OF SANTA FE 3 (2024) (The total number of homicides in Santa Fe during 2014 was 463. The homicide rate was 13,74. The province of Santa Fe was -and still is- the Argentinian state with the highest homicide rate in Argentina).

154. *See* MARC SCHUILENBURG, THE SECURITIZATION OF SOCIETY 125-30 (George Hall trans., 2015) (The government was traditionally responsible for providing security. During the last decades, an increasing repertoire of new actors have assumed responsibilities related to security. Schuilenburg refers to this dynamic as security assemblage. Politicians forced the criminal justice system to be part of this security assemblage. The urgency of the political context trapped the criminal justice system).

155. *See* PRATT, *supra* note 7; Bombini, *supra* note 9; BOTTOMS, *supra* note 10, at 39.

156. *See* Garland, *supra* note 14, at 258.

157. *See* David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA CULTURA 9, 9, 10 (2008).

Reform of the criminal justice system often occurs when politicians try to manage a social demand for immediate solutions for the increase in crime. Santa Fe's reform process was no exception. The instrumentalization of the criminal justice system by politicians, especially legislators, has been present since the beginning. During the years after the implementation, that control increased as the politicians started to realize that they could share the burden of the state's incompetence in managing the public safety crisis. This can be seen in the narrative they constructed about the criminal justice system and the legislative measures they have implemented since then. The counter-reform and transformation that the criminal justice system faced in the last ten years was almost entirely directed by the political attempt to point out the shared responsibility of the criminal justice system actors to control crime. Those efforts have increased the societal pressure on the judicial actors who had to deal with levels of citizen criticism as never before since the democratic return.

The politicization of the criminal justice system has been shaping the system itself and how politicians and judicial actors interact. It has profoundly impacted the attitude of judges, prosecutors, and defenders who face novel challenges in front of society. The politicization and the increased political control it brought have altered the correlation of forces among the different parts of the system. Thus, politicians were able to create new guilties to share the heavy burden of the state's failure to provide satisfactory levels of public safety to society. Judicial actors did not want—or could not—dispute this narrative and tied their legitimacy to accomplish an impossible mandate: reduce crime.

Criminology has proven that crime produces social uneasiness that the state must manage. In modern societies, public safety concerns are central to political agendas. Simon[158] explained this process in the United States during the last decades. Society's claim was at the center of the political agenda and constituted an isomorphism in all state policies.[159] Following these ideas, all state actions would be legitimate if they could improve public safety, at least as a manifest function. That process can be attested in Santa Fe and is the core of the political pretension to act quickly and emphatically to regain the lost legitimacy. For that, the policies regarding public safety must be spectacular and not necessarily efficient. The changes that the politicians' impulse enacted were not related to improving the system. The latent function of their actions was to share the burden of societal disquietude generated by the recurrent public safety crisis.

158. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 75-76 (2007).

159. *Id.* at 152-54.

The severe counter-reforms in Santa Fe, as well as in many other Latin American regions, were punitive and regressive. Many of the foremost humanitarian manifest functions used to justify the change were abandoned a few years after implementing the reformed criminal justice system. For instance, the public defense was undermined, the defendants' rights were challenged, and the detention times were increased, among other reverting legislative changes.[160] The legislators from Santa Fe passed these laws based on their perception of reality, constructing narratives that were not supported by objective and accurate information.[161] Nevertheless, all of them are connected by the same narrative. The promoters of the changes argued that the criminal justice system should be reformed because it failed to convict enough individuals and did not fulfill its obligations to reduce crime.[162] This narrative is deeply rooted in the common sense of the inhabitants of the state despite being contradicted by statistics showing a sustained growth in the incarcerated population since 2014.[163]

The complete avoidance of legislative efforts to incorporate technical and professional analysis before the sanction of the new statutes is an indisputable hint that the intentions were not to improve the performance of the criminal justice system. The political actors instrumentalize the criminal justice system to lighten the criticism that public safety concerns put over their shoulders. The judicial actors could not resist this advance for two reasons. First, they displayed an evident political clumsiness. There were many judicial actors who were recently incorporated into the criminal justice system. Those who were not new were used to the peacefulness of anonymity

160. *See* Law No. 13746, Dec. 28, 2017, B.O. (Arg.) (This statute is a punitive response to what politicians deemed as increased impunity due to a criminal justice system's lenient attitude. It provides more discretion to prosecutors and reduces defendants' rights by, for instance, extending the detention time without being presented in front of a judge).

161. *See* Maximo Sozzo, *Reforma de la justicia penal en América Latina: promesas, prácticas y efectos. A modo de introducción* [*Criminal justice reform in Latin America: promises, practices and effects. As an introduction*], in REFORMA DE LA JUSTICIA PENAL EN AMERICA LATINA [CRIMINAL JUSTICE REFORM IN LATIN AMERICA] 9 (2020) (This author argues that criminal justice reform processes in Latin America over the last decades were based on 'ought to be' notions rather than practical considerations. He suggests that this approach persists today. The expertise of those who could evaluate the potential success of political initiatives is often disregarded. Instead of relying on technical and objective opinions to guide their actions, politicians tend to favor perceptions and subjective approaches. This is another example of pursuing political benefits instead of systemic improvements).

162. *See* Ivana Fux, *El gobernador Pullaro volvió a solicitar una Justicia "más eficiente y no tan cara"* [*Governor Pullaro Again Requested a 'More Efficient and Less Expensive' Justice System*], EL LITORAL (May 3, 2024), https://www.ellitoral.com/politica/gobernador-maximiliano-pullaro-volvio-solicitar-justicia-eficiente-cara-ahora-hoy-santa-fe_0_Hc61uYjSBy.html.

163. *See* ANNUAL REPORT HOMICIDE: PERSONS DEPRIVED OF LIBERTY 3 (2024) (The incarcerated population was 4560 in 2014. In 2022, the incarcerated population was 9350. The total number of imprisoned individuals was duplicated in less than ten years).

and secrecy. In general, most of them were not trained in the skills that political discussions require. Second, as actors in a new system, they were anxious to prove they could be efficient. They assumed the challenges that the political actors have drawn, even those impossible to accomplish with their mechanism. Their inexperience drove them to tie the legitimacy of the new system to achieve an impossible mandate.

The politicians' actions were directed by the referred intentions and not by the efforts to improve the criminal justice system. Because of that, legal and technical discussions that may impact the system's functioning were not part of the political agenda. The inclusion of rules of evidence constitutes an example of this situation. Reforming the statutes to incorporate rules of evidence will not impact public opinion. Moreover, it is a reform that can only be propelled by judicial actors or experts who have not been part of most of the last transformations. Experts and judicial actors have been unable to influence the political agenda and the political discussion regarding the criminal justice system. While penal populism is the lens through which political actors evaluate the aspects to be reformed, there will be a small margin for discussions such as a Code of Evidence.

It is highly unlikely that society will demand a Code of Evidence. Technical discussions have different channels to be included in the political agenda. A Code of Evidence would be a hard sell if legislators only base their proposals on what society expects from the criminal justice system rather than its real functioning. Until now, the inclusion of evidentiary rules has been diluted in other reforms in the context of this political trend. If penal populism continues to govern legislative activity, creating an evidentiary subsystem remains improbable.

D. The New Criminal Judge's Attitude

Criminal judges are the judicial actors who have suffered the most significant transformations within the criminal justice system in Santa Fe. They passed from being the exclusive owner of a process dependent on their will to a subsidiary role centered on determined guilt. Recently, the Legislature in Santa Fe passed a law that established the unthinkable a few years ago: jury trials.[164] Surprisingly, the reaction of the criminal judges was moderate, and some criminal judges even made public declarations in favor of the initiative. What changed in the last ten years to produce a shift in the criminal judges' attitude? How was the most energetic and powerful obstacle for jury trials in Santa Fe finally overturned? There are multiple tentative answers to these inquiries, but they are still in the realm of hypothesis.

164. *See* Law No. 14253, Apr. 4, 2024, B.O. (Arg.).

Although I will offer some explanations rooted in the mechanics of the criminal justice system in the last ten years, I will defend the idea that the switch in criminal judges' attitudes also opens the door to including evidentiary rules, even a Code of Evidence.

As previously said, the reformed criminal justice system forced criminal judges to face society and its expectations. Those who had been hidden must explain their actions and struggle with the always-changing social mood. Criminal judges abandoned their privileged positions to participate in burdensome political discussions. For the first time since the democratic return, they were part of a machine that depended on legitimacy. As part of the governmental continuum, the judicial branch also started to be assessed by the communities, and it failed the test as the other branches. The judges were invited to the chronic legitimacy crisis[165] that even stresses the basis of modern democracies. Judges could not escape from the demolished effects of the recurrent crises, real or perceived, especially in the public safety arena. Thus, criminal judges in the last ten years experienced social pressure as never before. The response they found to those pressures was to incarcerate more people in less time.

The pursuit of lost legitimacy constitutes the cornerstone of many political initiatives in the analyzed period. Politicians, through policies and statutes; prosecutors, through increasing the number of cases processed; and judges, through more punitive and long sentences, chase the same objective: regain society's approval. Professional politicians are better positioned to structure their actions behind that objective since they gained experience during political campaigns. The judges in countries and states where they are appointed and not elected have limited political margins to maneuver and scarce tools to achieve that goal. The judicial actors in the criminal justice system were trapped by social expectations and unable to express their impossibility of achieving what society expects from them. Even more so when the professional politicians started to push the burden to their shoulders. The politics proposed a new narrative[166] in which the judges and prosecutors were the 'guilties' for the public safety crisis. They saw the opportunity to create the perfect scapegoat for their sins.

All these factors made social pressure intolerable for the judicial actors. The interviewees agreed in pointing out that according to their perceptions being a judge is significantly more difficult today than ten years ago. They

165. *See* Benjamin M. Studebaker, *Legitimacy Crises in Embedded Democracies*, 22 QUEEN'S COLL. (2023).

166. *See, e.g.,* Garland, *supra* note 14, at 258 (Noting that penal populism is foremost a form of political discourse. Through this lens, politicians directly or by implication profess narratives directed to "the people.").

sustained that a bad decision could terminate a long, prestigious judicial career. That kind of pressure is an immanent presence in the judges' minds. That is why when they act as intermediate judges, they accept all the charge evidence, and as trial judges, they are prone to convict rather than absolve. From this angle, the criminal defender's complaints about the judge's tendencies are reasonable. For many judges, absolving an individual is an act of bravery that they are reluctant to execute. However, it can be said that judging has always been an extremely difficult and unpopular profession, which is why some authors and theorists firmly opposed the existence of professional judging systems. In any case, criminal judges are more uncomfortable and afraid in the exercise of their judging powers.

In professional judging systems, judges' fear of furious social reactions can affect the quality of the justice service.[167] The criminal justice system falters if the judge's decision is more concerned about possible outcomes than guaranteeing its legality and justice. On every occasion that politicians increase the judges' burden of responsibility, they also undermine their chance of winning the public's trust. Judges who are afraid have a natural tendency to commit mistakes which may lead to injustices. The oversight of the public in judges' decisions reminded a central democratic principle that was forgotten: the judges are the voice of the State. If the judges are too frightened to speak clearly, their stutters are also the state's. To this trap, there is an escape, as Montesquieu knew, to return the judging power to the community. The judges were forced to arrive at the same conclusion.

Therefore, the shift in the judges' attitude toward juries was less voluntary than logical. In the beginning, the judges resisted juries to protect their power quota. Social pressure undermined their power to the point that they were helpless in front of social expectations. Even though they tried to satisfy society's punitive appetite by incarcerating more citizens than in the previous system, that was not enough. After suffering the corrosive effects of tying their legitimacy to impossible mandates, they did not need to protect any power because the current power is just a shadow compared with what it used to be. In this context, the jury stopped being a threat to their power and became a shelter from the unbearable social pressure. Criminal judges even demand juries as soon as they know they must face the community and pay the high cost of judging other citizens.

After ten years of an accusatory criminal justice system, the judges in Santa Fe relinquished the centrality to pursue the calmness of the periphery. By ceding the power to judge to juries, they can elude the pressure to actively

167. *See* John Pratt & Michelle Miao, *The End of Penal Populism; The Rise of Populist Politics*, 41 ARCHIVE OF CRIMINOLOGY 15 (2019); *see also* Beade, *supra* note 8, at 64.

participate in future crises. They become the guardians of legality[168] but do not carry the burden of the final decision. They do not lose power but resignify it from a more calm and protected position. The current struggle of criminal judges is not to remain powerful but to avoid the wounds inflicted by merciless social criticism of their legitimacy. They are not only willing to share the stages with juries but to yield it in full.

This fresh pretended secondary role may also affect the future of the evidentiary rules. To construct a less powerful image, the judges must be ready to renounce another source of authority, such as control over the evidence. That may create an opportunity to incorporate clear and comprehensive evidentiary rules. The political argument can be that if the judges still claim the power to control the evidence, they will retain control over the trial and its outcome. Even more, the judges could rely on the law instead of their discretion, as is the case today. This opportunity could be another assertion to construct a narrative where judges are the legality's guardians but not the trial's decision-makers.

Furthermore, including the jury institution in Santa Fe will also increase the pressure to include evidentiary rules. There is an intimate relationship between jury trials and evidentiary rules, even limited as in Santa Fe. Even if this bond has not generated an Evidence Code yet, it can be proven by the diluted legislative process. The inclusion of evidentiary rules, even straggly, was present in the first and the second waves of reform. I will look into this aspect in depth in the next section, but diluted codification is a process that demonstrates the closeness between evidence rules and jury trials.

IV. THE EVIDENTIARY RULES IN THE SECOND WAVE OF JUDICIAL PROCEDURE REFORMS IN SANTA FE

A. Neverending Story

Public safety was the axis of the political debate in Santa Fe during the campaigns in 2023. That year ended with a total of 397 homicides,[169] the fourth highest number in the period 2014-2023, only surpassed by the years 2014, 2015, and 2022. The concerns regarding criminal rates did not completely abandon the political debate in the entire period initiated in 2014. During the 2019 campaign, the rates of criminality were a source of promises by the incoming governor.[170] In the elections in 2023, the parties who had

168. *See* Belanger, *supra* note 3, at 75-76.

169. ANNUAL REPORT HOMICIDE: PROVINCE OF SANTA FE, *supra* note 153, at 3.

170. The social pressure to provide rapid solutions to the fear of crime pushes the politicians to propose more punitive solutions with the capability to provide brief benefits. The promises usually

lost in 2019 returned to power, in part because of the failure of the government to guarantee satisfactory levels of public safety.[171]

The politicians read the centrality that societal claims to improve public safety had in the political process.[172] Because of that, they have been trying during the last decade to convince the electorate that they are taking the issue seriously. To do that, they passed many bills focused on the criminal phenomenon; the executive proposed some of the bills, and others were legislative initiatives. Amid these efforts, the reformed criminal justice system and the procedure that it brought became the favorite target. Slowly, politicians instrumentalized the criminal justice system to accomplish their interests instead of improving the judicial service. During this period, the political actors increased their control over the criminal justice system to the point of turning it into their instrument. The pursuit of eluding the political costs of the crises in the public safety arena is the basis for instrumentalizing the criminal procedure.[173]

The reforms within the system that occurred in the lapse of 2014-2023 were recurrent but did not alter its designs. With some exceptions, the reforms mostly have a symbolic impact on the system's operation. They helped sustain the narrative that the criminal justice system and its actors had been failing in the duty to provide satisfactory levels of public safety to society. Every reform pretended to reinforce the idea that the political branches gave all the necessary instruments to the judicial actors to do what

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appeal to emotional responses. The proposal usually includes actions such as police incrementalism or more severe punishment. *See* Bombini, *supra* note 9.

171. *See Santa Fe: El Gobernador Perotti debió retirarse de una marcha por la inseguridad* [*Santa Fe: Governor Perotti had to withdraw from a march due to insecurity*], AMBITO (Oct. 28, 2021), https://www.ambito.com/politica/omar-perotti/santa-fe-el-gobernador-perotti-debio-retirarse-una-marcha-la-inseguridad-n5306825 (Between 2019 and 2023, several crowded riots were organized to demand action from the government about public safety concerns); *see also* Facundo Chaves, *Maximiliano Pullaro: "Metí presos a todos los narcos de Santa Fe y lo voy a volver a hacer*" [*Maximiliano Pullaro: "I imprisoned all the drug traffickers in Santa Fe and I am going to do it again*"], INFOBAE (July 8, 2023), https://www.infobae.com/reportajes/2023/07/09/maximiliano-pullaro-meti-presos-a-todos-los-narcos-de-santa-fe-y-lo-voy-a-volver-a-hacer/ (The winner candidate, Maximiliano Pullaro, made numerous promises regarding public safety during the campaign. He pushed the discourse that he will be tough and firm because of his previous experience as Minister of Security).

172. *See* Neil Hutton, *Beyond Populist Punitiveness?* 7 PUNISHMENT & SOC'Y 254 (2005) (Politicians usually read societal expectations in a simplistic manner. Hutton states that public opinion is much more contradictory than it appears at first glance. What politicians accept as societal expectations is not more than the opinion of a sector of society).

173. *See* John Pratt & Michelle Miao, *Penal Populism: The End of Reason,* 9 NOVA CRIMINIS 71 (2017) (These authors distinguish between 'populist punitiveness' and 'penal populism'. The difference lies in who is in control of the events. In Santa Fe, we can see aspects of both, as public pressure puts public safety concerns at the forefront, and politicians respond with promises and actions to increase punishment).

was expected from them. The fact that the criminal justice system cannot fulfill the expectation to reduce crime rates was irrelevant to them.

According to this narrative, if the criminality rates did not decrease, it is because of the criminal justice system's failures. The politicians have done everything they could. It is the criminal justice system and its members who are not willing to commit to the objective. Consequently, the criminal justice system must be reformed, not the policies. This fallacy had a corrosive effect on the criminal justice system. The manifest functions related to the defendant's fundamental rights were abandoned in the discourses and reverted in the law.[174] The criminal justice system assumed obligations in front of society forced by the politicians that were impossible and tied its legitimacy to them. Professional politicians succeed in creating a new center of power that allocates part of the disquietude that the crimes produce in society. The social pressure was the ultimate clash in the wall of judicial resistance. The judicial actors lost their means to resist the changes because the source of their power became social acceptance. With the wall finally demolished, the final transformation only requires a strong political leader unafraid to dispute the traditional system of power in Santa Fe.

The governor elected in 2023, Maximiliano Pullaro, received more than one million votes.[175] The governor assumed a high degree of legitimacy and with the mandate to provide quick solutions in the public safety area. He began his mandate aware of that and with a historic amount of votes that gave him a proper basis for propelling an agenda of change. This agenda included many reforms to the criminal justice system. The incoming governor had experience in managing public safety crises. He was appointed as the Minister of Security in Santa Fe from 2015 to 2019.[176] During that time, he received strong criticism. It is undoubtedly that his previous experience and insights into the issue were key to designing his strategy. He moved quickly

174. *See* Law No. 13746, *supra* note 160; *see also Se promulgó como Ley Nº 13.746 la adecuación del Código Procesal Penal* [*The adaptation of the Criminal Procedure Code was promulgated as Law No.13,746*], ELPROTAGONISTAWEB, https://elprotagonistaweb.com.ar/noticias/val/12567/se-promulgo-como-ley-n%C2%BA-13746-la-adecuacion-del-codigo-procesal-penal.html (Some of the impellers of this reform expressed clearly that it was as a response to the public safety concerns. Santa Fe Senator Lisandro Enrico declared at the time that the public safety problems 'get out of hand').

175. Tribunal Electoral de la Provincia de Santa Fe [Electoral Tribunal of the Province of Santa Fe], Sistema de Escrutinio Definitivo Elecciones Generales 10 de Septiembre de 2023 [Final Counting System General Elections Sept. 10, 2023] (Arg.), https://www.santafe.gov.ar/tribunalelectoral/wp-content/uploads/2023/09/G.pdf (showing how Maximiliano Pullaro was elected by 1.031.964 votes, representing 55.71% of the total).

176. Constanza Lambertucci, Threats to Governor Put Spotlight on Drug Trafficking Violence in Argentina, (Jan. 18, 2024), https://english.elpais.com/international/2024-01-18/threats-to-a-governor-put-spotlight-on-drug-trafficking-violence-in-argentina.html.

and proposed many bills to reform the criminal justice system in the most profound reform since 2007.[177] At the same time, he deepened the narrative against the judicial branch, which pointed out that it was responsible for the public safety situation in Santa Fe. Even if those actions aligned with the political strategy previously displayed by politicians, the rhythm and intensity of the criticism were increased. Before the judicial branch could even react, almost all the legislative initiatives proposed by this new leader were approved in the first months after he took possession of the office.[178]

The political control over the criminal justice system's actors in Santa Fe has been strengthening since the implementation of the current system. However, the new Governor decided to design a legal mechanism that took this influence to its more blatant manifestation since the democratic return. In Santa Fe, the governor can decide who will be part of the system despite the selection process. The control politics had built until this point was indirect and not recognized by the law. The judicial actors opposed this control. Although, the power to resist this reformistic wave is insignificant. The decree 659/24[179] that reformed the entity in charge to select the judges, prosecutors, and public defenders is the epitome of political control over the judicial branch. It is the consolidation of a process that began with the new system, which eroded the sources of legitimacy of the judicial actors. The judicial branch was invited to a fight and denied weapons even to compete.

Another clear example of instrumentalization of the criminal justice system was the discussion regarding the cases of organized crime, especially those related with drug trafficking. According to the empirical evidence, the higher rates of crimes in Santa Fe, and especially in the city of Rosario, are explained by this criminal phenomenon.[180] The majority of the violent murders that occurred in Santa Fe are related to organized crime. In

177. *See* Luis Rodrigo & Mario Caffaro, *Punto por punto, las nuevas herramientas para la persecución penal en la Justicia de Santa Fe* [*Point by point, the new tools for criminal prosecution in the Santa Fe Justice Department*], EL LITORAL [THE COASTLINE] (Mar. 28, 2024), https://www.ellitoral.com/politica/reforma-nuevas-herramientas-persecucion-penal-justicia-santafe_0_Kr9c0chxtn.html; *see also Reforma al Código Procesal Penal de Santa Fe: un ineficaz regreso al oscurantismo* [Reform to the Criminal Procedure Code of Santa Fe: an ineffective return to obscurantism], INECIP (Dec. 19, 2023), https://inecip.org/prensa/comunicados/reforma-al-codigo-procesal-penal-de-santa-fe-un-ineficaz-regreso-al-oscurantismo/.

178. *See Diputadas y Diputados dio sanción definitiva a la reforma del Código Procesal Penal* [*Deputies gave final sanction to the reform of the Criminal Procedure Code*], CÁMARA DE DIPUTADAS Y DIPUTADOS DE LA PROVINCIA DE SANTA FE [CHAMBER OF DEPUTIES OF THE PROVINCE OF SANTA FE] (Mar. 27, 2024), https://diputadossantafe.gov.ar/web/sesiones/view/181.

179. Cuna de la Constitución Nacional Santa Fe, L. N. º 1223 (2024) (The Decree 659/24 was enacted by Resolution 1223, signed by Governor Pullaro).

180. Cuna de la Constitución Nacional Santa Fe, L. N. º 467 (2013) (According to this document two out of three homicides that occurred in Santa Fe during 2023 were related with organized crime activities).

Argentina, the investigation and prosecution of drug trafficking depend on the federal government. Santa Fe pays the political cost of the inactivity but has a few manners to address this central issue. Thus, the governor decided that the division of roles among the federal and state governments should change.

The law 14.239 'de-federalized' some investigations related to drugs.[181] Since this law was passed, the state has been in charge of misdemeanor and minor offenses related to drug selling and trafficking. During the debate, the politicians enforced the discourses against the judicial actors. The governor said the judicial actors were inefficient, slow, and not satisfying the community's expectations.[182] This is a complex legal issue that is also related to the federalism system in Argentina. It is included here as an example of the new administration's wide and diverse range of actions to create a new narrative regarding its attitude toward public safety.

The executive initiatives are not directed at improving the criminal justice system's functioning. Many of them likely will create more problems than they solve. For instance, de-federalization makes coordination among different levels of government even more difficult. It increases the risk of overlapping and disturbance between state and federal investigations.

So, why did the executive branch propose and approve this transformation so quickly? The answer is that the initiatives allow the government to gain political benefits. First, the government displays an image of activity and decision in a complex and pivotal issue for the community. The new administration showed through these initiatives that it was prepared to address the crisis. Second, the government can reinforce the idea that if the crisis is not solved, it is because of the failure of others. They can build a narrative in which the pursuit of real solutions is irrelevant because the failure will eventually be because of the incapabilities of the judicial branch. Lastly, they won the political dispute against the judicial actors. The executive branch finally beat the last resistance to definitely subordinate the criminal justice system as its instrument. All the tensions and disputes emerging in the last decades among the politics and the criminal justice system were finally terminated by a decided politician who was massively voted for.

Moreover, the new authorities went even further. They succeed in an attempt that many other politicians have failed before. The new

181. Cuna de la Constitución Nacional Santa Fe, L. N. º 14239 (2023).

182. *See Primera conferencia de Pullaro: "Tenemos una Justicia cara e ineficiente"* [*Pullaro's first conference: "We have expensive and inefficient Justice"*], CADENA 3 (Dec. 11, 2023), https://www.cadena3.com/noticia/radioinforme-3-rosario/primera-conferencia-de-pullaro-tenemos-una-justicia-cara-e-ineficiente_376024.

administration could create the jury system in Santa Fe. Until this point, the counter-reforms the criminal justice system had suffered were not structural. The punitive shift and the increasing social and political pressure in the criminal justice system had not altered the judging system that remained in charge of the criminal judges. The inclusion of the jury inaugurated the second wave of reform.

The second wave of reform in Santa Fe has essential differences from the first. The recent reform was built upon a different foundation. The former Governor proposed the Criminal Procedure Code in Santa Fe in the last segment of his mandate. The party of the Governor lost the election the same year the Code was approved. On the opposite side, the new reform includes changes to the Code, but most importantly, a new system of judging. The current Governor propels these changes during the first month of his mandate after being elected by the highest number of voters since the democratic return.[183] The legitimacy levels to challenge the criminal justice judicial actors significantly differ between the two governors. But even if that was not the case, the power of the criminal judges is not what it used to be.

The judges' opinions regarding jury trials today seem quite different, as does the capability to resist its implementation. I propose that this shift is not because they suddenly desire to renounce their judging power; instead, in the context of them seeking means to elude the intolerable social pressure. In the first wave, the criminal judges tried not to relinquish more power than was necessary to turn the criminal justice system legally tolerated. Second, criminal judges are willing to renounce everything necessary not to remain powerful but to survive. The accusatorial procedure produced that the judges need to be popular to remain powerful. Initially, they tried to incarcerate more people, accept the prosecutorial petitions, and diminish the threshold of the defendant's rights. Rapidly, it was clear that their actions did not concede the community's trust. They lost their power because the source of it changed as soon as the secrecy and darkness were eradicated. In this context, jury trials are not a threat to the judges' power but a potential shelter from societal pressure.

Even with the inclusion of the jury trial in the criminal justice system, there is still no Evidence Code or even discussion of including it. This situation clearly indicates the politicians' pretensions regarding the change.

183. *See Maximiliano Pullaro y el récord de ser el más votado en democracia en Santa Fe: superó el millón de sufragios* [*Maximiliano Pullaro and the record of being the most voted in democracy in Santa Fe: he exceeded one million votes*], CLARÍN (Sept. 11, 2023), https://www.clarin.com/politica/maximiliano-pullaro-logro-record-votado-santa-fe-supero-millon-sufragios_0_x8WBKZXMDx.html?srsltid=AfmBOop0FxAxWR-VJBTzoUPPWpExVfPfBsD8UJDJrc26PL3iGaafvMds.

The initiatives are centered on political and not judicial needs. The technical discussions and initiative must have two traits to be allowed in the political debate. First, technical changes must foster the punitive response that the political branches are impulsing. Second, even if technical, the proposed changes must prove they could send a message to the community and be capitalized in the political debate. The transformation in the criminal justice system appears to be permitted only if they respond to the instrumentalization of the politicians.

A code of Evidence would fail in both requirements. The technical discussion needs to be framed with the real expectation of improving the system's functioning. Including a Code of Evidence would provide legality to the system, but it would not necessarily make it quicker and more punitive. Defendants could use the creation of clear and previous rules to resist punitive pretensions. Thus, this legal initiative would not only not produce the immediate political benefits expected but could also affect their intentions by providing new tools to the defendants.

Moreover, a Code of Evidence is a technical initiative that cannot be politically capitalized. The difficult debates that creating a Code implies will have no impact on society. To be acknowledged by the community, a code should be in effect for some time. This bet for the future is not how politicians are reforming the criminal justice system. The politicians in Santa Fe are looking for immediate relief from social pressure, and a Code of Evidence cannot deliver it.

As had already happened in the first wave, the second did not include, until now, a Code of Evidence, which does not mean that any evidentiary rule was enacted. The law 14.253 of jury trial incorporated even more evidentiary rules for this particular mechanism, adding to the scattered rules that the Criminal Procedure Code already established.[184] The existence of evidentiary rules highlights the close relationship with the jury and underscores their significance, even if they are not part of a specific subsystem. When there is no consensus among experts, or their opinions do not influence political actions, some legal discussions find their way into the system, but tehy are often disorganized and anarchic.

Even if the law is relevant for this approach with roots in civil law, the norms related evidence appears not to be to the same extent. In the former system, the outcome depended on the decision of judges who had nothing to prove to anyone other than themselves. The relevance of the evidence was relative since the judges could decide according to their belief and own investigation. Later, the criminal justice system was included as a part of the

184. Cuna de la Constitución Nacional Santa Fe, L. N. º 14253 (2024).

public safety machine. Thus, the responses began to need to be quick instead of fair. In both the previous and current systems, the consideration of evidence has not been at the center of the process, aside from the grand speeches made by politicians and judges. The sparse and nuclear rules regarding evidence did not emerge from an independent process, but rather from a mechanical and unreflective legal translation.

The evidence against a defendant is key when the entire criminal justice system is focused on proving guiltiness before convicting. Producing quality and legal proof takes time. Guaranteeing the accused's fundamental rights during a criminal procedure also consumes time. Neither of the requirements of developing a criminal justice system with the evidence in the center can be fulfilled in times of social panicking and anxiety. Panic claims immediate response, but the State was created to, among other duties, manage social moods to avoid violence becoming the only legitimate response. Politicians today undermined the state when they organized their agendas and actions around social panic and the expectations of violence. Building a criminal justice system that recovers the evidence as the center of it and obligates the judicial actors to act with justice and not anxiety will be a way to eschew penal populism. Fair decisions may take time, but anxiety only brings injustice. Evidence Code can reinstate the importance of proving guilty in front of juries and judges instead of on the streets, the media, or any other scaffold.

B. Juries as an Instrument and More Drops of the Diluted Codification

The jury trial will be implemented during the last part of 2024. However, this judging system will be limited to a range of crimes. The jury trial defenders raised some criticism for this decision, but it was made by the incoming government aligned with its agenda. There are several reasons why the government made this call. Among the most relevant is the cost of jury trials. The government is not unaware of the dimensions of the investment that a criminal judicial system requires. The government probably tried to be strategic in the crimes that they chose to be decided by jurors. Because of that, the government's choice has some messages to send.

According to article 2 of law 14.253,[185] a jury will decide the following cases: homicides, sexual assault followed by murder, aggravated robbery involving the use of deadly force, or death as a result of actions of police and

185. *See* Law No. 14253, *supra* note 164, at art. 2.

penitentiary personnel who acted in situations of confrontation.[186] The only exception is the express renouncement of the defendants.[187]

The main trait that all the selected crimes share is their severity. They are among the most severe crimes that an individual may be accused of committing. They are also the crimes that create more expectations in the community and ignite their more passionate reaction. The inclusion of the deadly use of force by law enforcement officials is based on the presumption that the community tolerates their actions, even those considered excessive by the law. For some critics, that inclusion responds to the government's intention to be more lenient with the police and penitentiary officers. Following the critics' ideas, because the community tolerates the use of violence, the police officers would feel that they are entitled to use it. This eventually may result in more confrontations and, more deaths and abusive uses of force. That concern has not yet been confirmed, but it seems, a priori, reasonable.

The second trait that can be found when the crimes are analyzed is that all of them are highly risky for decision-makers, both politicians and judges. The chance to make a decision—or even a public declaration—that infuriates part of the society is higher than in other cases with more societal tolerance. The government's decision was partly motivated by the pretension to return the opportunity to the community to exorcise its own ghosts. The traditional benefit attached to the jury trial in terms of community involvement could avoid negative reactions against the political and judicial actors.[188] It is now the same community that decides if the accused is guilty. The disconformity is no longer placed in the hands of politicians and judges but is distributed throughout society as a whole.

The potential problem with jury trials is that the jurors decide using common sense and general experiences. In the pursuit of legitimacy, the jury judging system begets many risks. The jurors can be seduced by ideas that are not legally valid. In criminal justice systems with long traditions, the decision-makers and system actors are fully conscious of these threats. For instance, in the United States, jurors need to be protected to avoid deciding on a basis different from what is being presented before them during trials. The defendants have the right to challenge the inclusion of proof that may result in excessively prejudicial or incite the jury's animadversion against them. But, where can the legal instrument to protect the juries be found in an accusatorial system? The answer is in a Code of Evidence.

186. *Id.*

187. *Id.*

188. *See* Pratt & Miao, *supra* note 173, at 26.

The creation of a jury system without an Evidence Code reflects the intentions of the reformers to take advantage of its benefits in terms of legitimacy but without understanding exactly where it comes from.[189] The legitimacy of a jury's decision depends not only on being made by jurors who are part of the same community. That decision must also be fair and based on proper evidence gathered legally. If a government pretends to repair the community's esteem by inviting some of its members to decide in complex and challenging judicial cases, the government also must guarantee that the jurors will have access to quality evidence that respects the fundamental rights of the defendants. To be legitimate a decision needs to be popular, but also just.

Implementing a jury system makes the creation of evidentiary rules mandatory. There is a close relationship between jury trials and the mechanism to include evidence to be presented to them. This is because the jurors are not trained to base their decisions on complex legal reasoning. In jury systems, the jurors arrive at conclusions because of the information the parties expose. If there are no clear rules to introduce, challenge, and present evidence in front of the jurors, the quality of the information they will access and eventually support their decision will not be guaranteed.

The new law of jury trials in Santa Fe appears to recognize this relationship when it includes evidentiary rules in its letter. Although, the real effect that this inclusion had was creating an evidentiary subsystem for the jury trials that cannot be conciliated with the general criminal procedure. The jury trials' law concedes rights not available to the defendant prosecuting the traditional system. Moreover, the decision to maintain the intermediate instances that lead to a different judge than the trial judge decides the evidence's admission conserves the design that creates the issues exposed in the previous section.

Article 22 of the law 14253 builds a subsystem hidden within another subsystem.[190] This distinction strengthens the system's disorganization and sets the platform for unfair decisions. The article includes a definition for pertinency that was not in the Criminal Procedure Code.[191] It is unclear if it can be used to resolve cases through the traditional professional judging

189. *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L., 2003, at 839, 869 (The expectations of legitimacy come from the fantasies and powerful images that jury trials have conveyed. As Miller sustains, the inclusion of this legal institute can be explained by its prestige. Politicians are interested in enhancing their legitimacy by the creation of laws that pursue to be grandiloquent and spectacular instead of efficient. They appeal to the written legal norms as a source of rational authority to send messages to society).

190. *See* Law No. 14253, *supra* note 164, at art. 22.

191. *See id.*

mechanism. Even more, the article contains a list of reasons why pertinent evidence can be deemed inadmissible.[192] There are two reasons related to jury trials: the risk of inclusion of evidence that is unfairly prejudicial and that may confuse jurors. The other two are unrelated to jury trials and would perfectly fit the traditional procedure. Those reasons are: a) improper delay in the procedure, and b) unnecessary cumulative proofs. Its inclusion in this precarious subsystem is a problem because it is unreasonable. If these rules are included in this special law, they are supposed to be applied in jury trials and not in the professional judging system.[193] That may lead us to think that if defendants are prosecuted by traditional procedure, the evidence that is pertinent cannot be deemed inadmissible because of improper delays or being cumulative. If that is the case, the inquiry is why. If it is not, and these reasons already are recognized in the Code in the power conceded to the judge to limit evidence, the question is why include them in this law since the Code of Procedure also applies to jury trials. Similarly, another problematic inclusion in this law is the concept of pertinency in the same article. While it would be more appropriate to use the term "relevance," the definition does not align with the criteria established by the Code for general admissibility.[194] In the professional judging procedure, a judge must assess whether the evidence is related to the fact that is being proven. However, when the evidentiary decision affects a jury trial, the judge must consider whether the evidence makes the fact more probable. These two laws govern the same system and demand the application of different standards to admit evidence.

This article's contradictions and systemic conflicts are pristine examples of the dangers of the diluted codification process. Article 22 of a Santa Fe State Law 14253 is a recent proof of the problems that the inclusion of evidence rules without proper discussion and analysis generates within a legal system. The subsidiary role that evidentiary reflections have had in the last major criminal procedure reforms in Santa Fe proves that the technical and systemic analysis face hardship to be part of the reforming process. The proliferation of subsystems with remarkably technical weaknesses adds complexity to the criminal justice system and moves it away from the chance

192. *See id.*

193. *Id.* at art. 159 (Article 159 establishes that the judge can limit the number of evidence in the case that they are cumulative or impertinent. The article does not concede the power to declare them inadmissible but to reject them due to these motives. The power to exclude evidence is not exactly the same as the power to declare evidence inadmissible. This technical difference also proves the need for an autonomous and systemic study of the evidentiary subsystem that pretends to regulate a criminal justice system. The improper delay, although, is not included in the basis for the exercise of the judges' limitation powers in the traditional procedure).

194. *See id.* at art. 22.

to improve its performance. The referred tensions and difficulties underline the importance of abandoning the diluted evidentiary codification.

The evidentiary rules should reflect the agreement regarding how the Santa Fe community wants to include proof when an individual is accused of committing a crime. Politicians in Santa Fe seem willing to prove all the changes except those connected with the real functioning of the criminal justice system. Thus, the evidentiary reflections are too important and complex to be a slight part of other reforms. To construct an evidentiary subsystem, the evidentiary rules need to stop being codified as diluted drops and must start to be considered as an autonomous space of analysis.

V. CONCLUSION

The article analyzed the criminal justice system in Santa Fe from the perspective of its vacancies and offered possible answers to why its reform did not include an Evidence Code. It has shown that a criminal justice system reforming process is highly complex because it involves several layers of analysis and a plurality of actors. It has also demonstrated the relevance of including a political, legal, or procedural perspective rather than being captured by legal discussions that block the analysis of concrete practices.

The study had to deal with the difficulty of understanding why a decision was not made instead of why it was. The lack of an Evidence Code can be traced to the different stages of the reform. This absence remains a vacancy that has not been directly addressed by the actors yet, but their actions and decisions influence its possibility to exist. Despite not being directly treated, the evidentiary rules found their path to enter the criminal justice system in Santa Fe. The article has demonstrated that the evidentiary rules entered the system diluted in other reforms. They are hidden behind major transformations. The manner in which they were included affected their quality and coherence.

The evidentiary considerations are not yet reflected in an autonomous legislation body. They are not in a coherent subsystem either. They were incorporated during the subsequent reforms and counter-reforms without proper analysis or discussion. First, the reformers questioned the inclusion of evidentiary rules and succumbed to the judge's pressure to make the reform possible. Later, the expert opinions and advice were relegated by politicians as the crime was becoming central to the political agenda. When the experts' views dictated the content and rhythm of the reform, the evidentiary rules did not enjoy unanimous consensus. After implementing the reformed Code, the agreement regarding its utility increased. To that point, the politicians had monopolized the means to produce changes. The changes during the years after the reforms, and still today, abandoned any technical pretensions. They

are structured majorly by political interest and used for electionary purposes. These objectives are far from technical discussion, such as the mechanism through which the evidence must be presented and admitted during trials.

The article demonstrates that anyone who intends to understand a reform process must focus on the practices instead of the law. The law invites misunderstandings and mistakes, while concrete practice offers the chance to renounce discourses and appreciate realities. It was in the concrete practice areas where the article recovered the elements to explain the absence of an Evidence Code.

This article pointed out that politicians, such as the Legislature of Santa Fe, are among the more relevant actors in the reform processes. The politicians instrumentalize the criminal procedure to align it with their political agenda instead of improving the judiciary's functioning. These actions performed by the politicians defied the explanations that transformations were the result of the pretension of satisfying superior standards of legality based on humanitarian and democratic values. Many of the most significant changes happened in the context of political crises. They were mostly used to send a strong message to society. The reforms sought to convince society that they were assuming the seriousness of their claim, generally in the public safety realm. As that political strategy became more popular, the initiatives that pursued improving the system's functioning in justice and fairness became rare.

Politicians propelled the transformation and the creation of new actors, such as the Prosecution Office or juries, seeking to share the responsibilities and criticism that the community posed on the government for failing to guarantee public safety. With that action, politicians could build discourses to transfer part of the heavy load composed by the negativity that the increasing crime rates, real or perceived, had produced. Politicians successfully designed and implemented a new map of power that allowed them to find new 'guilties.'

Judicial actors bite the bait. They were anxious to prove that the new system was more efficient than the previous one. Moreover, the reformed system opened the courts' doors. Judicial actors had to face social pressure and social criticism. Their political ingenuity led them to assume an impossible obligation: influence the crime phenomenon, real or perceived. When they realized that they did not have the means to fulfill those social expectations, it was too late.

The reformed criminal justice system had tied its legitimacy to public acceptance. It adjusts its actions to align with what it believes society expects. These expectations are generally translated as more severe decisions. In the pursuit of social approval, the functioning of the system became more

punitive.[195] The sentences were extended, the power of the police increased, and the judicial control relaxed, but nothing could satisfy the ardent claim of society. The negative assessment of society undermined the criminal justice system's legitimacy and affected the judicial actors' self-perception. They were amid social and political pressure with limited mechanisms to resist. Publicity, which was expected to enhance the legitimacy of the criminal justice system, had the opposite effect when the true nature of the system's functioning was uncovered.

Selfish political interests dynamize transformations, but they are not the only impulse. There are always competing interests during these turbulent processes. This article explains how inter and extra-systemic pressures played a key role throughout the reform in Santa Fe. This situation proves in its terms that even if political interests and needs are relevant, they are not sufficient to drive a structural reform. In the particular case of Santa Fe, the reform was only possible when the external pressure broke the resistance wall that the criminal judges had built for decades. Even after its implementation, the change of rules had to deal, and still has, with traditions, practices, and actors that influence, and in many cases determine, the depth and extension of the transformations.

Although, the dynamics of the reform have undermined the power of the judicial actors. Politicians have turned the criminal justice system into part of the political discussion regarding public safety. To underline that new character, they have passed bills that are aligned with what they considered the punitive expectation of society and not necessarily with improving the system's functioning. The criminal justice system has turned into an instrument to elude social pressure. Judicial actors witnessed politicians create this new narrative through discourses and political actions.

The criminal judges are the actors who have faced the most profound transformation in the last ten years. Based on the recent legislature's decision to create jury trials, we see how their power passed from almost absolute to suffering significant reduction. The principal sources of power of the judge in the inquisitorial system were secrecy and lack of accountability. Through these, they prevent the public's participation in trials and other judicial practices. A totalitarian judge demands that society be left outside the tribunals. This assertion can foster the idea that a professional judge in an inquisitorial system is incompatible with a democracy. As soon as they opened the doors of their courts, they had to face the deafening claim of society. They could not keep hiding behind their written decisions. That

195. *See* Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 239 (2001).

process ended in what ten years ago seemed impossible. Criminal judges are willing to accept the jury and lose the last vestige of their formerly absolute power: the power to judge whether an individual is guilty.

Regarding the lack of an Evidence Code in the Province of Santa Fe, the existence of a powerful judge at the beginning was among the major obstacles. The power of the judge influenced this absence in two ways. First, the judges strongly opposed the incorporation of jury trials at the time. There is a direct relation between evidentiary rules and jury trials. Criminal judges sent messages, sometimes tacit but often quite explicit, that the jury trials would go too far and deep in the reform. Other sectors who tried to advocate for the changes believed them. Second, the judges considered, as well as some sectors of the reformers and experts in favor of the reform, that evidentiary rules would limit them through excessive rigidness. They believed a more informal process would allow them to conserve great influence on the prosecutors and the system. Following these ideas, the judges wanted to maintain the power to influence the trials through the evidence. They accepted to be stripped of the power to investigate but nothing more.

This presumption led the judges to the same conclusions as some reformers but from a different avenue. Some reformers thought an accusatorial system 'ought to be' informal, while the judges wanted to keep it informal to maintain their unofficial influence.

When the Criminal Procedure Code was written, the necessity of a Code of Evidence in Santa Fe was a marginal discussion that did not deserve complete acceptance from experts and judicial actors. Because of that, the reformers and supporters were willing to renounce its inclusion in the original list of legislation and codes to be reformed. These positions have changed with the consolidation of accusatorial practices in recent years.

Many judicial actors argue that certain rules, even if not part of a specific Code, could help address or alleviate some issues present in the criminal justice system. There is a shift in the previous understanding that many actors had. Even many who thought that evidentiary rules were improper for an accusatorial code because they created rigid standards outside the hearings and trials where the controversies were supposed to be solved are now evaluating their benefits. From these perspectives, the evidentiary rules would be a valid method to enhance legal certainty. To this traditional validation of foreseeing any possible objection of core evidence, another creative reason must be added to defend the inclusion of evidentiary rules: reduce the tendency to bureaucratize. As the article explains, several practices are being repeated mechanically and unnecessarily because they are deemed mandatory by standards and guidelines. With a Code establishing

silver lines, countless hours of sterile discussion would be saved as judicial discretion would be reduced.

Furthermore, the incorporation of jury trials in Santa Fe, decided at the beginning of 2024, will bolster the incipient defense of the necessity of clear rules to determine what evidence is relevant and trustworthy to be presented to the jurors. This article underlines the traditional relationship between evidentiary rules and juries. Even more so when its incorporation is attached to its potential legitimacy boost. The decision to rely on the membership's jurors to the community implies paying a cost in terms of the risks they decide on an improper basis. Jurors cannot identify what evidence is legally producible and center their attention on the evidence's conviction power. The system must include rules to guarantee that all the evidence presented to them is legal and respects fundamental rights. When the evidence has already been introduced, it is too late, even if the judges can give them directions regarding the legal and correct uses. Jurors are called to determine whether a defendant is innocent or guilty; the Codes and statutes governing the procedure must assure the trial's legality. If there are no clear rules to establish which evidence will be accepted or denied, the possibility of the jurors' decision being legitimate but unfair exists.

This article contributes to the attempt to answer important unanswered questions about the criminal procedure reforms in many countries in the global south. It exemplifies how analyzing a reform requires including political, historical, academic, and cultural elements to build a holistic comprehension. Perhaps the main contribution of this paper was to raise questions in areas that until now only offered silence. The article is hesitant to generalize its conclusions. Notwithstanding, it is a bet on the future. The motives why Codes of Evidence remain outside countries' legal systems with deep historical traditions of codification, such as in Latin American, are still unexplored. The article suggests reasons to explain why this occurred in Santa Fe with the hope that future research and hypotheses come from other latitudes with criminal justice systems that share this contradiction.

VI. METHODOLOGY

For this project, I conducted nine in-depth interviews. Six of the interviewees were judicial actors, either active or retired. One was a representative of a relevant Non-Governmental Organization. The last two were specialists in accusatorial systems and evidentiary rules. Moreover, six were from the Province of Santa Fe.

The interviews were semi-structured. Most of the dialogues quickly derived to a conversational nature. Even though the interviews were conducted through video calls to foster the intimacy of the interviewees, none

of them were recorded. This decision permitted the interviewees to express themselves freely. I promised anonymity to my informants. Because of that, I will avoid any reference to their positions or institutional affiliations in the paper.

The interviewees came from two groups. The first group includes three individuals representing the NGO and experts sector. I eventually realized that the NGO and experts' influence was not fundamental in the process that I attempted to understand, which was more focused on the interaction of the local actors in Santa Fe. However, it is a line of search that can be studied in depth in further explorations to amplify the scope of this study. The second group is composed of six judicial actors of Santa Fe. To select them, I use two parameters. First, to elude self-reporting bias and institutional official posture, I interviewed representatives from the three actors in the criminal justice system in Santa Fe: the Prosecution Office, the Public Defense Office, and criminal judges. I relied on information that was not the result of direct perception or comment of any of them but derived from the common traits and repetitions found in several. Second, I interviewed active actors and retired actors. The retired were part of the inquisitorial system and the active of the accusatorial. In addition, three were part of the codification process as experts.

The study relied almost entirely on qualitative methods. I added secondary sources to the referred interviews to provide historical context to relevant events and circumstances. I used some quantitative data about crime rates and other indicators relevant to the functioning of the current system, but the study is essentially qualitative.

CODETERMINATION AS A REMEDY FOR AMERICAN LABOR WOES, OR HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB

*Anthony Carini**

Abstract

Over the past few decades, the systematic erosion of labor union membership in the United States has correlated with increased income inequality, wage stagnation, and worker dissatisfaction. On the other hand, the advantages of unionization, such as higher wages and better benefits, are well studied and documented. This article suggests that implementing a codetermination scheme similar to that of Germany in the U.S. is a feasible and effective way to empower workers and reverse the harmful effects of weakened labor unions.

Codetermination is a system that Germany, along with a handful of other countries, uses to pursue the equality between labor and capital by reserving a certain amount of seats on large companies' boards for employee representatives. First, codetermination is feasible in the U.S. because it fits into our current statutory scheme of labor protections, it can function independently of unions, it doesn't require the abandonment of our shareholder primacy corporate culture, and it has growing political support. Second, codetermination produces benefits for workers similar to unions such as promoting sustainable, long-term decision making by companies, increasing annual wage growth, increasing subjective job quality, and decreasing income inequality. Finally, codetermination will ensure the U.S. truly upholds its constitutional guarantees of freedom of

* Anthony Carini is a J.D. Candidate (2025) at Southwestern Law School, and was a Staff Editor of the Southwestern Journal of International Law, 2023-2024. The author thanks his father, Christopher Carini, and his grandfather, Gary Smith, for always encouraging him to think deeply about and discuss important, controversial topics. The author also thanks his mother, Wendy Bell, for stressing the importance of education and setting an example of what it means to be a lifelong student. Last but not least, the author thanks Southwestern Law School for introducing him to his great friends and valued interlocutors, Raul Garcia, Felipe Villa, and Alborz Javaheri, who never shy away from a discussion on even the most frivolous of topics.

association and contract by shrinking the worker-employer bargaining power gap and allowing workers to democratically decide on representatives to advocate on their behalf.

I. INTRODUCTION

For decades, Germany has utilized codetermination in its corporate governance structure to give workers a voice in ways American workers largely don't have.[1] By placing employees on corporate boards, many of the current ills plaguing workers, such as inequality and dissatisfaction, can be remedied.[2] Adopting Germany's codetermination scheme presents an excellent opportunity for the U.S. to restore worker power without significantly disrupting corporate culture, law, or politics.

It is no secret that economic inequality in the United States has dramatically increased in the past few decades.[3] A report from the Economic Policy Institute in 2015 showed that from 1979 to 2013, middle and low-

1. *See* Simon Jäger et al., *Codetermination and power in the workplace*, ECON. POL'Y INST. (Mar. 23, 2022), https://files.epi.org/uploads/246857.pdf.

2. *See* Lenore Palladino, *Why Workers on Corporate Boards Just Make Sense*, ROOSEVELT INST. (Aug. 14, 2018), https://rooseveltinstitute.org/2018/08/14/why-workers-on-corporate-boards-just-makes-sense/.

3. *See* Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call it a Top Priority*, PEW RSCH. CTR., 16 (Jan. 9, 2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/01/PSDT_01.09.20_economic-inequailty_FULL.pdf.

wage workers saw a 6% increase and a 5% decrease in wages, respectively.[4] Meanwhile, earners in the ninety-fifth percentile saw a 41% increase during that same time period.[5] Since its peak in 1970, the inflation-adjusted minimum wage has decreased by about 40%.[6] Additionally, from 1979 to 2024, worker productivity growth outpaced hourly pay growth by fifty-one percent.[7] According to a Pew Research Center 2013 survey, less than half of American workers feel "very satisfied" with their pay, opportunities for training and promotion, and benefits.[8] The brunt of the dissatisfaction in these categories is, unfortunately yet predictably, borne by lower and middle income workers.[9]

At the same time, since 1983, union membership has been cut in half and is now among the lowest out of the Organization for Economic Co-operation and Development (OECD) countries.[10] This downward trend is partly attributable to the natural effects of a globalized, technologically advanced service economy.[11] But it can also be traced to specific policies and court decisions, such as *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, the Taft-Hartley Act, "Right to Work" laws, and broad shifts in attitude surrounding corporations' responsibility to shareholders.[12] The decreased

4. *See* Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECONOMIC STAGNATION IN NINE CHARTS, 6 (Jan. 6, 2015), https://files.epi.org/2013/wage-stagnation-in-nine-charts.pdf.

5. *Id*.

6. Bureau of Labor Statistics, *Real and Nominal Value of the Federal Minimum Wage in the United States from 1938 to 2024 (in 2024 U.S. dollars)*, STATISTA, https://0-www-statista-com.library.swlaw.edu/statistics/1065466/real-nominal-value-minimum-wage-us/ (last visited Sept. 29, 2024) (showing inflation adjusted wage in 1970 was approximately $12.50 per hour, but in 2023 the same metric shows approximately $7.50 per hour, in sum a $5.00 per hour decrease, which is 40% of $12.50).

7. *The Productivity–Pay Gap*, ECON. POL'Y INST., https://www.epi.org/productivity-pay-gap/ (last updated Aug. 2024) (stating that productivity increased by 80.9% and hourly pay increased 29.4% between 1979 and 2024).

8. Juliana Horowitz & Kim Parker, *How Americans View Their Jobs*, PEW RSCH. CTR. (Mar. 20, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/03/ST_2023.03.30_Culture-of-Work_Report.pdf.

9. *Id*. at 5.

10. *See* Jeff Goldstein, *How the U.S. Compares to the World on Unionization*, ATL. COUNCIL (Oct. 28, 2022), https://www.atlanticcouncil.org/blogs/econographics/how-the-us-compares-to-the-world-on-unionization/.

11. *Id.*

12. *See id*.; Lawrence Mishel et al., *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST. 2, 19 (Nov. 18, 2020), https://files.epi.org/pdf/215908.pdf.

worker bargaining power that follows from weak union membership strongly correlates with and likely has aided, these bleak labor statistics.[13]

On the flip side, a recent report from the U.S. Department of the Treasury highlighted the many benefits of unionization.[14] For example, union workers on average earn about 20% higher wages than non-union workers, which is referred to as "the union wage premium."[15] Union workers are also much more likely to be offered medical benefits, retirement, life insurance, and numerous other fringe benefits and amenities from their employer than non-union workers.[16]

Unfortunately, however, it is unlikely that union membership will ever recover to its mid-century level due to various structural and cultural barriers that have been erected since the Taft-Hartley Act. This means that the U.S. needs to consider other options available to empower workers in the way unions could when they had significant influence over labor relations.

To achieve labor empowerment and reverse the harmful effects that weakened unions have had on American workers, the U.S. needs to implement a federal codetermination scheme similar to that of Germany. Codetermination is the best option for the U.S. because it can restore workers' voices in a way that complements the modern American legal and political climate, it can produce benefits for workers much like unions can, and it brings the U.S. closer to actually upholding freedom of contract and association.

II. A BACKGROUND ON CODETERMINATION AS APPLIED IN GERMANY

Beginning in 1976 with the Codetermination Act, Germany embedded in its legal system a requirement for equal participation in the company decision-making process between shareholders and employees.[17] In 1979,

13. *See* Anna Stansbury and Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 3 (Mar. 18, 2020), https://www.brookings.edu/wp-content/uploads/2020/12/StansburySummers-Final-web.pdf ("Worker power—arising from unionization . . . enables workers to increase their pay above the level that would prevail in the absence of such bargaining power.").

14. *See generally* U.S. DEPARTMENT OF THE TREASURY, LABOR UNIONS AND THE MIDDLE CLASS (2023), https://home.treasury.gov/system/files/136/Labor-Unions-And-The-Middle-Class.pdf.

15. *Id.* at 13.

16. *Id.* at 16-17.

17. *See* Bennet Berger and Elena Vaccarino, *Codetermination in Germany – a Role Model for the UK and the US?*, BRUEGEL: PUBLICATIONS (Oct. 13, 2016), https://www.bruegel.org/blog-post/codetermination-germany-role-model-uk-and-us.

the German Federal Constitutional Court held that a challenge by numerous companies to the Codetermination Act was unfounded, and stated that, "[The Codetermination Act] also has the task of mitigating the external control associated with the subordination of employees to external management and organizational power in larger companies through institutional participation in business decisions . . . and of supplementing the economic legitimacy of company management with a social one."[18]

One of the main ideas behind codetermination is pursuing equality between capital and labor through a democratic decision-making process that rewards employee loyalty with participation rights.[19] Although many other European countries have adopted some form of codetermination, Germany has the most well-known and enduring form of it.[20] This, along with similarities in their corporate law structure, makes codetermination a great fit to use as a model for the U.S.

First, German codetermination is split into two levels—one at the "company" level and one at the "workplace" level.[21] German labor law defines a "workplace" as "an employer's facility in which several employees normally work together," while a "company" is comprised of all the workplaces—for example where an automotive manufacturer is a "company", its factories are the "workplaces."[22]

At the company level, the Codetermination Act creates a supervisory board composed of employee representatives and shareholders in companies with more than 2,000 employees.[23] The amount of representation on the supervisory board depends on the size of the company but is always divided

18. BVerfG, 50 BvR 290/95, Mar. 1, 1979, https://www.servat.unibe.ch/dfr/bv050290.html (translating the text from German).

19. *See* WOLFGANG STREECK, MITBESTIMMUNG UND NEUE UNTERNEHMENSKULTUREN - BILANZ UND PERSPEKTIVEN: EMPFEHLUNGEN DER KOMMISSION MITBESTIMMUNG - EMPFEHLUNGEN ZUR ZUKÜNFTIGEN GESTALTUNG DER MITBESTIMMUNG [CO-DETERMINATION AND NEW CORPORATE CULTURES - BALANCE SHEET AND PERSPECTIVES: RECOMMENDATIONS OF THE CO-DETERMINATION COMMISSION - RECOMMENDATIONS FOR THE FUTURE DESIGN OF CO-DETERMINATION] 2 (Hans-Boeckler-Stiftung, Bertelsmann Stiftung eds. 1998), https://www.ssoar.info/ssoar/handle/document/19523.

20. *See* Matthew Bodie & Grant Hayden, *Codetermination: The Missing Alternative in Corporate Governance*, LPE PROJECT (Jan. 13, 2022), https://lpeproject.org/blog/codetermination-the-missing-alternative-in-corporate-governance/.

21. *See German Codetermination ^"Mitbestimmung"^*, DGB: CODETERMINATION, VOCATIONAL TRAINING MINIMUM WAGE, https://en.dgb.de/fields-of-work/german-codetermination (last visited Sept. 29, 2024).

22. *Id.*

23. Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz - MitbestG) [Law on Employee Co-Determination] § 1, May 4, 1976, https://www.gesetze-im-internet.de/mitbestg/__1.html (Ger.) [hereinafter Codetermination Act].

equally between employees and shareholders.[24] However, the supervisory board is chaired by a shareholder whose vote is decisive when there is a deadlock.[25]

This differs from the unique supervisory board scheme for companies in the mining, coal, iron, and steel industries set out by the Coal, Iron, and Steel Codetermination Act.[26] Here, the supervisory board applies to all companies with more than 1,000 employees and has a neutral member elected by agreement from both sides to offset the shareholder chairman.[27] Companies covered under this act are subject to the unions' right to propose members for supervisory board seats, but union members are not required to hold seats, as they still need to be elected.[28] This is in contrast to companies covered under the Codetermination Act, where union member participation on the supervisory board is compulsory.[29]

For companies with 500 to 2,000 employees though, the One-Third Participation Act applies, which explicitly states that unions do not have a right to propose members for board seats.[30] Additionally, as the name suggests, employee representatives are outnumbered by shareholders as they only represent one-third of the board.[31]

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24. *See id.* § 7 (stating that for companies between two thousand and ten thousand employees, representation is split at six each, companies between ten thousand and twenty thousand representation is split at eight each, and above twenty thousand has ten from each).

25. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

26. *See id.*

27. *See* Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (MontanMitbestG) [Law on the Co-determination of Employees in the Supervisory Boards and Management Boards of Companies in the Mining and Iron and Steel Producing Industries] §§ 1(2), 4, May 21, 1951, https://www.gesetze-im internet.de/montanmitbestg/BJNR003470951.html (Ger.) [hereinafter Coal, Iron, and Steel Codetermination Act]; *id.*

28. *See id.* §§ 4–6.

29. *See id.*; Codetermination Act, *supra* note 23, §§ 10(1), 10(2).

30. *See* Verordnung zur Wahl der Aufsichtsratsmitglieder der Arbeitnehmer nach dem Drittelbeteiligungsgesetz (Wahlordnung zum Drittelbeteiligungsgesetz - WODrittelbG) [Regulation on the election of employee supervisory board members under the One-Third Participation Act (Election Regulations for the One-Third Participation Act – WODrittelbG)] § 4, June 23, 2004, https://www.gesetze-im-internet.de/wodrittelbg/BJNR139310004.html (Ger.) [hereinafter Election Regulations for the One-Third Participation Act]; German Codetermination ("Mitbestimmung"), *supra* note 21.

31. *See* Verordnung zur Wahl der Aufsichtsratsmitglieder der Arbeitnehmer nach dem Drittelbeteiligungsgesetz (Wahlordnung zum Drittelbeteiligungsgesetz - WODrittelbG) [Law on the One-Third Participation of Employees in the Supervisory Board (Third Participation Act - DrittbG)] § 4, May 18, 2004, https://www.gesetze-im-internet.de/drittelbg/BJNR097410004.html (Ger.) [hereinafter One-Third Participation Act].

The Codetermination Act states that employee representatives in companies with more than 8,000 employees are elected by delegates unless the employees agree to a direct election.[32] The act states, in each of the company's operations, "employees shall elect delegates by secret ballot and in accordance with the principles of proportional representation."[33] There is "one delegate for every ninety employees entitled to vote" (over the age of eighteen).[34] If that calculation results in more than:

1. 25 delegates, the number of delegates to be elected is reduced to half; these delegates each receive two votes.
2. 50 delegates, the number of delegates to be elected is reduced to a third; these delegates each receive three votes.
3. 75 delegates, the number of delegates to be elected is reduced to a quarter; these delegates each receive four votes.
4. 100 delegates, the number of delegates to be elected is reduced to a fifth; these delegates each receive five votes.
5. 125 delegates, the number of delegates to be elected is reduced to one sixth; these delegates each receive six votes.
6. 150 delegates, the number of delegates to be elected is reduced to one seventh; these delegates each receive seven votes.[35]

Companies with less than 8,000 employees directly elect their representatives, unless the employees decide on an election by delegates.[36] The alternative election decision is made after one-twentieth of the employees sign an application to bring it to a vote.[37] Then, it takes a majority to flip the election process.[38]

Typically under German codetermination laws the supervisory board is tasked with overseeing and appointing members of the executive board.[39] Since Germany employs a two-tiered system with a separate executive board composed of the CEO and other executives the supervisory board appoints, the employee power here is mainly derived from being able to oversee and disapprove of decisions the executives make.[40] Unless the company is covered by the Coal, Iron, and Steel Codetermination Act, the employee

32. *See* Codetermination Act, *supra* note 23, § 9.
33. *Id.* § 10.
34. *Id.* §§ 10–11.
35. *Id.* § 11.
36. *Id.* § 9.
37. *Id.*
38. *Id.*
39. *See* Berger & Vaccarino, *supra* note 17.
40. *See id.*

representatives generally serve three main functions with their minority position on the board: sharing information and worker perspectives with the executives, influencing decisions about working conditions, and using their company level information to support workplace level efforts.[41]

Aimed to compliment the supervisory board, the workplace level "works councils" were established by the Works Constitution Act of 1952, amended in 1972.[42] These are voluntary councils of employees, elected by employees, that exert more direct influence on employers over matters of interest to the average worker—in contrast to the broad decision-making influence of the supervisory board.[43] The works council can draft "works agreements" that act as enforceable agreements with the employer concerning "wage supplements, working time, professional development, or company pension schemes."[44] Additionally, employers cannot create new rules regarding a specific set of worker issues without consulting the works council.[45] These include health and safety measures, hours, leave plans, pay systems, and procedures to monitor employee conduct and performance.[46] Further, works councils' increase in size commensurate with workplace size, much like supervisory boards do at the company level.[47]

III. BACKGROUND ON LABOR UNIONS IN THE U.S.

Unions have a complicated history in the United States. After steadily growing throughout most of American history and peaking in the 1940's,[48] their membership and influence began to steadily decline in the 1960's.[49] Beginning with the Taft-Hartley Act in 1947, employers were able to undermine unions' efforts to inform and recruit workers.[50] A string of

41. *See* Jäger et al., *supra* note 1, at 207-08.

42. *See* BVerfG, 50 BvR 290.

43. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.* (stating that workplaces with less than 20 employees have a 1-member works council; workplaces with 100 employees have a 5-member works council; workplaces with 250 employees have a 9-member works council; and workplaces over 7,000 employees have a 35-member works council).

48. *See generally*, Am. Fed'n of Lab. and Cong. of Indus. Org., *A Short History of American Labor*, 88 AFL-CIO AM. FEDERATIONIST 1 (1981), https://oac.cdlib.org/ark:/28722/bk0003z4v2t/?brand=oac4 [hereinafter A Short History of American Labor].

49. *See* Mishel et al., *supra* note 12, at 8.

50. *See id*. at 7-8.

subsequent Supreme Court decisions then bolstered employers' ability to delay and disrupt union organizing efforts.[51] These, coupled with employers finding creative ways to circumvent the protections of the NLRA,[52] created a union-hostile environment in the United States that persists to this day.

From as far back as the early colonial days of the seventeenth and eighteenth century, organizations resembling modern unions influenced American law and politics.[53] By the turn of the nineteenth century, numerous strikes and negotiations to improve working conditions by printers, cabinet makers, carpenters, and more were organized by unions.[54] As industrialization ramped up around the time of the Civil War, workers began to notice the immense power and wealth their employers were accumulating and recognized the need to join their organizing efforts.[55] The National Trades' Union and the National Labor Union were the first short-lived attempts at this but were both casualties of recessions.[56] In 1881, delegates from a variety of trades came together in Pittsburgh to form the Federation of Organized Trades and Labor Unions, which adopted a formal constitution and focused significant energy on legislation.[57] A few years later, this group evolved into the American Federation of Labor and expanded its membership to include women.[58]

The next few decades were plagued with intense struggles between titans of industry and the loosely organized, but still relatively weakened unions.[59] By 1904, the American Federation of Labor had a membership of 1.7 million workers and was eventually able to urge Congress to create the U.S. Department of Labor—tasked with protecting the rights of wage earners.[60] In 1914, the Clayton Act was adopted; it enumerated that "the labor of a human being is not a commodity or article of commerce," and reinforced the

51. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974); Nat'l Lab. Rels. Bd. v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

52. *See* Mishel et al., *supra* note 12, at 13.

53. *See* A Short History of American Labor, *supra* note 48, at 3.

54. *See id.* ("In 'pursuit of happiness' through shorter hours and higher pay, printers were the first to go on strike, in New York in 1794; cabinet makers struck in 1796; carpenters in Philadelphia in 1797; cordwainers in 1799.").

55. *See id.* at 4.

56. *See id.*

57. *See id.* at 4-5.

58. *See id.* at 5.

59. *See id.* at 6.

60. *See id.* at 9.

right to strike and boycott while limiting the use of injunctions in labor disputes.[61]

Against a backdrop of a floundering economy during the Great Depression, President Roosevelt urged Congress to pass the National Recovery Act (NRA), which cemented the rights of unions to negotiate with employers in statute for the first time.[62] Although it had no real enforcement power and was eventually held unconstitutional by the Supreme Court, in 1935, the Wagner Act (NLRA) was passed which mandated workers to have freedom of association to organize into unions.[63] It also established that companies were obligated to enter into bargaining agreements with government-certified unions.[64] In contrast to the NRA, it actually had an enforcement mechanism in the National Labor Relations Board (NLRB).

Despite all this, beginning in the 1960s union membership in the U.S. steadily decreased as workers faced more difficulty getting past each successive step in the process of forming one.[65] To form a union workers must procure 30% interest and ask for a government election, win the government election by a majority vote, and negotiate their first contract with their employer.[66] This added difficulty can be traced to a few major policy and legal decisions.

Initially, The NLRB required employers to remain neutral on the issue of unions, but the 1947 Taft-Hartley Act allowed employers to freely express their views on unions so long as there was no offer of benefit or threat of reprisal involved.[67] Additionally, there was a provision that allowed "employers to file petitions to determine whether their employees actually wanted union representation," a process that was previously only available when multiple unions were competing.[68] Subsequently, the NLRB under President Nixon began allowing employers to tell workers that forming a union could be "fatal" or cause "turmoil" because they would risk losing everything they had by starting from the beginning with bargaining.[69] They

61. *See id.* at 10 (citing the Clayton Act, 15 U.S.C. §§ 17).
62. *See id.* at 12.
63. *See* Mishel et al., *supra* note 12, at 19.
64. *See id.*
65. *See id.* at 20.
66. *See id.* at 9.
67. *See id.* at 18.
68. *See id.*
69. *See id.* at 19 (first citing Airporter Inn Hotel, 215 NLRB 824, 824 (1974); then citing Stumpf Motor Co., 208 NLRB 431, 432 (1974); and then citing Birdsall Construction Co., 198 NLRB 163, 163 (1972)).

could also predict they would have to close down due to finances if workers unionized.[70]

In *Linden Lumber*, the Supreme Court ruled that employers could refuse to recognize unions based on majority support and insist on an NLRB election so that they could engage in anti-union campaigns during the delays NLRB involvement would create.[71] Further, a 1956 Supreme Court decision in *NLRB v. Babcock & Wilcox*, held that employers didn't have to give union organizers access to parking lots to talk with employees unless they had no other means of reaching employees.[72] This exacerbated the already unequal balance in the ability to communicate with employees between the employer and unions.

Attacks on labor laws intensified when, in the 1970s, employers learned through experience that labor violations never carried any significant penalty.[73] Workers do not have a right to sue employers under the NLRA, and the NLRB does not award any monetary damages.[74] So even though charges for unfair labor practices increased sevenfold between 1950 and 1980, employers had little incentive to stop engaging in threats, mandatory anti-union meetings, and illegal firings.[75]

Lastly, Taft-Hartley also allowed states to ban "union security" agreements which ensured all represented employees would share union costs through dues.[76] This led to states implementing Right to Work laws that allowed employees to reap the benefits of union representation without sharing in the cost.[77] This free-rider problem—where employees who do not pay union membership dues still reap union membership benefits—severely

70. *See id.* at 20.

71. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 436 (1974) (Stewart, J., White, J., Marshall J., Powell, J., dissenting) (stating that "the employer can refuse to recognize the union, despite its convincing evidence of majority support, and also refuse either to petition for an election or to consent to a union-requested election").

72. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 110 (1956) (stating "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution"), abrogated by Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021) (stating where "access regulation grants labor organizers a right to invade the [employer's] property," the regulation "constitutes a *per se* physical taking" (emphasis in original)).

73. *See* Mishel et al., *supra* note 12, at 12.

74. *See id.* at 29 (citing HUM. RTS. WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER THE INTERNATIONAL HUMAN RIGHTS STANDARD (2000)).

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

76. *See id.* at 28.

77. *Id.* at 29 (citing 29 U.S.C. § 164(b)).

undermined union membership and the impacts of these laws can still be felt today.[78]

In sum, the methodical erosion of labor laws in the era following the Taft-Hartley Act has left the U.S. in a position where rebuilding the legal framework surrounding unions would take a herculean effort. This has left a major hole in American labor relations, as workers cannot rely on a strong union system to advocate on their behalf, and their employers have nearly free reign to set whatever standards they please.

IV. CODETERMINATION RESTORES WORKER'S VOICES IN A WAY THAT COMPLIMENTS AMERICAN LAW AND POLITICS

German codetermination has the potential to fill the void left by weakened unions because it doesn't require strong union participation, it can be adapted to fit the U.S. statutory labor law scheme, and German corporations have key similarities to American ones. Notably, an additional key detail is that the U.S. adheres to a "shareholder primacy" scheme of corporate governance which has the sole purpose of maximizing shareholder benefit.[79] This philosophy goes back to the Berle-Dodd Debate in the 1930s where Berle espoused the idea that corporate law should function like trust law, in that corporate managers owed a fiduciary duty to manage the corporation in the interest of shareholder-beneficiaries.[80] Dodd, on the other hand, argued that corporate managers "should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."[81] In Dodd's view, corporations have "a social service as well as a profit-making function."[82] As we now know, Berle's argument won the

78. *See* Kabir Dasgupta & Zofsha Merchant, *Understanding Workers' Financial Wellbeing in States with Right-to-Work Laws*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES, (Sept. 8, 2023), https://www.federalreserve.gov/econres/notes/feds-notes/understanding-workers-financial-wellbeing-in-states-with-right-to-work-laws-20230908.html (first citing William J. Moore & Robert J. Newman, *The Effects of Right-to-Work Laws: A Review of the Literature*, 38 INDUS. & LAB. RELS. REV. 571, 574 (1985); then citing Daniel H. Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C. L. REV. 233, 240 (1959); then citing Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. LAB. ECON. 255, 257 (1991); and then citing James Feigenbaum et al., *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws*, 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24259, 2018)).

79. *See* Jäger et al., *supra* note 1, at 3; Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 647 (2006) (citing A. A. Berle, Jr., *Corporate Powers as Powers in Trus*t, 44 HARV. L. REV. 1049, 1074 (1931)).

80. *See* Fisch, *supra* note 79, at 647 (citing Berle, Jr., *supra* note 79, at 1074).

81. *Id.* (quoting Berle, Jr., *supra* note 79, at 1156).

82. *Id.* (quoting Berle, Jr., *supra* note 79, at 1148).

day, because shareholders are deemed as the owners of the corporation with their interest defined in property rights.[83]

Milton Friedman said, "an entity's greatest responsibility lies in the satisfaction of the shareholders."[84] This norm has now permeated much of corporate culture in the U.S., as well as the world, and has led to companies making hasty decisions in order to reach short-term goals for the sake of shareholder benefit.[85] Often this has the effect of corporate managers neglecting the long-term effects of their decisions on consumers, the environment, and workers.[86]

The shareholder primacy corporate culture, combined with a neutered union framework, has created a landscape that effectively silences worker voices. One of the few remaining places workers can turn to have their interests protected are labor specific statutes. Statutory schemes such as the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act provide certain protections to workers but are contingent on a legislature that values the interest of labor.[87]

Although this reality may appear bleak, it presents a unique opportunity for the U.S. to take advantage of its statute-heavy, bargaining devoid, labor relations scheme and legislate a federal codetermination law. Even though Germany has a thriving union culture in comparison to the U.S., its codetermination scheme can operate entirely independently of it.[88] The Codetermination Act only specifically calls for union participation in Section 7 "Composition of the Supervisory Board," and states:

The employee members of the supervisory board must include:

1. In a supervisory board composed of six employee supervisory board members, four employees of the company and two representatives of trade unions;

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83. *See id.* at 649 (citing David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 230 (1991)).

84. *See* Corp. Fin. Inst., *Friedman Doctrine* CFI: RESOURCES, https://corporatefinanceinstitute.com/resources/equities/friedman-doctrine/ (last visited Sept. 1, 2024).

85. *See id.*

86. *See id.*

87. *See generally* Fair Labor Standards Act of 1938 29 U.S.C. §§ 201–219; Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678; Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461; U.S. Dep't of Labor**,** *Summary of the Major Laws of the Department of Labor* (2023), https://www.dol.gov/general/aboutdol/majorlaws (last visited Sept. 1, 2024).

88. *See generally* Codetermination Act, *supra* note 23, § 7(2).

2. In a supervisory board composed of eight employee supervisory board members, six employees of the company and two representatives of trade unions; and

3. In a supervisory board composed of ten employee supervisory board members, seven employees of the company and three representatives of trade unions.[89]

At no other point in the act are unions mandated to be a part of any of the functioning of supervisory boards; their members sitting on the board are merely granted rights that are commensurate with the rights of non-union board members.[90]

Furthermore, the Works Constitution Act similarly allows for cooperation with and participation of trade unions in works councils but lacks any language mandating them to be a part of them.[91] The act states, "the employer and the works council work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment."[92]

Thus, the works councils have even less of a required tie to the unions than the supervisory boards do. They are simply provided for in the statutory language to assure that since they do exist, the council will respect their agenda as it goes about its work.

This framework, where the supervisory board and works council are encouraged to work with the unions but only required to in one section of the Codetermination Act, lends itself nicely for application in the United States. Since American unions have relatively little influence, a codetermination scheme that does not rely on them to function fits snuggly into U.S. labor law. The U.S. would only need to erase the language that mandates that a share of supervisory board seats go to union members, and simply indicate that half of the seats are occupied by shareholders and half by employees. If a union exists and wants to collaborate with the board or council, they have the right to, but it is not required.

Also, the election process outlined in the Codetermination Act translates smoothly into U.S. companies as well.[93] The same principle of unions

89. *Id.*

90. *Id.*

91. *See generally* Betriebsverfassungsgesetz BetrVG [Works Constitution Act], Oct. 11, 1952, https://www.gesetze-im-internet.de/betrvg/BJNR000130972.html (Ger.) [hereinafter Works Constitution Act].

92. *Id.* at § 2(1).

93. *See generally* Codetermination Act, *supra* note 23, §§ 10-17.

providing input on delegates or candidates—if they exist—can apply here because the election process is capable of being run entirely independently of unions. The first set of board elections would be organized by management, and from there on out the representatives could run the employee elections as they internally deem fit. As for the shareholder representatives, U.S. corporations already have internal processes for electing their board, so that side will not need to be dictated at all by codetermination law.[94]

If the U.S. follows the German approach, perhaps it should not make a distinction between companies with less than 2,000 employees only having one-third representation, and companies with more than 2,000 employees having near parity.[95] Germany, and other European codetermination countries, can get away with this distinction because their various collective bargaining schemes ideally make up for the power that minority board representation lacks. The U.S. does not have strong collective bargaining to fall back on, so it needs to implement the most effective form of codetermination in order to restore workers' voices. A Finnish representative said this about the dynamic between workers and shareholders with a minority rule: "We have the same powers and responsibilities, but of course I know where the power lies. Of course, if we come to a vote, then we lose—but the [shareholder representatives] always seek consensus . . . . Very frequently, they ask us, they challenge us, and so they want our opinion."[96] There are undoubtedly benefits merely from the dialogue fostered with minority worker representation, but the U.S. needs to maximize worker power, which is what parity codetermination potentially offers.[97]

Another aspect of German codetermination that can be especially useful for the U.S. is its two-level structure.[98] The supervisory board operates separately from the executive board, as essentially an auditor of its decisions, so corporations can retain their current hierarchy that has been built out of the shareholder primacy norm.[99] The executive board still makes the high-level operating decisions for the entire company and can continue operating to maximize shareholder benefit, but workers will have the backstop of the

94. *See* James Chen, *Board of Directors: What It Is, What Its Role Is*, INVESTOPEDIA (Feb. 19, 2024), https://www.investopedia.com/terms/b/boardofdirectors.asp.

95. *See generally* German Codetermination ("Mitbestimmung"), *supra* note 21.

96. Michael Gold, Norbert Kluge & Aline Conchon, '*In the Union and on the Board': Experiences of Board-Level Employee Representatives Across Europe* 35, 40 (Michael Gold et al. eds., 2010).

97. *See* Jäger et al., *supra* note 1, at 2.

98. *See generally* Berger & Vaccarino, *supra* note 17.

99. *See id.*

supervisory board it reports to, to hold it accountable for any erroneous or harmful decisions it makes.[100]

Further, at the company ground level at all the various branches, plants, and stores, the works council can have its finger on the pulse of the day-to-day decisions of management.[101] This can fill in the gaps of where unions are lacking influence over the issues most tangible to the average worker. In Germany, employers cannot make changes to the issues covered by works agreements without first consulting the works council.[102] This, combined with the Nordic style "single channel" workplace representation,[103] is perfectly applicable to achieve the bargaining power the U.S. lacks in the absence of unions. The issues works councils negotiate with employers on include safety measures, hours, benefits, and pay systems, which are the kinds of things unions would have covered before they were gutted.[104] The U.S. can adopt this exact system and include wage negotiation to create a system where workers' voices are mandated to be heard at all levels of employer decision-making.

The U.S. clearly has made a concerted effort over the years to pass legislation on tangible issues in workers' everyday lives. Regulations regarding working conditions, minimum wages, benefits, and many other topics can be found in statutes the U.S. Department of Labor enforces.[105] So if the U.S. wants to maintain this dedication to protecting workers by statute, it makes sense for a federal statute introducing codetermination to be added to the Department of Labor's toolbox. It would be consistent with the nation's trend of holding employers accountable by statute, while also creating an added dimension of direct worker influence on how these companies make decisions.

In addition, the U.S. and Germany share some key corporate law and structure norms that may prove to streamline the adoption of codetermination. First, German corporations—like their American

100. *See id.*

101. *See id.*

102. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

103. *See* Jäger et al., *supra* note 1, at 18 ("In countries with 'single-channel' shop-floor representation, such as the Nordic countries, establishment-level union representatives function both as codetermination representatives (who have co-decision-making rights) and as union representatives (who have rights to engage in local wage negotiations and collective bargaining).").

104. *See* Jäger et al., *supra* note 1, at 16 (citing Christine Aumayr et al., EMPLOYEE REPRESENTATION AT ESTABLISHMENT LEVEL IN EUROPE (2011), https://www.eurofound.europa.eu/en/publications/2011/employee-representation-establishment-level-europe).

105. *See generally Summary of the Major Laws of the Department of Labor, supra* note 87.

counterparts— drifted away from considering all stakeholders in their decision-making in the second half of the twentieth century.[106] In 1965, the German Stock Corporation Act was revised to eliminate previously enumerated duties to the welfare of the corporation, employees, the people, and the state.[107] The rationale for the elimination was that these duties were implied in every corporation, but as can be observed from American corporate culture, eliminating these express duties has the tendency to allow profit-seeking corporations to act in more myopic ways.[108] Today, many corporate directors in Germany mainly consider the interests of the large banks that own most corporate stock to the detriment of other small shareholders and stakeholders.[109]

Second, state corporate laws usually permit U.S. corporations to adopt a two-level structure similar to Germany's supervisory board and executive board.[110] The board of directors in U.S. corporations typically outsources their day-to-day operational decision-making duty to a group of executives that report to the board, like how the executive board is subject to supervisory board disproval in German companies.[111] The main difference between the

106. *See* Franck Chantayan, *An Examination of American and German Corporate Law Norms*, 16 ST. JOHN'S J. LEGAL COMMENT. 431, 440 (2002) (citing Enno W. Ercklentz, Jr., *The GmbH Law Amendments of 1980*, 15 THE INT'L LAW. 645 (1981) (indicating 1965 revision of Stock Corporation Act eliminated many duties required of management in the 1937 Act)).

107. *See id.* at 440-41.

108. *See id.*

109. *See id.* at 445 (first citing Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69, 105, 107 (1998); then citing David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV.145, 149 (1998); and then Gustavo Visentini, *Compatibility and Competition between European and American Corporate Governance: Which Model of Capitalism*, 23 BROOK. J. INT'L L. 833, 843 (1998); and then Mary E. Kissane, *Global Gadflies: Applications and Implications of U.S.-Style Corporate Governance Abroad*, 17 N.Y.U. J. INT'L COMPAR. L. 621, 651 (1997)).

110. *See id.* at 438 (first citing Aktiengesetz [Stock Corporation Act], § 82(1) https://www.gesetze-im-internet.de/aktg/__82.html (Ger.); then Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L. J. 73, 97 (1998); and then Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 THE GEO. WASH. L. REV. 135, 147–49 (1997)).

111. *See id.* at 441 (stating that where in the U.S. the board will usually select a group of officers to run the day-to-day affairs, the "German management board is obligated to supply information to the supervisory board") (first citing DEL. CODE ANN. tit.8, §142(a) (1998); then citing HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS §212 at 158 (3rd ed. 1983); then citing E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 395 (1997); then citing § 90 AktG; then citing HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 260 (1982); and then citing David Charney, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 150 (1998)).

two is that American boards are more acutely scrutinized by individual shareholders who can remove the board with or without cause; in Germany, boards can only be removed for cause with a lower standard of proof than in the U.S.[112]

One key difference to note is that German law holds corporate managers to the standard of a "diligent and conscientious manager."[113] U.S. law, on the other hand, only holds managers to the standard of care of an "ordinarily prudent person in a like position."[114] Although this standard difference can potentially lead to incongruent outcomes in lawsuits, when accountability is handled internally, these two approaches should be easily reconciled. Each company will be different in how its supervisory board and executives interact, so the state's law on the official standard of care they are beholden to will not make a difference since the U.S. has a lower standard than Germany to begin with. German courts also give managers less discretion than American courts, more often deciding they have taken unreasonable risks.[115] Since U.S. courts are less likely to question companies' business judgment, codetermination can serve as a useful backstop to internally stop nearsighted decisions from being made that German courts would hold companies accountable for.

Moreover, in *Stop the Beach Renourishment, Inc. v. Florida. Dep't of Env't Prot.*, a Florida statute allowing local governments to get permits to restore coastlines where private citizens owned property rights was not a constitutional taking.[116] The owners had the right to access the water from their property and receive accretions (gradual additions of sand and other materials) to their property and claimed that the government restoration would create a new boundary line so that new accretions would be on public land rather than theirs.[117] The Supreme Court reasoned that these rights to

112. *See id.* at 444 (first citing § 93 II AktG; then citing HORN ET AL., *supra* note 113, at 260; then citing DEL. CODE ANN. tit.8, §141(k) (1974); and then quoting Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Board*, 70 TUL. L. REV. 1819, 1824–25 (1996)).

113. *See* Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures* 17 ARIZ. J. INT'L & COMP. L. 555, 590 (2000) (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 21, 1997, 135 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 245 (Ger.)).

114. *See id.* (citing N.Y. Bus. Corp. Law § 717(a) (Consol. Lexis Advance through 2024 released Chapters 1-334)).

115. *See id.* at 591 (citing Uwe Huffer, AKTIENGESETZ, KOMMENTAR, § 95 Rn. 6 (1999)).

116. *See* Stop the Beach Renourishment Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 715 (2010).

117. *See id.* at 710.

future exposed land and contact with the water were inferior to the State's right to restore its coastal land.[118]

This is significant for the constitutionality of codetermination legislation because the statute allowed for a public determination that the outer edges of the owner's property rights should yield restoration for the public good.[119] This same logic may be applied to potential takings clause challenges to codetermination, as employee representation can be analogized to public restoration to the outer edges of privately held companies. With the precedent set by *Stop the Beach Renourishment Inc*., codetermination is more likely to survive constitutional challenges like it did in Germany at its inception.[120]

Finally, passing codetermination legislation seems to be becoming more politically feasible. In 2018, Senator Elizabeth Warren proposed the Accountable Capitalism Act which provided, among other corporate governance changes, that "the boards of United States corporations must include substantial employee participation: Borrowing from the successful approach in Germany and other developed economies, a United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees."[121]

Additionally, that same year, Senators Tammy Baldwin, Brian Schatz, and Elizabeth Warren sponsored the Reward Work Act, which would require every publicly traded company to allow employees to elect one-third of its board of directors.[122] Although neither of these bills rises to the level of German codetermination, they prove that there is interest in the concept at one of the highest levels of the U.S. government. A 2018 study by Data for Progress found that 52% of likely 2018 voters supported codetermination and only 23% opposed it.[123] Not only does German codetermination fit well into American labor law, but it is also on the verge of having legitimate political viability.

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118. *See id.* at 713.

119. *See generally id.*

120. *See* BVerfG, 50 BvR 290.

121. Elizabeth Warren, *Accountable Capitalism Act*, ELIZABETH WARREN: NEWSROOM: PRESS RELEASES (Aug. 15, 2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf; *see* Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

122. *See* Reward Work Act, S. 2605, 115th Cong. (2018).

123. *See* Data for Progress, THE NEW PROGRESSIVE AGENDA, https://www.dataforprogress.org/the-new-progressive-agenda-project/ (last visited Oct. 6, 2024).

V. CODETERMINATION PRODUCES BENEFITS FOR WORKERS SIMILAR TO UNIONS

The benefits workers see from strong union representation are well documented.[124] Therefore, for codetermination to legitimately make up for where union representation in the U.S. lacks, it needs to create similar benefits. Luckily, Germany, and many other European countries, have experience with their systems in place to study the impacts.[125]

First off, it has been found that companies governed by codetermination invest more domestically than U.S. companies do.[126] This has led to more capital-intensive production that serves overseas markets better, evidenced by Northern European countries' relatively smaller trade deficits with China compared to the U.S.[127] This has also benefitted the workforce by increasing the share of skilled workers in high-wage jobs in a codetermination country's labor forces.[128] As companies governed by codetermination consider the needs of all stakeholders, including workers and their communities, more fulfilling jobs will be created domestically rather than outsourced.

Another example of codetermination considering the needs of all stakeholders can be found in a 2019 study on the relationship between codetermination and a company's corporate social responsibility (CSR) policies.[129] The results were that codetermination has a positive relationship with substantive CSR policies like targets for reduction in emissions, CSR reporting, and employment security.[130] This study made clear that when employees have their voices heard at the highest level of management, companies respond with more sustainable decision-making.

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124. *See generally* LABOR UNIONS AND THE MIDDLE CLASS, *supra* note 14.

125. *See Board-Level Employee Representation*, https://worker-participation.eu/board-level-employee-representation0#:~:text=Thresholds%20and%20numbers,there%20are%20not%201%2C000%20domestically (last visited Nov. 3, 2024).

126. *See* George Tyler, *Trade War Anomaly: Why Northern Europe Sells More to China, Proportionally, Than We Do*, THE AM. PROSPECT (Aug. 15, 2019), https://prospect.org/power/trade-war-anomaly-northern-europe-sells-china-proportionally/.

127. *See id.* ("[German] exporters outperformed Americans by a factor of four or five. Dutch exporters outperformed Americans by a factor of 2.5. Swedish exporters outperformed Americans by a factor of two. And Danish exporters outperformed Americans by nearly 50 percent").

128. *See* George Tyler, *The Superiority of Codetermination*, SOCIAL EUROPE (July 16, 2019), https://www.socialeurope.eu/the-superiority-of-codetermination (stating that as of 2006, the share of the workforce in each major codetermination country—Germany, Denmark, Sweden, Finland, Norway, Austria, and Netherlands—in skilled occupations is larger than the U.S.).

129. *See generally* Robert Scholz and Sigurt Vitols, *Board-Level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?,* 25 EUROPEAN J. OF INDUS. RELS. 233 (2019).

130. *See id.* at 241.

A 2004 study by Forschungsinstitut zur Zukunft der Arbeit [Institute for the Study of Labor] looked at sixty-five companies' productivity levels before and after the Codetermination Act of 1976.[131] The study concluded that these newly codetermined companies increased overall productivity in the years following the Codetermination Act compared to the years preceding it.[132] This result is in stark contrast to many of the criticisms leveled at codetermination, which worry that it will negatively impact productivity and profits as the cost for redistributing power to workers.[133] When worker perspectives are represented at the highest levels of decision-making, everyone involved in the company wins. Productivity can be increased, resulting in more returns for shareholders, and resulting in better jobs for workers.[134]

An additional study from Hans-Böckler-Stiftung compared German companies with codetermination to similar European companies without codetermination as they recovered from the Great Recession.[135] The study found that between 2006 and 2011, German companies saw a 7.2% increase in earnings per share, while the other European countries saw a 21.1% decrease.[136] Additionally, the German companies cut jobs at a lower rate than the other companies during and while recovering from the recession.[137] This is likely because they chose to cut pay instead, as their employees were already making more on average than those at the non-codetermination companies.[138] Finally, the codetermination companies made significantly more investments in research and development and new plants between 2008 and 2013.[139] This is an excellent example of codetermination helping

131. *See generally* Felix R. FitzRoy and Kornelius Kraft, *Co-Determination, Efficiency, and Productivity* (Forschungsinstitut zur Zukunft der Arbeit [Inst. for the Study of Lab.], Discussion Paper No. 1442, 2004).

132. *See id.* at 19.

133. *See id.*

134. *See* Larry Fauver and Michael E. Fuerst, *Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards*, 82 J. FIN. ECONS. 673 (2006) (showing that the judicious use of labor representation increases firm market value and that the greater the need for coordination within the firm, the greater the potential improvement there is in governance effectiveness).

135. *See generally* Marc Steffen Rapp & Michael Wolff, MITBESTIMMUNG IM AUFSICHTSRAT UND IHRE WIRKUNG AUF DIE UNTERNEHMENSFÜHRUNG [CO-DETERMINATION IN THE SUPERVISORY BOARD AND ITS EFFECT ON CORPORATE MANAGEMENT] (Hans-Böckler-Stiftung Mitbestimmung Forschung Stipendien et al. eds. 2019).

136. *See id.* at 40.

137. *See id.* at 56.

138. *See id.* at 59.

139. *See id.* at 61.

companies put long-term investments into action that they might not have if they were only run with short-term shareholder profits in mind.

From a broad, company-wide perspective, codetermination can lead to more sustainable decision-making that creates better jobs for workers and long-term returns for companies. This doesn't necessarily remedy the ills that diminished unions in the U.S. have plagued workers with. There needs to be specific evidence that workers will see substantive change under codetermination.

A 2017 study on median annual compensation growth across OECD countries can shed some light on this.[140] From 1995 to 2013, every major European codetermination country significantly outpaced the U.S. in this metric, ranging from Germany almost doubling the U.S. to Sweden outpacing the U.S. ten-fold.[141] As a percentage of productivity growth, each of these countries, once again, far outpace the U.S. over the same time.[142] This percentage difference is especially significant because productivity far outpacing hourly wage growth is one of the key indicators of how labor has been squeezed since the 1980s.

Furthermore, the U.S.'s Gini coefficient, which is a measurement of a country's inequality on a scale of zero (perfect equality) to 1 (perfect inequality), is significantly higher than the codetermination countries.[143] A 2018 OECD economic survey showed that the U.S. had a Gini coefficient of almost .38—putting it near the bottom of the list with Turkey, Chile, and Mexico.[144] Meanwhile, the majority of the codetermination countries were below .30.[145]

Moreover, a 2016 World Bank study found that the U.S. possesses about 10% less of a middle class than the codetermination countries.[146] Further, according to a 2006 meta-analysis, the U.S. has a significantly higher intergenerational earnings elasticity than some of the codetermination

140. *See generally* Cyrille Schwellnus et al., *The Decoupling of Median Wages from Productivity in OECD Countries*, 32 INT'L PRODUCTIVITY MONITOR 44 (2017).

141. *See id.* at 49 (showing over this period, the U.S. had a growth rate of 0.19; Germany had a rate of 0.34; Sweden had a rate of 2.22).

142. *Id.* (showing that by dividing real median compensation by productivity, Austria is at 72%; Denmark is at 114%; Finland is at 132%; Germany is at 56%; Netherlands is at 62%; Norway is at 83%; Sweden is at 103%; the U.S is at 13%).

143. OECD, *OECD Economic Survey: Germany 2018,* OECD, July 2018, at 16, http://dx.doi.org/10.1787/eco_surveys-deu-2018-en.

144. *See id*.

145. *See id.*

146. OECD, *Under Pressure: The Squeezed Middle Class,* OECD (2018), at 20, https://doi.org/10.1787/689afed1-en.

countries.[147] This means that earnings are more persistent across generations or, in other words, the U.S. has lower social mobility than Germany, Sweden, Denmark, and other codetermination countries.[148] These statistics speak directly to the sharp increase in inequality the U.S. has experienced since the suppression of unions, and how this simply has not been the reality for codetermination countries.[149]

Most of the studies on the impacts of codetermination focus on the companies themselves rather than the workers. A recent study published in the Journal of Law and Political Economy investigated the impact of both company level and workplace level codetermination in a handful of European countries though.[150] It concluded that even though most codetermination systems only afford workers a minority of seats on the board, there are still small positive impacts on wage levels and subjective job quality.[151] It is important to note, however, that each of the codetermination countries also have comparatively robust union frameworks compared to the U.S.[152] The synergy and cooperative culture this has created over time can negatively affect this data, as these countries already have strong institutions empowering workers, with or without codetermination.[153] While the benefits workers reap from codetermination in Europe may be marginal,[154] the benefits in the U.S. could be substantially greater since workers are starting in a situation of greater power imbalance with their employers.

An example of a synergistic effect can be seen in California with its recently passed Assembly Bill 1228.[155] The bill allowed a council of fast-food employees, employers, and government officials to negotiate up to a

147. *See* Anna Cristina d'Addio, *Intergenerational Transmission of Disadvantage: Mobility or Immobility Across Generations?* 33 (OECD Social, Employment and Migration, Working Paper No. 52, 2007).

148. *See id.* ("The higher [intergenerational earnings elasticity], the higher is the persistence of earnings across generations and thus the lower is intergenerational earnings mobility.").

149. *See also* Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCI. 398, 340 (2007) (concluding that income mobility rates have fallen from 90% for children born in 1940 to 50% for children born in the 1980's).

150. *See generally* Jäger et al., *supra* note 1.

151. *See id.* at 25.

152. *See id.* at 22 (stating that as compared to Europe, in the U.S. "unions are much weaker and collective bargaining coverage is much lower").

153. *See id.* (stating that evidence is not yet conclusive that codetermination laws "improve the quality or cooperativeness of a country's industrial relations").

154. *See id*. at 25.

155. *See generally* Press Release, Off. Of Governor Gavin Newsom, California Increases Minimum Wage, Protections for Fast-Food Workers (Sept. 28, 2023), https://www.gov.ca.gov/2023/09/28/california-increases-minimum-wage-protections-for-fast-food-workers/; Assemb. B. 1228, 2023-2024 Reg. Sess. (Cal. 2023).

$22 per hour minimum wage.[156] Although the bill did not set up a traditional codetermination scheme like that used in Germany, the council bears enough resemblance in its composition and function to provide a good comparison. It operated outside of unions, with equal worker and employer representation, and came to a useful compromise on an issue where worker voices have long been suppressed.[157] This looks very similar to the federally mandated codetermination scheme with equal representation and the power to discuss all company and workplace issues that unions no longer have the strength to bargain over. This one bill, in one state, affecting one industry created sweeping change for thousands of workers – imagine what it could do at the federal level when all companies are held to this standard.

VI. CODETERMINATION TRULY UPHOLDS FREEDOM OF CONTRACT AND ASSOCIATION

When the U.S. significantly dismantled its union framework, many workers lost more than just their ability to have their voices heard through union membership. Without unions working to shrink the gap between employer and worker bargaining power, workers miss out on much of their freedom of contract. Also, without a significant union presence at many workplaces, workers are also missing out on their full freedom of association. These are key fundamental freedoms, protected by foundational legal documents in most developed democracies, which have been substantially limited in the U.S. Codetermination can reverse this.

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[158] The Supreme Court has long held that, even though the amendment's text does not expressly recognize a freedom to associate, it is "an indispensable means of preserving" the other First Amendment freedoms.[159] In *Thomas v. Collins*, the court held that freedom of association gave union organizers the right to inform workers of

156. *See* Emily Peck, *California Fast-Food Bill Marks Pivotal Moment for Low-Wage* Workers, AXIOS (Sept. 1, 2022), https://www.axios.com/2022/09/01/california-fast-food-bill-marks-pivotal-moment-for-low-wage-workers; Assemb. B. 1228, 2023-2024 Reg. Sess. (Cal. 2023).

157. *See id.* (demonstrating that A.B. 1228 established a negotiation framework that bypassed traditional union channels, ensuring equal representation for workers and employers, resulting in a compromise that addresses concerns about worker disenfranchisement).

158. U.S. CONST. amend. I.

159. Roberts v. U. S. Jaycees, 468 U.S. 609, 618 (1984).

the advantages and disadvantages of joining a union.[160] In the U.S., the right to freely associate is deeply ingrained through its founding documents and case law specifically targeting workers.[161] When that right is deliberately limited by laws that have a "chilling effect on association,"[162] that assault on workers' constitutional rights requires a remedy. Additionally, one of the U.S.'s foremost labor laws, the NLRA, states in section 151:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[163]

One of the core purposes of the NLRA was to protect workers' ability to freely associate so that they could elect representatives to negotiate on their behalf, in other words – workplace democracy.[164] Although the NLRA intended to encourage this ideal through union membership, it doesn't preclude other forms of workplace democracy.[165] Codetermination also allows workers to elect representatives to negotiate with employers on their behalf.[166] Albeit in an unintended form, the NLRA promise of freedom of association can still be upheld.

On the international level, the International Labor Organization (ILO) reinforced the right to freely associate at the Right to Organize and Collective Bargaining Convention of 1949.[167] More recently, the ILO Declaration on

160. *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).

161. *See* Libr. of Cong., *Amdt 1.8.1 Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Sept. 2, 2024) (first citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965); and then citing Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984)).

162. *See* Ams. for Prosperity Found. v. Bonta, 141 U.S. 2373, 2389 (2021).

163. National Labor Relations Act (NLRB), 29 U.S.C. §§ 151-169.

164. *See id.* § 151.

165. *See id.* § 159(a) ("[A]ny individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect . . . .").

166. *See generally* Jäger et al., *supra* note 1, at 16.

167. *See* Int'l Labor Org. [ILO], *Right to Organise and Collective Bargaining Convention* art. 1-2 (June 8, 1949), https://www.ilo.org/media/334646/download ("Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment . . . Workers' and employers' organization shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.").

Fundamental Principles and Rights at Work affirmed that all members must be committed to protecting "freedom of association and the effective recognition of the right to collective bargaining."[168] Although the U.S. is not a party to the 1949 convention,[169] these international agreements should persuade a global leader like the U.S. to reinforce its domestic commitments to upholding free association.

Further, the U.S. Code also protects the right of every citizen to freely "make and enforce" contracts: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."[170] Here, the right to make and enforce contracts includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[171]

When power imbalances between employer and employee exist, the freedom of contract looks more like Lord Denning's[172] depiction in the English Court of Appeal case, *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*:

> [Exemption clauses] were held to be binding on any person who took them without objection . . . . No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract." But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it.[173]

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168. *See* Int'l Labor Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, at 9 (June 10, 2022), https://www.ilo.org/media/343176/download (stating that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize . . . freedom of association and the effective recognition of the right to collective bargaining").

169. *See* Int'l Lab. Org., *Up-to-date Conventions and Protocols not ratified by United States of America*, NORMLEX, https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871 (last visited Sept. 3, 2024).

170. 42 U.S.C. § 1981(a).

171. *Id.* § 1981(b).

172. Tom Denning was the head of England's Court of Appeal from 1962 to 1982. *See Lord Denning*, BRIT. INST. INT'L COMPAR. L., https://www.biicl.org/documents/9_1987_lord_denning_biography.pdf (last visited Sept. 4, 2024).

173. George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1982] WLR 1036 at 1043 (Eng.).

Unfortunately, the freedom of contract that presumes employers and employees have equal power to walk away from the contract and find a replacement is not a reality for most workers. Employers often "enjoy plentiful access to willing new workers while employees face more difficulties and costs in finding alternative comparable employment."[174] To counteract this natural power imbalance, workers need a collective voice to advocate on their behalf; otherwise, they are at risk of perpetually being at the whim of their employers' contractual terms.

In the past, unions played the role of leveling the bargaining power playing field between employers and employees.[175] Modernly, most workers do not have that luxury though, so a new leveler must be implemented for the U.S. to truly uphold its promise of freedom of contract. This is where codetermination comes in. The German codetermination model, with its two-level structure, offers workers the opportunity to have bargaining power at the company and workplace level.[176] The combined voice of employee representatives on the supervisory board and the works councils will collectively cover most of the issues unions once covered. By requiring employees to have a seat at the table, freedom of contract can finally become a reality on both ends of the bargain.

A similar deprivation has occurred when it comes to the promise of freedom of association in the U.S. On the surface, it would seem by its laws and purported liberties that everyone in the U.S., including workers, can freely associate however they please. Workers can choose, at least ideally, where they work, to be a part of affinity groups at their workplace, and even simply who among their coworkers they associate themselves with. However, due to the developments in labor law that eroded union influence,[177] workers do not truly have the freedom to fully associate themselves in the way the NLRA intended.[178]

Since Right-to-Work laws are embedded in many states' legal systems a right to also not join a union, codetermination is necessary to restore the right for workers to organize that was lost in many workplaces in part because

174. *See* Lawrence Mishel, *The Legal 'Freedom of Contract' Framework is Flawed Cecause It Ignores the Persistent Absence of Full Employment* ECON. POL'Y INST., 4 (Feb. 3, 2022), https://files.epi.org/uploads/242998.pdf.

175. *See* Jäger et al., *supra* note 1, at 4.

176. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

177. *See generally* Mishel et al., *supra* note 12.

178. *See* 29 U.S.C. § 151 (demonstrating that Congress intended that the NLRA would be a policy that eliminates obstructions to commerce by promoting workers' rights to freedom of association, organization, and the designation of representatives to negotiate employment terms on their behalf).

of those Right-to-Work laws.[179] As the German Federal Constitutional Court states: "[a]s historical development shows . . . [g]uaranteeing freedom of association, which primarily serves to protect employees, is not limited to the collective bargaining system. The protection of freedom of association only arises through the interaction of the collective bargaining system, company codetermination and works constitution."[180]

Codetermination can restore workers' ability to come together and decide on representatives who will advocate on their behalf at the company and workplace level. At companies without a union presence, this is likely the only hope employees have to reclaim their ability to associate and advocate on their own behalf via their collective voice. It may not be what the law intended by guaranteeing the freedom to associate in the workplace, but it is an opportunity to reach a very similar end.

VII. CONCLUSION

The woeful state of the American worker is the product of a methodical undermining of their collective voice. The U.S. needs a new remedy to restore its voice if it wants to see its growing inequality and workplace dissatisfaction reversed. This remedy can be found in Germany's codetermination laws.

The U.S. should implement Germany's codetermination scheme because it fits in with its labor and corporate law, as well as the current political landscape. Based on a plethora of studies on current codetermination countries, it also has the potential to produce benefits for workers similar to that of unionization. Lastly, codetermination is an opportunity for the U.S. to uphold its legal promises of freedom of association and contract.

Over the last century, the U.S. became one of the largest economic powerhouses the world has ever seen on the backs of its indispensable workforce.[181] It is time the U.S. show some gratitude toward those workers by taking a significant step in the direction of restoring their power. Codetermination has the potential to benefit workers and companies in ways that are long overdue.

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179. *See* Mishel et al., *supra* note 12, at 28 (citing 29 U.S.C. § 164(b) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.")).

180. *See* BVerfG, 50 BvR 290, ¶ 95.

181. *See* M. Ayhan Kose, Csilla Lakatos, Franziska Ohnsorge & Marc Stocker, *The Global Role of the U.S. Economy*, 1 (World Bank Grp., Policy Research Working Paper No. 7962, 2017) ("The United States is the world's single largest economy (at market exchange rates), accounting for almost 22 percent of the global output and over a third of stock market capitalization.").

THE STIFLED VOICES OF WOMEN IN ARMENIA: HOW GENDER QUOTAS WILL SAVE THE VICTIMS

*Liza Hayrapetyan**

Abstract

This paper explores the critical role of gender quotas in addressing the systemic underrepresentation of women in Armenia's police force and political institutions, particularly in combating the widespread issue of domestic violence. Rooted in deeply entrenched patriarchal traditions, Armenian society has long marginalized women from leadership roles, resulting in ineffective legal protections and law enforcement responses to gender-based violence. By examining the impact of gender quotas in other countries, such as those in Latin America, Europe, and Africa, this paper demonstrates how increased female representation in law enforcement leads to higher reporting rates, improved police responsiveness, and greater institutional sensitivity to domestic violence cases.

Additionally, gender quotas in political offices have been shown to challenge cultural norms, promote women's rights legislation, and allocate resources toward combating gender-based violence. While critics argue that quotas may compromise meritocracy or face societal resistance, this paper counters these concerns by highlighting evidence that quotas create long-term shifts toward gender equality without undermining democratic integrity. Through legal analysis, comparative studies, and statistical evidence, this paper underscores the urgency for Armenia to implement stronger gender quotas, ultimately fostering a more equitable society where women are empowered, protected, and represented in decision-making processes.

* Liza Hayrapetyan is a J.D. candidate at Southwestern Law School, with an expected graduation in May 2025. She holds a B.S. in Environmental Science, with a concentration in Oceanic and Atmospheric Sciences, from the University of California, Los Angeles (UCLA). Ms. Hayrapetyan currently serves as the Special Projects Editor for the Southwestern Journal of International Law. She expresses heartfelt gratitude to her family for their unwavering support and encouragement. She also extends special thanks to Robert for his constant support.

I. INTRODUCTION

The Republic of Armenia is one of the oldest countries, with some of the richest backgrounds and deeply rooted traditions.[1] One of the most critical historical events in Armenia's recorded history is its declaration as the world's first Christian nation in 300 CE.[2] The country is also known for possessing one of the oldest national Christian Churches in the world.[3] As a result, the religion of Christianity has played a significant role in the history and culture of Armenia. With the acceptance of Christianity as the nation's official religion,[4] Armenia's society has subconsciously implemented ideologies and customs into their social lives that have drastically changed life in Armenia. However, this raises an issue in a rapidly changing world, particularly regarding women's rights.

Due to the traditionally held beliefs of a majority of Armenians, likely to be a result of Christian beliefs, men handle most of the "important" roles in government and social institutions.[5] This leads to a disproportionate number of men being in charge of the laws and regulations for the Armenian people, with a lack of representation for women.[6] Additionally, women in Armenia are at a constant risk of domestic violence, and over half of those

1. *See Armenia*, ENCYC. BRITANNICA, https://www.britannica.com/place/Armenia (last visited Oct. 22, 2024).

2. *See id*.

3. *See Armenian Apostolic Church*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Armenian-Apostolic-Church (last visited Nov. 13, 2024).

4. *See Armenia*, *supra* note 1 (stating that with the reign of Tiridates III, Christianity was adopted as the state religion).

5. *See* Int'l Lab.Org. [ILO], *Work and Family Relations in Armenia*, at 2 (Mar. 11, 2010), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@europe/@ro-geneva/@sro-moscow/documents/publication/wcms_312640.pdf (stating that "[w]omen remain significantly underrepresented in leadership positions").

6. *Id.*

who face it do not expect to be helped.[7] With the underrepresentation of women in important roles in Armenian society, victims do not feel comfortable speaking up about the problems and trauma that they may face.[8] As a result, domestic violence has become normalized due to the constant exposure and lack of resolution. With its laws failing to protect women and the police force refusing to enforce the laws, Armenia needs to make changes as soon as possible.

Armenian people have also been a victim of various conflicts throughout its history and even experienced a genocide as recently as the year 1915.[9] Over 900 years ago, Armenian people were a victim of an invasion by the Scythians.[10] During the Armenian Kingdom of Cilicia era, the Scythians invaded Armenia while Armenia was recovering from a previous conflict.[11] During this incursion, the Scythians subjected Armenian women to horrific acts of violence, leading to mass deaths and the capture of the victims.[12]

The ongoing persecution of Armenians, particularly women and children, has deeply impacted the nation's populace, leaving lasting emotional scars.[13] Previous studies have shown that there was an increase in intramarital violence after a genocide occurs.[14] Considering the recency of the atrocities committed, the wound is still fresh in the minds of Armenians. Continued aggression from neighbors in the region only adds to the growing unrest and conflicts that the Armenian people have faced throughout

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7. *See* Human Rights Watch Submission to the Committee on the Elimination of Discrimination against Women Review of Armenia to the United Nations (Sept. 21, 2022), https://www.hrw.org/news/2022/09/21/armenia-submission-un-committee-elimination-discrimination-against-women (stating that that "53.5 percent [of victims] said that help is not expected from anyone" (citing Stat. Comm., AM Partners Consulting Co. & Int'l Ctr. For Hum. Dev., *Survey Domestic Violence Against Women: Analytical Report 2021* (2021), https://armstat.am/file/article/gbv_report_eng.pdf [hereinafter Survey Domestic Violence Against Women])).

8. Varouj Vartanian, *A Hidden Epidemic: Domestic Violence in Armenia,* HETQ (Aug. 15, 2023), https://hetq.am/en/article/159066.

9. *See Armenia*, *supra* note 1; *Armenian Genocide*, ENCYC. BRITANNICA, https://www.britannica.com/event/Armenian-Genocide (last visited Oct. 27, 2024).

10. *See* 2 MICHAEL CHAMICH, HISTORY OF ARMENIA: FROM B. C. 2247 TO THE YEAR OF CHRIST 1780, OR 1229 OF THE ARMENIAN ERA 234 (Johannes Advall trans., n.p., Bishop's College Press by H. Townsend ed., 1827) [hereinafter HISTORY OF ARMENIA].

11. *See id.*

12. *See id*. at 234-35.

13. *See* Gregory Aftandilian, *The Impact of the Armenian Genocide on the Offspring of Ottoman Armenian Survivors*, 25 J. SOC'Y FOR ARMENIAN STUD. 201 (2016).

14. *See* Giulia La Mattina, *When All the Good Men Are Gone: Sex Ratio and Domestic Violence in Post-Genocide Rwanda* 18 (Bos. Univ. Inst. for Econ. Dev., Working Paper, 2012), https://www.bu.edu/econ/files/2012/11/dp223.pdf.

history.[15] This has also likely increased the occurrence of domestic violence as men take their frustration out on women.[16]

Gender quotas in other countries have proved to have a positive impact on women's representation, including decreasing domestic violence.[17] At least 127 countries worldwide have already implemented "some type of quota system in the government."[18] Part II will address how gender quotas in Armenia will help increase sensitivity and, thus, effectiveness in the police force.

Additionally, women holding positions of power help change social norms, improve policies, bring awareness against social issues, and advocate for women's rights.[19] Currently, Armenia implements a "1 in 4" ratio under the electoral code, where "every set of three candidates on a party's list would include at least one male and one female," but this representation is insufficient.[20]

Part III will address the effects of implementing gender quotas in political offices and how it would change the cultural attitudes in Armenia. Finally, Part IV will address the prominent drawbacks and critiques of gender quotas. With studies showing a connection between a higher number of women in political and police offices and a decrease in domestic violence, Armenia must make changes quickly. Domestic violence against women remains an ongoing issue, so Armenia must implement higher gender quotas in its police force and political offices to improve the gaps in police enforcement, cultural attitudes, and lack of resources for victims.

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15. UNICEF, *Children and Families Affected by Nagorno-Karabakh Conflict*, UNICEF, https://www.unicef.org/armenia/en/children-and-families-affected-nagorno-karabakh-conflict (last visited Jan. 2, 2025).

16. *See* La Mattina, *supra* note 14, at 8 ("Genocide survivors could suffer from post-traumatic stress disorder and become more prone to violence.").

17. *See* Lexi Hanks, Impact of Legislative Gender Quotas on Gender Violence Legislation in Latin America 6 (May 1, 2015) (Undergraduate Thesis, UVM College of Arts and Sciences College), https://scholarworks.uvm.edu/castheses/20.

18. *See Gender Quotas Database,* INT'L INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE [INT'L IDEA], https://www.idea.int/data-tools/data/gender-quotas-database/countries (last visited Nov. 9, 2023) (listing 138 counties with constitutional, electoral or political party quotas, and an average level of representation for women in those countries at 27%).

19. *See* Jaya Nayar, *Equal Representation? The Debate Over Gender Quotas*, *Part 1*, HARV. INT'L REV., Nov. 21, 2021, https://hir.harvard.edu/equal-representation-the-debate-over-gender-quotas-part-1.

20. *See* Harout Manougian, *Armenia's New Electoral Code: Part III*, EVN REP. (Aug. 8, 2018), https://evnreport.com/politics/armenias-new-electoral-code-part-iii.

II. HOW GENDER QUOTAS WILL INCREASE SENSITIVITY AND EFFECTIVENESS IN THE POLICE FORCE

This paper argues that the addition of gender quotas within the police force will help decrease domestic violence and also increase the sensitivity and effectiveness of police officers. Additionally, implementing gender quotas will lead to higher reporting rates by women, as well as improved management of domestic violence issues. Domestic violence is a prevalent issue in Armenia, and without support from the police force, victims will be caught in a vicious cycle. Armenia can draw from other countries where quotas have proven to be effective and follow their lead in taking the right step for women's' safety and representation.

Police officers in Armenia tend not to provide support to women in Armenia who are victims of domestic violence.[21] Instead, women are left alone to deal with these "family matters."[22] As a result, most women who go through domestic violence often do not report the incident; only 5% of the women who experienced physical or sexual violence in 2021 said they reached out for help from the police.[23] Attackers do not fear punishment since they know no consequences will come to them.[24] This, in turn, enables a perpetuation of violence, which leads to a destructive cycle.

Women in Armenia continue to be victims of domestic violence. Research conducted on the occurrences of domestic violence for women in Armenia has returned with alarming results. The data of women surveyed found that when asked, 31.8% reported psychological abuse by their husbands/partners, 6.6% reported being victims of sexual abuse, and 14.8% reported being victims of physical abuse.[25] The study also surveyed women to identify the levels of severity of physical abuse reported.[26] The findings showed that 13.1% of women reported being "moderately" abused, which involved slapping, throwing objects, pulling hair, and pushing.[27] In contrast,

21. *See* Human Rights Watch Submission to the Committee on the Elimination of Discrimination against Women Review of Armenia to the United Nations, *supra* note 7.

22. *See id.*

23. *See id.* (citing Survey Domestic Violence Against Women, *supra* note 7, at 56).

24. *See id.*

25. *See* Susina Khachatryan, *Those Who Speak Up: Combating Domestic Violence*, EVN REP. (Jan. 11, 2023), https://evnreport.com/raw-unfiltered/those-who-speak-up-combating-domestic-violence/.

26. *See id.*

27. *See id.*

"severe" abuse, which involved beating, kicking, dragging, strangling, and use of a weapon, was reported at a rate of 5.5%.[28]

Additionally, due to cultural norms and societal expectations, a sizable number of women in Armenia consider it to be their responsibility as a wife to engage in sexual intercourse with their husbands.[29] As a result, when asked about sexual abuse incidents with their husbands, women tend to provide conflicting responses.[30] This inconsistency is illustrated when comparing their confessions of the abuse with their affirmative stance on whether they believe it is their responsibility to fulfill their husbands' needs in that regard. Regardless, the statistics showed that 62.5% of women reported being sexually abused by their husbands.[31]

In response to whether or not they have experienced bodily injury as a result of abuse from their husbands, 20.6% of women reported that they had received physical injuries.[32] In comparison, 1% reported severe injuries that required medical attention.[33] The majority of respondents do nothing to protect themselves from their abuser.[34] Among Armenian women who were victims of domestic violence, 67% did not fight back,[35] and 43.3% stayed silent on the matter.[36] Domestic violence against women in Armenia must be addressed as soon as possible because it is a prominent issue.

The addition of gender quotas within the police force in Armenia will decrease domestic violence against women, as countries that implement such quotas often find that women feel more comfortable reporting domestic violence incidents and are much more likely to do so.[37] One report found that a more prominent female officer representation "lower[s] the subsequent rates of [domestic violence] per population [and] repeated [domestic violence incidents] per month..."[38] Considering that domestic violence is one of the

28. *See id*.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id*.
33. *See id*.
34. *See id*. (76.5% of women who have been physically or sexually abused by their partner continue living with them, seemingly not responding).
35. *See id*.
36. *See id*.
37. *See* Amalia R. Miller & Carmit Segal, *Do Female Officers Improve Law Enforcement Quality? Effects on Crime Reporting and Domestic Violence*, 86 REV. ECON. STUD. 2220, 2244-45 (2019).
38. *Id.*

most common types of violence against women worldwide, it is unacceptable for the female population not to be able to rely on their police.[39]

The diverse perspectives that women bring to the police force challenge traditional power dynamics and contribute to a more holistic approach to handling domestic violence cases.[40] Rather than arguing that "female officers are equal substitutes for males," advocates for women in the police force have argued that female police officers bring to the table what male officers have difficulty doing.[41] For example, female police officers are more likely to respond effectively to victims of domestic violence.[42] Advocates for women have argued that this is one of the distinct contributions females make to the police force.[43] This is significant because it emphasizes the importance of diversity in law enforcement. It is crucial to have a broad range of skills in the police force because the police deal with matters of safety and life and death. Women in domestic violence situations are likely to be scared, feel helpless, and experience psychological trauma.[44] Women might also feel like they have no one to turn to, so they think they cannot escape the situation.[45] They likely feel trapped and, as a result, might have suicidal thoughts.[46] This could put anyone in an extremely dark and dangerous state of mind and thus

39. *See* Ravina Raj, *Domestic Violence Against Women*, 4 INDIAN J. L & LEGAL RSCH. 1, at 1 (discussing domestic violence, most common type of violence conducted against women, as an ongoing female issue in India where "women are subjected to violence as a result of cultural norms and economic dependence").

40. *See* Ivan Y. Sun, *Policing Domestic Violence: Does Officer Gender Matter?*, 35 J. CRIM. JUST. 581, 583 (2007) ("Female officers were significantly more likely than male officers to refer women to shelters and to show sympathy and understanding.").

41. *See* Miller & Segal, *supra* note 37, at 2221 (citing Cara E. Rabe-Hemp, *Female Officers and the Ethic of Care: Does Officer Gender Impact Police Behaviors?*, 36 J. CRIM JUST. 426 (2008)).

42. *See id.* at 2221-44 (citing KIM LONSWAY ET AL., HIRING & RETAINING MORE WOMEN: THE ADVANTAGED TO LAW ENFORCEMENT AGENCIES 3 (2003), https://www.researchgate.net/publication/234761455_Hiring_Retaining_More_Women_The_Advantages_to_Law_Enforcement_Agencies ("[F]emale officers often respond more effectively to incidents of violence against women, a crime that represents approximately half of all violent crime calls to police.")).

43. *See id.* at 2221 (citing Rabe-Hemp, *supra* note 41).

44. *See e.g.,* Ana Gotter, *Battered Woman Syndrome*, HEALTHLINE (May 6, 2021), https://www.healthline.com/health/battered-woman-syndrome#:~:text=Battered%20woman%20syndrome%20is%20considered,t%20get%20away%20from%20it.

45. *See id.*

46. *See id.* (stating that because symptoms of anxiety and depression are also long and short-term effects of battered woman syndrome, it can be assumed that risk of suicide also increases).

must be dealt with carefully.[47] As previously mentioned, domestic violence is a common occurrence throughout the world.[48] Thus, it is not irrational to believe that females in the police force might have experienced it as well. Female officers who might have been in similar situations or know others in similar situations are likely to respond with the right amount of care.

Further, creating a gender-diverse environment in the police force will likely lead to a greater understanding of the needs of domestic violence victims, as well as an improved sensitivity when handling domestic violence incidents, leading to increased reporting rates. This will have incredible impacts if women feel heard, believed, and encouraged to come forward. A study conducted in 2010 showed that having a female leader "caused women to report more crimes [which were perpetuated] against [the women themselves]."[49] Data showed that women "living in a village with a female head are slightly more likely to approach the police."[50] The study showed that there was an increase of 44% in reported crimes against women and a "related increase in the number of arrests for these crimes."[51] The study also indicated that women were "significantly more likely to say that the police solved their case" and that they were less likely to say that "the police refused to register their complaint."[52] Overall, the study indicated a "change in police attitude towards women when there is a female leader."[53]

Interestingly enough, the study also noticed no increase or decrease in other areas of crime.[54] A similar study also showed that there was no impact on the reporting rates of violent crimes against male victims.[55] There is likely an argument here that this confirms a direct correlation between crime reporting rates of violence against women and the presence of women in the police force.[56]

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47. *See id*. (stating references to help in case of emergency and how to tread with someone you might believe is in such relationship).

48. *See* Raj, *supra* note 39, at 1.

49. *See* Rohini Pande & Deanna Ford, *Background Paper: Gender Quotas and Female Leadership* to WORLD DEV. REP. 2012: GENDER EQUAL. AND DEV. 20, at 24 (2011), http://hdl.handle.net/10986/9120.

50. *Id.*

51. *Id.* at 20 (citing Lakshmi Iyer et al., *Political Representation and Crime: Evidence from India*, (Working Paper, Nov. 2010), https://www.isid.ac.in/~pu/conference/dec_10_conf/Papers/LakshmiIyer.pdf).

52. *Id.* at 24.

53. *Id.*

54. *See id.* at 20.

55. *See* Miller & Segal, *supra* note 37, at 2222.

56. *See* Pande & Ford, *supra* note 49, at 24 ("Having a female leader caused women to report more crimes against them.").

Thus, it is clear that women are more likely to trust the police if they know the police represent them. This empathetic connection is crucial in fostering trust and encouraging survivors to seek help, breaking the cycle of silence that often surrounds domestic violence cases. As a result, implementing a gender quota could have significant implications, breaking the vicious cycle and creating a much more positive one.

Recently, Brazil has implemented women's police stations that intend to "assist all women who have been victims of domestic and family violence and crimes against sexual dignity."[57] These police stations will work "around the clock, including holidays and weekends," and will be carried out privately to ensure the victims' privacy.[58] Ensuring that help is available for victims of domestic violence at all times throughout the day and year will likely increase reporting rates in the area. It is also crucial to ensure the privacy of the victims, as it is common for domestic violence incidents to lead to life-or-death situations.[59] Furthermore, all of the female officers working at these specialized police stations are required to receive adequate training to "allow for the reception of victims in an effective and humanitarian manner."[60] This is a crucial component of the program because it signifies that the female officers responding to those incidents would likely be able to handle the situation with care. Lastly, these police stations must provide a telephone number or other electronic messenger for victims to immediately alert the police in case of an incident.[61] This program was enacted in early April of 2023 and will provide "psychological and legal assistance to female victims of violence."[62] Although it is too soon to examine the impacts of these specialized police stations on domestic violence against women in Brazil, it is likely to have a positive impact. These police stations will not only train female police officers to handle sensitive incidents, such as domestic violence cases, but also provide opportunities for females to participate in

57. *See* Eduardo Soares, *Brazil: New Law Creates Specialized Police Stations for Women*, L. LIBR. OF CONG. (Apr. 28, 2023), https://www.loc.gov/item/global-legal-monitor/2023-04-28/brazil-new-law-creates-specialized-police-stations-for-women/ (citing Decreto No. 14.541, de 3 de Abril de 2023, Diário Oficial da União [D.O.U.] de 4.04.2023 (Braz.) [hereinafter Decreto No. 14.541]).

58. *Id*. (citing Decreto No. 14.541, *supra* note 57).

59. *See* CDC, *About Intimate Partner Violence*, CDC, https://www.cdc.gov/intimate-partner-violence/about/index.html (last visited Nov. 27, 2024) (discussing statistics that one in five homicide victims are killed by an intimate partner, and that over half of the female homicide victims are killed by a current or former male intimate partner, suggesting that domestic violence is likely to lead to life-or-death situations).

60. Soares, *supra* note 57 (citing Decreto No. 14.541, *supra* note 57).

61. *Id.* (citing Decreto No. 14.541, *supra* note 57).

62. *See id*. (citing Decreto No. 14.541, *supra* note 57).

leadership roles within the police force. This will also encourage women to seek help and allow them to gain trust in law enforcement.

III. GENDER QUOTAS IN THE POLITICAL ARENA AND ITS IMPACT ON TRANSFORMING CULTURAL ATTITUDES

This section addresses the cultural and societal barriers women face in Armenia, such as traditional gender roles, and a patriarchal society that is resistant to change. Additionally, harmful stereotypes about women are heavily prevalent in Armenia.[63] These barriers often lead to violence and prejudice against women.[64] Implementing gender quotas will allow for the normalization of women in power and politics. These quotas will break the stereotypes and prepare more women for a life in the political arena. With an increase in representation for women in politics, domestic violence will eventually decrease.

The Republic of Armenia has deeply ingrained traditional gender roles, in part due to its patriarchal society that is resistant to change.[65] Although seemingly innocent, these traditional stereotypes about women often cause harm.[66] Men often perceive "women defenders" as "challenging accepted socio-cultural norms," and thus, they are at risk of "suffering certain types of violence and prejudice."[67] This includes "threat of both physical [and] verbal attacks" from "anti-human rights extremist groups."[68] Furthermore, Armenia is failing to fulfill its duty to provide a safe environment and adequate protection for human rights defenders, as required by the international treaties that Armenia has ratified.[69] Nevertheless, this goes ignored.

Implementing gender quotas is crucial to breaking these cultural attitudes towards women by normalizing women holding positions of power. It is the first step needed to guarantee the protection of women. These women can become role models for other women and introduce a more women-friendly legislation.[70] Furthermore, this would convey that women can and

63. *See Biannual Newsletter, January–June 2019* (Coalition to Stop Violence Against Women) 2019, at 1 [hereinafter Violence Against Women Newsletter].

64. *See id.* at 13.

65. Khanum Gevorgyan, *Born Ashamed: Overcoming Gender Stereotypes in Armenia*, HETQ (Mar. 23, 2019), https://hetq.am/en/article/102075.

66. *See* Violence Against Women Newsletter, *supra* note 63, at 13.

67. *Id.*

68. *Id.*

69. *See id.*

70. *See* Hanks, *supra* note 17 ("[A] larger quantity of women in a legislature would produce more women friendly legislation.").

should participate in important legislative decisions. Women play an "important role in creating laws that protect themselves from gender violence."[71]

Additionally, the higher the number of women found in the total legislation, there is a higher "likelihood of having full legal protections against gender violence."[72] This implies that women are more likely to tackle issues in the political arena that will help battle domestic violence. A law targeting domestic violence may go unnoticed or be ignored in a political stage in which men dominate. However, it is less likely to be brushed under the rug by a woman. This is because domestic violence laws indirectly and implicitly relate to the female population since women are more likely to suffer domestic violence, especially in a country like Armenia.[73]

It is worthwhile to note that the South American countries have seen a tremendous change in women's representation and rights after the implementation of gender quotas. Argentina, in particular, has seen a positive impact of implementing gender quotas in its politics.[74] Additionally, Argentina was the "first country in the world to have passed a Gender Quota Law for legislative elections in 1991."[75] This was in line with "Argentina's policy on the promotion of women's political participation."[76] Argentina has seen tremendous success because "gender parity applied to electoral lists is the policy that has produced the best results in increasing the ratio of female lawmakers elected to lower houses in Congress."[77] As a result, Argentina, like most of the countries that have passed gender parity laws, has seen women's representation "show a significant increase with unprecedented rates, most of which are over 40%."[78] This figure is not marginal but rather substantial.

Furthermore, the implementation of these gender quotas in Latin America has shown a difference in the way society perceives women.

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71. *See id*. (citing David L. Richards & Jillienne Haglund, Violence Against Women and the Law (Paradigm Publishers ed., 2015)).

72. *See id*. (citing Richards & Haglund, *supra* note 71).

73. *See* Violence against Women Newsletter, *supra* note 63, at 1.

74. *See* Tricia Gray, *Electoral Gender Quotas: Lessons from Argentina and Chile*, 22 BULL. LAT. AM. RSCH. 52, 61 (2003) ("The quota law has had a powerful positive impact on the number of women elected in the Argentine Chamber of Deputies.").

75. Press Release No. 541/17, Ministry of Foreign Aff. Int'l Trade and Worship, Argentina Passes Law on Gender Parity in Political Representation (Nov. 24, 2017), https://www.cancilleria.gob.ar/en/news/releases/argentina-passes-law-gender-parity-political-representation (citing Law No. 24012, Nov. 6, 1991, [21174] B.O. 1 (Arg.)).

76. *Id*.

77. *Id.*

78. *Id*.

Opinion polls in Latin America have shown that "two-thirds of the population consider that quotas are, in general, beneficial to the region."[79] In the same poll, 57% of people also agree that "[gender quotas] lead to the formation of better governments" because "women are more honest than men . . . and are better at making decisions."[80] Implementing gender quotas in Latin America has also raised awareness of the problems entailed in women achieving political equality with men.[81] Additionally, the majority of people have agreed that these issues should be addressed "in the short term" and how now the women's question has come to be accepted as a part of the public agenda.[82]

Egypt also implemented gender quotas early on but abandoned them quickly.[83] Egypt introduced a quota of 8% (equivalent to 30 women) in 1979, which yielded thirty-six women into its parliament.[84] Although they did not pass any laws or raise "a substantial number of political issues," this was likely because they received "inadequate support and parliamentary training."[85] After Egypt shortly abolished the female quota in 1986, it saw a significant decrease in women's representation to 2.2% in the immediate cycle.[86] This established that the gender quota implemented was the right move and extremely necessary. Without it, it was almost impossible for women to have a voice or any representation within the political arena. More recently, Egypt's new constitutional amendments of 2019 mandated a 25% women's quota,[87] but also recognized their past mistakes in that implementing the quota alone is not enough. Egypt's constitutional amendments of 2019 also added that for the quotas to be effective and allow meaningful participation, they must be "sustained effort over time."[88] Thus, it is evident that gender quotas have had a significant impact on the political representation of women in South American countries as well as Egypt.

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79. INTERNATIONAL IDEA ET AL., MUJERES EN EL PARLAMENTO. MAS ALLA DE LOS NUMEROS [Women in Parliament: Beyond the Numbers] 174 (Myriam Mendez-Motalvo & Julie Ballington eds., 2002).

80. *Id.*

81. *See id.*

82. *See id.* at 174-75.

83. *See* Jomana Qaddour, *Women's Quotas: Making the Case for Codifying Syrian Women's Political Participation*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 557, 557-79 (2020).

84. *Id.* at 577 (first citing Law No. 21 of 1979 (Election Law), Apr. 1979 (Egypt); and then citing Gihan Abou-Zeid, *Introducing Quotas in Africa: Discourses in Egypt*, in THE IMPLEMENTATION OF QUOTAS: AFRICAN EXPERIENCES 46, 48 (Julie Ballington ed., 2004)).

85. *Id.* (citing Abou-Zeid, *supra* note 84, at 47–48).

86. *See id.* at 578 (citing Abou-Zeid, *supra* note 84, at 47).

87. *Id.* at 581.

88. *Id.* at 582.

Currently, the representation of women in the political arena in Armenia is incredibly low. Studies show that less than 2% of women in Armenia are represented as community heads, and only roughly 10% of women are represented in the local council as of 2019.[89] Furthermore, 24% of the National Assembly Members are women, 8% of Government Ministers are women, and 26% of the Deputy Ministers are female.[90] Currently, there are no female governors, and only 18% of the vice-governors are female.[91] The numbers are staggeringly low, considering that out of the female population in Armenia, 56% of females have completed higher education.[92]

There could be numerous reasons as to why this is so. First, females may feel pressured to stay out of the political arena. This is an incredibly difficult barrier whether they feel unqualified or lack confidence.[93] The male population likely plays a significant role in this aspect. The stereotypes typically seen in Armenia about the female population likely decrease women's confidence. It is also likely that the lack of female representation in political parties prevents women from participating.[94] As there is no representation, women do not feel heard and are less likely to have the courage to participate. However, a survey of politically "elected female[] village leaders in West Bengal, India shows that after two years in their position, they feel as competent as their male counterparts in executing their duties."[95] It is clear that "women want to be leaders"[96] and that they are more than capable.

Many countries have found that there was an impact on domestic violence upon implementing more women in politics. One example of this occurred in Brazil, "where gender violence is widespread."[97] A study shows

89. *See Armenia: Women in Politics*, UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP] (Dec. 2022), http://web.archive.org/web/20230604125047/ (describing project regarding statistics about females and their political representation in Armenia).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Pande & Ford, *supra* note 49, at 4 (citing Lori Beaman et al., *Political Reservation and Substantive Representation: Evidence from Indian Village Councils, in* India Policy Forum, 2010–11 (Suman Bery et al. eds., 2010).

96. *Id.* (alteration in original).

97. Magdalena Delaporte & Francisco J. Pino, *Female Political Representation and Violence Against Women: Evidence from Brazil* 1 (IZA Inst. of Lab. Econ., Working Paper No. 15365, 2022), https://www.econstor.eu/bitstream/10419/263581/1/dp15365.pdf (citing FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA, ANUÁRIO BRASILEIRO DE SEGURANÇA PÚBLICA [Brazilian Public Security Forum, Brazilian Public Security Yearbook] 6 (2018)).

that after a female mayor was elected in Brazilian municipalities, there was "a significant and sizeable reduction in domestic violence against women of relevant age (between [fifteen] and [forty-nine]) over the [four]-year term."[98] This was around a 50% reduction in physical, sexual, and psychological violence against women.[99] The study further concluded that women holding positions of power have "increased attention to policies that might favor women welfare."[100] A similar study found that the presence of a female mayor in Brazil "reduce[d] overall violence against women by between 6 and 11 incidents per 10,000 women."[101] This is estimated to be a decrease of 63%.[102] Additionally, the study found that this effect is more prominent when more women are present in the city council.[103] The study compared the results to one conducted in Italy, which produced significantly similar results, showing that women are less likely to be voted out and more likely to implement policies that will tackle violence.[104]

It is clear that there is a connection between the increase in women's participation in politics and the decrease in domestic violence against women. There are several reasons as to why this is the case, but three particularly stand out. First, women in politics are more likely to advocate for women, especially regarding women's rights and safety. Thus, women in politics are likely to advocate and enact policies that could address domestic violence. Second, women are more likely to use their positions of power to raise awareness about issues that are often left ignored, like domestic violence against women. Lastly, a woman who holds a position of power could influence decisions regarding the budgets and allocate resources toward programs addressing domestic violence. This is especially true in a country where domestic violence is an ongoing and prominent issue.

Additionally, women who live in the Republic of Armenia are at a massive disadvantage due to lack of resources to address their complaints.[105] With very few support groups available, it becomes difficult to seek help.[106]

98. Alena Bochenkova et al., *Fighting Violence Against Women: The Role of Female Political Representation,* J. DEV. ECON., July 7, 2023, at 2.

99. *Id.*

100. *Id.*

101. Delaporte & Pino, *supra* note 97, at 2.

102. *Id.*

103. *Id.*

104. *Id.*

105. *See Armenia: Little Protection, Aid for Domestic Violence Survivors: New Law Should Enhance Safety, Services, Justice*, HUM. RTS. WATCH (Jan. 12, 2018), https://www.hrw.org/news/2018/01/12/armenia-little-protection-aid-domestic-violence-survivors.

106. *See id.*

With little to no medical, psychological, or legal services available, it becomes almost impossible to find help.[107] Armenia only has two domestic violence shelters, "each with a capacity for five women and their children."[108] This is nowhere near enough. The "Council of Europe standards call for at least one . . . shelter in every region and one shelter per 10,000 people."[109]

With more women in the legislative system, it will be more likely that the law will represent them. A study found that there was a correlation between a low representation of women in "law-making processes" in Nigeria and a poor representation of women.[110] Places like Africa, South Africa, Rwanda, and Ethiopia have found a positive correlation between appointing more women in politics and the representation of women.[111] Additionally, some courts have taken the implementation of gender quotas seriously and aim to enforce these quotas.[112]

One such case was raised in 2018 and decided in 2019, where three Slovenian nationals and two political parties challenged the rejection of a candidate list because there were more males than allowed, as per the gender quota.[113] The electoral commissions rejected two separate lists of candidates that the coalition party submitted on May 3, 2018.[114] These two lists included two Slovenian nationals who were candidates for the political parties involved in the case.[115] The electoral commissions stated "that the lists had been drawn up contrary to section 43(6) of the National Assembly Election Act," which essentially prohibited that no female candidates "represent less

107. *See id.*

108. *Id.*

109. *Id.*

110. *See* Zekeri Momoh & R. Nanji Umoh, *Electoral Quotas, Women Representation and Lawmaking Processes in Nigeria's Democracy (1999-2019)*, 11 COGITO MULTIDISCIPLINARY RSCH. J. 128, 139 (2019) (discussing how the lack of electoral quotas has a negative impact on women's representation in Nigeria).

111. *See id.* at 130, 139.

112. *See* Jurij Toplak, *The ECHR and Gender Quotas in Elections*, EJIL: TALK! BLOG EUR. J. INT'L L. (Dec. 19, 2019), https://www.ejiltalk.org/the-echr-and-gender-quotas-in-elections/ (discussing an international case where a party's candidate list did not meet the 35% gender quota and so the electoral authorities "rejected the entire list of candidates, without giving either the candidate or the part[y] any possibility to remedy these [errors];" holding that it was crucial to reject the complete candidate lists to ensure "a more balanced participation of women and men in political decision-making," and explaining that rejecting the list was done so in pursuit of the "legitimate aim of strengthening the legitimacy of democracy"); *see also* Zevnik v. Slovenia, App. No. 54893/18 (Nov. 16, 2018), https://hudoc.echr.coe.int/eng?i=001-199209.

113. *See* Zevnik v. Slovenia, App. No. 54893/18, paras. 1-4 (Nov. 16, 2018), https://hudoc.echr.coe.int/eng?i=001-199209.

114. *Id.* at para. 4.

115. *Id.* at paras. 1, 4.

than 35% of the total number of candidates on . . . [a candidate] list."[116] Neither list had the required 35% female candidates.[117] One list had "six male and two female candidates," whereas the other had "five male and two female candidates."[118]

The Slovenian nationals and political parties argued that the lists should be accepted because both of the lists combined had the required 35% female representation.[119] They also argued that the electoral commissions should have given them time to correct the list rather than just rejecting it immediately, seeing as no other European democracy immediately disqualified entire candidate lists for the aforementioned reasons.[120] However, both the Supreme Court and the Constitutional Court rejected these arguments.[121] The two courts upheld the decision of the electoral commission to reject the list because they stated that the rules had been clear and they should have known the punishment for not complying with them.[122] Furthermore, the Court stated that the "advancement of the equality of the sexes is, today, a major goal in the member States of the Council of Europe."[123] This means that although they recognized their decision to reject the candidate lists was strict, they went forward nevertheless because they believed meeting the gender requirements was just that important.

The Court further explained that the institutions in the member States of the Council of Europe consider the "lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality."[124] The Court highlighted how crucial it is to have adequate female representation in politics and, thus, why they used this justification when they decided to reject the candidate list.[125] By rejecting the candidate lists, the Court implied that without these gender quotas, it would be challenging to have equality. Additionally, the Court stated that they considered that the "interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of

116. *Id.* at para. 4.

117. *Id.*

118. *Id.*

119. *Id.* at para. 5.

120. *Id.*

121. *See id.* at paras. 5-12.

122. *See id.*

123. *Id.* at paras. 22-24, 34 (referencing SGP v. Netherlands, App. No. 58369/10, para. 72 (Oct. 6, 2010), https://hudoc.echr.coe.int/eng?i=001-112340.

124. Zevnik, App. No. 54893/18, paras. 22-24, 34 (referencing SGP, App. No. 58369/10, para. 72).

125. *Id.*

women and men in political decision-making."[126] The Court essentially stated that the purpose of the law is to correct the imbalance between male and female representation in politics.[127] Mandating a gender quota would promote a proportional involvement of both genders when making political decisions that affect all citizens.[128] Additionally, this could promote and even encourage the normalization of women in important decision-making roles.

In its decision, the Court compared and contrasted the facts of the case with another,[129] where the Court considered the reasons for noncompliance when it came to "accepting or rejecting lists of candidates."[130] The Court stated that when balancing the "right to stand for election and ensuring observance of the gender quota," they considered whether or not the "list had been composed diligently."[131] The Court also considered whether the "proposer has knowingly composed it in breach of the gender quota."[132] Thus, they took into account why the noncompliance happened in the first place. In *Zevnik v. Slovenia*, the Court ruled that the breach of the gender quota in the candidate lists occurred because the proposer of the lists "acted without due diligence."[133]

Furthermore, "[t]he proposer was the only one to blame for the breach of the gender ratio requirement."[134] This is significant because it highlights how much the court wants to punish for purposely breaking the gender quotas. Adding sanctions in these situations would discourage gender inequality and would break social norms by normalizing the requirement of women in these roles. Furthermore, the fact that the applicants appealed multiple times, but the higher courts continued to affirm the electoral commissions' decision proves the recognition of gender quotas throughout the different levels of the courts.[135]

Staatkundig Gereformeerde Partij v. Netherlands further evidences the importance of gender equality in Europe.[136] During this case, the Court

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.* at para. 36; *see generally* Sarukhanyan v. Armenia, App. No. 38978/03, (Aug. 27, 2008), https://hudoc.echr.coe.int/eng?i=001-86482.

130. *See* Zevnik, App. No. 54893/18, para. 36 (citing Sarukhanyan, App. No. 38978/03).

131. *See* Zevnick, App. No. 54893/18, para. 36.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* at para. 6.

136. *See* Staatkundig Gereformeerde Partij v. Netherlands, App. No. 58369/10 (July 10, 2012), https://hudoc.echr.coe.int/eng?i=001-112340.

reiterated that because "advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe[,] . . . very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible."[137] This means that the Court would only be willing to allow treating the genders differently under very narrow circumstances. The Court believed that these strict rules are necessary because they recognize that protecting women's representation is of the utmost importance.[138] The Court further proved this by highlighting Article 7 in the applicant's Statement of Principles, which states, "[a]ny measures aimed at acknowledging the equality of men and women are to be regarded positively."[139]

Additionally, Europe has made great legal strides to address gender equality in politics.[140] The Council of Europe's Parliamentary Assembly produced one such resolution that addresses the "impact of measures to improve women's political representation."[141] The measure, which passed in 2016, states that "[e]lectoral quotas are the most effective means of achieving significant, rapid progress, provided that they are correctly designed and consistently implemented."[142] The Council of Europe recognizes that there need to be strict rules set upon first implementing the quotas because, without them, the quotas would not be effective. This is proved by the statement that "[q]uotas should be adapted to the electoral system in force, set ambitious targets, and be coupled with stringent sanctions for non-compliance."[143]

The document also recognizes that "[c]ultural factors determine women's ability to participate in political life and in the economic and social development of a country."[144] The Council of Europe recognizes that social norms play a huge role in shaping the representation of women and that this is a crucial step to making a change. Cultural factors tend to prohibit progression in the battle for women's representation. For example, the common stereotype is "often related to a limited vision of women as mothers,

137. *Id.* at para. 72 (collecting cases).

138. *Id.*

139. *Id.* at para. 9.

140. *See* Toplak, *supra* note 112 (commenting on Staatkundig Gereformeerde Partij, App. No. 58369/10, at paras. 72–73).

141. *See* Eur. Consult. Ass., *Assessing the Impact of Measures to Improve Women's Political Representation*, 16th Sess., Resol. 2111 para. 15.2.4 (2016) (promoting measures to increase political representation).

142. *Id.* at para. 2.

143. *Id.*

144. *Id.* at para. 7.

with the role of homemaker."[145] Thus, this must be addressed for gender quotas to be fully effective. The document recommends "[e]ducation and training" and states that they "are crucial, as they are a precondition for acquiring the necessary skills and for eradicating the stereotypes which still prevent the achievement of full and real parity."[146] Armenia should follow these steps and start education and training early to break the stereotypes.

Finally, the document states that "[p]rovisions on political and civil rights for women in various constitutions are essential because they pave the way for gender equality and for equal citizenship and are the foundation for more specific action for equality."[147] It has been proven that quotas are an effective way to promote gender equality; however, the quotas must be paired with additional "provisions"[148] in order to be as effective as possible.

Thus, there is a connection between resource allocation and a woman holding a position of power in the political arena. To conclude, more resources will be appointed for victims when more women are involved in these issues.

IV. EXAMINING THE DRAWBACKS OF GENDER QUOTAS: CHALLENGES AND CRITIQUES

Although gender quotas are generally seen as positive, there are those who think negatively of them. "Some argue that gender quotas could allow women in based purely on their gender and not on merit."[149] Due to the general lack of opportunities available to women in these communities, there may be a lack of women with all the requirements needed. Implementing a gender quota could cause a police force or political office to feel pressured to meet their quotas. This would then prevent the police force or political office from choosing candidates whose qualifications may not be completely up to par. It would be unfair to candidates with the needed qualifications because it would take opportunities away from them. Furthermore, implementing a gender quota could lead to resentment among the co-workers in the police force or political office. This resentment could cause even more issues for women, especially if the workers believe there are more capable candidates whose spot was taken in order to meet a gender quota.[150]

145. *Id.*
146. *Id.*
147. *Id.* at para. 10.
148. *Id.*
149. *See* Nayar, *supra* note 19.
150. *See id.*

Similarly, a critique has been made that implementing gender quotas in political office will, in fact, further gender discrimination.[151] This argument states that by implementing gender quotas, the country is now favoring women over men when it should be a "society of equal citizenship that does not distinguish between its genders."[152]

However, these arguments can easily be refuted. First, women make up roughly half the population of the world. In order to have a society of equal citizenship, we need equal political representation of both genders. Generally, there has always been a large representation of males in politics.[153] As a result, women have been left behind.[154] Because the quota is "an affirmative action-type mechanism," the quotas must provide preferential treatment to women for them to catch up.[155] The quotas must be "aimed at creating a balance in view of the inequalities women face in acceding to political posts" and must aim to "force their entry [into] positions of public authority" rather than relying on the goodwill of political parties or traditional selection processes.[156] Thus, it is essential to implement gender quotas to address the historical imbalances placed on women's political representation.

Furthermore, it is entirely possible to implement a gender quota without compromising meritocracy. There are likely enough women candidates available in Armenia, especially with the implementation of the International Criminal Investigative Training Assistance Program in Armenia's capital, Yerevan.[157] This organization officially opened the Women in Policing Course in the nation's capital in order to celebrate women in the police force and to emphasize the "importance of gender diversity as a vital component of police reform in Armenia."[158] The International Criminal Investigative

151. *See* Kathleen A. King, Comment, *Representation of Women: Constitutional Legislative Quotas in Rwanda and Uganda*, 1 CHARLESTON L. REV. 217, 227 (2007).

152. Qaddour, *supra* note 83, at 558 (citing Irene Tinker, *Quotas for Women in Elected Legislatures: Do They Really Empower Women?,* 27 WOMEN'S STUD. INT'L F. 531, 533 (2004)).

153. *See id.* at 557–58 ("[T]he average level of representation in countries even with quotas still only hovers around 25.7 percent." (citing *Gender Quotas Database*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (last visited Mar. 22, 2020)).

154. *See id.* at 557 ("In 2019, women represented a mere twenty-four percent in all houses of parliament worldwide." (citing WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT vii (2018))).

155. INTERNATIONAL IDEA ET AL., *supra* note 79, at 1.

156. *Id.*

157. *See Armenia: ICITAP Supports Women in Policing in Partnership with U.S. Embassy*, CRIM. DIV. U.S. DEP'T OF JUST., https://www.justice.gov/criminal/criminal-icitap/blog/armenia-icitap-supports-women-policing-partnership-us-embassy (last updated Aug. 11, 2023) (noting that in 2021 at the opening of the ICITAP there were 37 police female officers).

158. *Id.*

Training Program (ICITAP) worked with the Ambassador of Armenia to officially open the program on November 8, 2021.[159] Additionally, they "welcomed three ICITAP senior police advisors (hailing from municipal police departments from the [United States])" to encourage more women to undergo the training.[160] The Women in Policing course will "address the challenges facing women as they enter traditionally male-dominated workplaces" and provide them with "collective methods for overcoming resistance."[161] Additionally, the program will introduce "personal strategies for maintaining physical and mental well-being in a highly stressful situation."[162]

The Women in Policing program is an incredible step in the right direction for women in Armenia who are interested in joining the police force. The program will allow for women to be trained and ready for the police force. This means that more and more fully qualified female candidates are coming out of the program. Thus, upon implementation of the gender quotas, there will likely be enough qualified candidates who are available for the police force to choose from. This will allow the police force to choose a female candidate based on merit rather than simply based on their gender.

While conducting my research, I was not able to identify similar programs offered to shape women into qualified candidates for political office. However, as previously mentioned, it is known that 56% of the female population in Armenia have higher education.[163] Although "[w]omen are important actors in education and social affairs and . . . [even] well-represented in academia," their political presence remains lacking.[164] This shows that the female population in Armenia is smart, ready, and fully capable of holding positions of power. Furthermore, no specific educational path is required to get into politics. Considering that over half of the female population in Armenia has completed higher education, they are more than ready to pursue a career in politics.[165]

Armenia can implement policies that promote the preparation of females entering the political arena. This has been seen before, with one such example

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 89 (stating that 56% of people with higher education in Armenia are women).

164. Beatrice Koreen Magbauna et. al., *Unraveling the Lingering Truths: Accounts of Women in Men-Dominated Societal Spaces*, 8 PSYCH. & EDUC. MULTIDISCIPLINARY J. 677, 677 (2023).

165. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 89.

happening in Europe.[166] As previously mentioned, Resolution 2011 states that "[a]ccompanying measures are also needed to help women overcome the hurdles they face in accessing and progressing in political life."[167] Additionally, the resolution states that this includes "training and awareness-raising activities, media time reserved for women politicians, policies to help reconcile private life and political activities and, last but not least, legislation and other measures in favor [sic] of more balanced sharing of family responsibilities between women and men."[168] The Council of Europe has long recognized that necessary steps must be taken in order to give the female population the boost it needs to step into the political arena.[169] Without this boost, it is increasingly difficult. This is why Armenia must implement similar steps to address any meritocracy issues it may encounter.

Furthermore, studies have shown that the implementation of gender quotas in politics does not create a public backlash, as previously suspected.[170] Instead, studies have shown that the public tends to react by "[updating] their beliefs about women."[171] Certain groups of people tend to respond strategically by deliberately mitigating the "impact[s] of gender quotas on leadership outcomes."[172] However, it is rational to believe that time and constant exposure to women in political or leadership positions will decrease the likelihood of this occurring.

Second, it is unlikely that implementing gender quotas will cause discrimination against males. On the contrary, the quotas will aim to foster a more inclusive and equitable society by mandating equal representation of both genders.[173] The emphasis on balanced representation ensures that the voices and perspectives of both men and women are adequately heard and considered in decision-making processes.[174] In other words, incorporating gender quotas will increase the chances of equal representation of both genders because the quota would also require equal male representation.

166. *See generally* Eur. Parl. Ass., Resol. 2111, *supra* note 141.

167. *Id.* at para. 3.

168. *Id.*

169. *See* Eur. Consult. Ass., *Assessing the Impact of Measures to Improve Women's Political Representation Report*, Doc. 14011 (2016).

170. Pande & Ford, *supra* note 49, at 3.

171. *Id.*

172. *Id.* ("[T]he groups who are affected adversely – male incumbents, party leaders and firm owners – respond strategically in order to reduce the impact of gender quotas on leadership outcomes.").

173. *Id.*

174. *See id.*

Evidently, courts care about equal representation for both genders, not just for the female population. First, most gender quotas that are implemented require quotas for both genders, not just the female representation. This is specifically to address any concerns of discrimination that can occur as a result of attempting to increase female representation. Furthermore, in one such case, a court disqualified a list of candidates that were predominantly female.[175] The applicant, who was a female, appealed to the Constitutional Court, arguing that because females are underrepresented in Slovenian politics, there "could be no legitimate aim in taking away the rights of those who propose many female candidates."[176] She further argued that this went against the original aim of the Slovenian Parliamentary Elections Act, which was to increase female representation in politics. However, the Constitutional Court did not agree with her arguments. The three-judge panel dismissed the appeal as "inadmissible" and explained that the rules were clear for implementing a 35% gender quota for both genders.[177] Although the case is currently pending with the European Court of Human Rights,[178] the fact remains that the Constitutional Court believed it was important to uphold the gender quotas as a whole for both genders. This shows that although the original aim of implementing the Slovenian Parliamentary Elections Act was to increase the number of elected women, it was never intended for female representation to take over completely.[179] Rather, the ultimate goal was for an equal representation of both genders.

In summary, although some valid arguments can be made against implementing gender quotas in the police force and political office, the benefits heavily outweigh the detriments. It is not only necessary but crucial for the Republic of Armenia to implement gender quotas. It may be a challenge for Armenia to implement the gender quotas, given the likelihood of backlash. However, Armenia must balance its interest in keeping the citizens happy and its interest in the safety, protection, and well-being of half of its population. Given the options, it is likely that the protection of women heavily tips the scale.

175. *See* Zevnik v. Slovenia, App. No. 54893/18, para. 47 (Nov. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-199209.

176. Toplak, *supra* note 112 (citing Zevnik, App. No. 54893/18, para. 7).

177. *Id.*; *see also* Zevnik, App. No. 54893/18.

178. *Id.*

179. *See id.* (citing Zevnik, App. No. 54893/18, para. 34).

V. CONCLUSION

As a nation lagging behind, the Republic of Armenia must move forward and implement higher gender quotas to protect domestic violence victims. The implementation of gender quotas has been seen in multiple countries, including Egypt and Latin America, and has yielded successful results. Embracing the successful models we have seen in these countries is a step in the right direction. Gender quotas are necessary in order to preserve the safety of women, as they have been proven to do so. Women in Armenia will see an improvement in the effectiveness of police, laws, and resources, and thus, indirectly, an improvement against domestic violence. In these modern times, women should not live their lives in fear of what violence their husbands will bring home with them. The implementation of higher gender quotas stands as a beacon of progress, fostering an environment where the safety and well-being of women are paramount.

ESCALATING FOREST FIRES AND GREECE'S FAILURE TO UPHOLD HUMAN RIGHTS: A MODERN GREEK TRAGEDY

*Maria Pappas**

Abstract

The surge in global temperatures and increasing instances of disastrous wildfires have brought environmental litigation to the forefront. Notably, in Duarte Agostinho v. Portugal, the first case of its kind to be heard by the European Court of Human Rights (ECtHR)—Portuguese youths challenged thirty-three European member nations, including Greece, for having inadequate measures against climate change-induced wildfires. Greece responded stating that "the effects of climate change as recorded so far, do not seem to directly affect human life or human health." This paper will argue that the ECtHR must hold that states have a human rights obligation to safeguard the natural environment against wildfires, including climate change-induced fires, emphasizing Greece's unique position due to its landscape and culture. Further, Greece is violating the European Convention on Human Rights (ECHR) by failing to adequately prevent wildfires.

* This note was written by Maria Pappas, a 3L J.D. Candidate at Southwestern Law School with a Bachelor of Arts in Languages and Literature from California State University, Northridge. The author extends her sincere gratitude to Professors Jonathan Miller and Natalia Anthony, the editorial board and staff of the Southwestern Journal of International Law, and Gavriil Xanthopoulos for their invaluable contributions to the development of this paper.

I. INTRODUCTION

Environmental Rights are Human Rights.[1]

Catastrophic forest fires have become the archetype of a distinguished modern tragedy across the globe demanding urgent attention.[2] In 2023 alone, the World witnessed devastating blazes in Maui, Canada, Portugal, Brazil, and Greece.[3] In August, Greece battled the largest wildfire recorded in Europe.[4] The fire, burning for over three weeks in Evros, northern Greece,

1. *See* LAURA WESTRA, HUMAN RIGHTS: THE COMMONS AND THE COLLECTIVE, 9 (UBC Press ed., 2011) (citing Gabcikovo-Nagymaros Project (Hung./Slovk.), Judgment, 114 (Sept. 25, 1997) (separate opinion by Weeramantry C.G.), https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-03-EN.pdf.

2. *See generally 2023: A Year of Intense Wildfire Activity*, COPERNICUS ATMOSPHERE MONITORING SERVICE, (Dec. 12, 2023), https://atmosphere.copernicus.eu/2023-year-intense-global-wildfire-activity.

3. *See id.*

4. *See* European Commission, *Wildfires: Biggest RescEU Aerial Firefighting Operation in Greece*, EUROPEAN CIVIL PROTECTION AND HUMANITARIAN AID OPERATIONS, (Aug. 29, 2023),

accounted for more than 81,000 hectares of lost land, including 30% of the protected Dadia Forest, and over twenty reported deaths.[5] Dadia Forest is home to rich biodiversity and part of "Natura 2000," the world's largest network of protected areas.[6] Meanwhile, approximately 20,000 residents and tourists were evacuated on the island of Rhodes, the highest number of evacuations in Greece's history, amid ravaging flames.[7] The Prime Minister (PM) of Greece, Kyriakos Mitsotakis, reported that "there were weeks . . . with more than 500 fires" breaking out across the country.[8] Thousands of homes were lost along with livelihoods, like beekeeping, honey making, and olive farming.[9] For example, hundreds of thousands of olive trees, many irreplaceable, were destroyed, including those of the ancient Makri mill, yielding around 1,000 to 3,000 tons of olive oil each season.[10] Forests where people could once enjoy nature were left unrecognizable.[11] Campsites such

https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/news/wildfires-biggest-resceu-aerial-firefighting-operation-greece-2023-08-29_en (stating Evros wildfire largest recorded since inception of European Forest Fire Information System (EFFIS) in 2000).

5. *See* George Fokianos, *Pyrkagiés: I Elláda tha plirósei ton pio varý logariasmó – Sta 1,66 dis. to kóstos* [Fires: Greece will pay the heaviest bill – At 1.66 billion the cost], OIKONOMIKÓS OIKONOMIKÓS [Economic Postman] (Sept. 4, 2023, 4:00 PM), https://www.ot.gr/2023/09/04/oikonomia/pyrkagies-i-ellada-tha-plirosei-ton-pio-vary-logariasmo-sta-166-dis-to-kostos/.

6. *The Natura 2000 Protected Areas Network,* EUROPEAN ENVIRONMENT AGENCY, https://www.eea.europa.eu/themes/biodiversity/natura-2000/the-natura-2000-protected-areas-network (last visited Sept. 17, 2024).

7. *See Greece Fires in Maps and Satellite Images Show Extent of Damage*, BBC (July 27, 2023), https://www.bbc.com/news/world-europe-66295972.

8. *See Greek Summer Wildfires Will Burn Over 150,000 Hectares: PM* (Aug. 31, 2023), https://phys.org/news/2023-08-greek-summer-wildfires-hectares-pm.html.

9. *See* Charlotte Elton, *Greece Turns to Tech to Tackle Wildfires as Largest Ever Blaze in EU Continues to Burn*, REUTERS, (Sept. 2, 2023, 1:50 PM GMT+2), https://www.euronews.com/green/2023/09/01/greece-turns-to-tech-to-tackle-wildfires-as-largest-ever-blaze-in-eu-continues-to-burn; *see* Gavriil Xanthopoulos & Miltiadis Athanasiou, *The Fires of Mount Hymettus near Athens Greece (1996-2017): History and Fire Behavior Characteristics in* ADVANCES IN FOREST FIRE RESEARCH 2018 661, 661 (2018).

10. *See* Costas Vasilopoulos, *No Respite in Greece as Wildfires Incinerate Ancient Olive Groves in Makri*, OLIVE OIL TIMES, (Aug. 29, 2023, 3:45 PM UTC), https://www.oliveoiltimes.com/briefs/no-respite-in-greece-as-wildfires-incinerate-ancient-olive-groves-in-makri/123444; Lisa Radiosvky, *Megafire Burns 120,000 Olive Trees in Evros, NE Greece*, GREEK LIQUID GOLD: AUTHENTIC EXTRA VIRGIN OLIVE OIL, (Sept. 14, 2023), https://www.greekliquidgold.com/index.php/en/news/505-megafire-burns-120-000-olive-trees-in-evros-ne-greece#:~:text=Dimitris%20Adamidis%2C%20owner%20of%20Konos,and%20damaging%20Konos%20Hill%20unimaginably.

11. *See generally* Anthony Faiola & Elinda Labropoulou, *How Wildfires are Threatening the Mediterranean Way of Life*, WASHINGTON POST, (Sept. 4, 2023, 5:46 PM EDT), https://www.washingtonpost.com/world/2023/09/02/greece-fires-2023-rhodes/.

as that in the village of Saranti burned down, destroying the stomping grounds of fond memories and future enjoyment of the area.[12]

This distressing pattern is evidenced by prior incidents like the fires that ravaged the island of Evia in 2007 where seventy-eight people died, and another fire in 2021.[13] Further, the infamous 2018 Mati fire tragically claimed the lives of over one-hundred individuals.[14] After the Mati disaster, the then-government ordered for a Commission to investigate and present a report as to why the fires were so devastating and how to prevent such disastrous forest fires and wildfires in the future.[15] That report, named the Goldammer Plan, was presented in February 2019; however, it was never implemented due to a change in government leadership from the SYRIZA party to the New Democracy party.[16] The SYRIZA party accused the New Democracy party, led by Prime Minister Mitsotakis, of failing to protect Greece's citizens and land, showing the need for comprehensive action regarding wildfires.[17]

This paper will argue that Greece must finally implement the Goldammer Plan to protect the environment and human rights. Further, the European Court of Human Rights needs to recognize that environmental sustainability and resiliency affects human rights, and Greece's failure to mitigate the risk of forest fires violates the European Convention of Human Rights.

First, this paper will discuss the background of wildfire issues in Greece, starting with Greece's unique disposition regarding its landscape, culture, and history, then how climate change has exacerbated the issue. Second, this paper will exemplify how environmental litigation can be useful in holding states accountable for failure to protect the natural environment and highlight legal theories upon which a duty exists. Finally, this paper will reiterate the

12. Alan Taylor, *Hundreds of Wildfires Rage Across Greece*, THE ATLANTIC, (Aug. 23, 2023), https://www.theatlantic.com/photo/2023/08/photos-wildfires-greece/675092/.

13. *See* Gavriil Xanthopoulos et al., *Not Business as Usual - New Projects, Policies, and Personnel Aim to Prevent Wildfire Disasters*, INT'L ASS'N OF WILDLAND FIRE (2023), https://www.iawfonline.org/article/situation-report-greece/.

14. *See id.*

15. Alexandros Dimitrakopoulos et al., *I ékthesi tis Anexártitis Epitropís gia tin análysi ton ypokeímenon aitión kai ti dierévnisi ton prooptikón diacheírisis ton mellontikón pyrkagión dasón kai ypaíthrou stin Elláda.* [Report of the Independent Committee Tasked to Analyze the Underlying Causes and Explore the Perspectives for the Future Management of Landscape Fires in Greece], THE GLOBAL FIRE MONITORING CENTER, 11 (Jan. 28, 2019) [hereinafter Goldammer Plan].

16. Xanthopoulos et al., *supra* note 13.

17. *See* Eleni Stergiou, *Fire and Fury in the Parliament with Conspiracy Theories and...Other Mischief*, POL. SECRETARIAT, (Sept. 1, 2023, 7:31 PM), https://www.in.gr/2023/09/01/politics/politiki-grammateia/pyr-kai-mania-sti-vouli-theories-peri-synomosias-kai-allon-diamonion/.

proposals from the Goldammer Plan that were never implemented to deal with forest fire prevention and risk management in Greece.

II. BACKGROUND

A. Greece's Unique Disposition

Greece has a particularly challenging disposition to the increasing occurrence of forest fires because it has over two hundred inhabited islands, many difficult to access from the mainland during an emergency.[18] Further, its woodlands are covered in extremely flammable foliage such as pine needles, pine trees, and other flammable terrain.[19] Additionally, Greece's forests are filled with rich biodiversity, including species not found anywhere else in the world, such as certain types of hawks and vultures.[20] Further, many of the world's cultural and archaeological treasures are found in Greek forestland, such as ancient ruins, temples, monasteries, and villages.[21] For example, ancient Olympia, home to the original Olympic games, is in forestland that was recently threatened by fires.[22] Also threatened by wildfires, were the ancient Greek civilization Mycenae, ancient temple of Ammon Zeus and Mt. Athos in Halkidiki, and Acropolis in Athens.[23] As such, protecting Greece's forests are not only an environmental issue, but also a cultural heritage issue.

Another concern is that disastrous forest fires will deter tourists from traveling to Greece during its high season. Tourism is one of Greece's most important industries, so this would have a significant impact on its economy.[24] Of the thousands evacuated from Rhodes in 2023, many reported

18. *See* Gavriil Xanthopoulos et. al., *Innovative Action for Forest Fire Prevention in Kythira Island, Greece, through Mobilization and Cooperation of the Population: Methodology and Challenges*, SUSTAINABILITY, Jan. 6, 2022, at 1, 3.

19. *See id.* at 8.

20. *See* Matina Stevis-Gridneff, *Tested in Greece's Fires: An Emergency Force for 27 Countries*, N.Y. TIMES, (Aug. 30, 2023), https://www.nytimes.com/2023/08/30/world/europe/greece- fires-eu-climate.html.

21. *See* Peter Schwartzstein, *Greece's Fires Cause Choking Smoke, Threaten Heritage Sites*, NAT'L GEOGRAPHIC, (Aug. 9, 2021), https://www.nationalgeographic.com/environment/article/greeces-fires-cause-choking-smoke-threaten-heritage-sites.

22. *See id.*

23. *See id.*

24. *See For a Sustainable Tourism Industry*, HELLENIC REPUBLIC, GREECE IN THE USA https://www.mfa.gr/usa/en/about-greece/tourism/for-sustainable-tourism-industry.html (last visited Dec. 22, 2023).

terrifying emergency conditions and disorganized orders.[25] Though Prime Minister Mitsotakis offered those who had to flee free vacations to Greece in the future, the fear induced by their past experiences might convince them to altogether avoid the region.[26]

The lack of safe immigration routes for refugees poses a specific threat to a vulnerable group during forest fires. Of the twenty-six reported deaths over the summer of 2023, at least twenty were found to be migrants trapped in the forest.[27] Usually the European refugee crisis and horrors migrants face on their journey to a better life are associated with overcrowded boats and the dangerous conditions people endure for their future and their families. However, the dangers of the forests, too, are real and should not be overlooked. Many refugee camps in Greece are near forests.[28] Refugees are some of the most vulnerable members of society and are confronted with a specific threat of wildfires in this situation, often on islands, increasing the difficulties of reaching safety.[29]

In addition, forest fires differ from other kinds of natural disasters because of their ability to affect neighboring countries with smoke, ash, and air pollution.[30] In *Trail Smelter*, the Arbitral Tribunal stated: "under the principles of international law . . . no State has the right to use *or permit* the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein."[31] This concept is

25. *See* Stephane Mandard, *The Fires in Rhodes Have Spared Tourism, But Not The Island's Nature*, LE MONDE, (Aug. 7, 2023, 8:07 AM), https://www.lemonde.fr/en/environment/article/2023/08/07/the-fires-in-rhodes-have-spared-tourism-but-not-the-island-s-nature_6082925_114.html; *see also* Fedja Grulovic, *Rhodes Wildfire Forces Thousands of Evacuations, Tourists Flee*, REUTERS, (July 23, 2023, 4:46 PM), https://www.reuters.com/world/europe/tourists-flee-greek-island-rhodes-wildfire-thousands-evacuated-2023-07-23/ ("Another holidaymaker, Fay Mortimer from Cheshire in northern England, said the experience had been terrifying.").

26. *See Greece Offers Free Holiday to Tourists who Fled Rhodes Fires*, NEWS 24, (Aug. 2, 2023), https://www.news24.com/news24/world/news/greece-offers-free-holiday-to-tourists-who-fled-rhodes-fires-20230802.

27. *See Greece: Evros Wildfire Dead are Victims of "Two Great Injustices of our Times"*, AMNESTY INT'L, (Aug. 23, 2023), https://www.amnesty.org/en/latest/news/2023/08/greece-evros-wildfire-dead-are-victims-of-two-great-injustices-of-our-times/.

28. *See* Sebastian Skov Andersen & Gabriel Geiger, *Planned Greek Refugee Camp is in 'High-Risk' Fire Zone Next to Landfill*, OPEN DEMOCRACY, (Feb. 15, 2022, 12:01 AM), https://www.opendemocracy.net/en/greek-refugee-camp-lesbos-high-risk-fire-zone-next-to-landfill/.

29. *See id.*

30. *See* Gavriil Xanthopoulos, *Who Should be Responsible for Forest Fires?: Lessons From the Greek Experience*, PROC. OF THE SECOND INT'L SYMP. ON FIRE ECON., PLAN., AND POL'Y: A GLOB. VIEW 189, 198 (2008).

31. Michael Eburn, *The International Law of Wildfires*, *in* RSCH. HANDBOOK ON DISASTERS & INT'L L. 336, 343 (Susan C. Breau & Katja L.H. Samuel eds., Edward Elgar Publishing Limited,

widely known today as the "no-harm" rule of international environmental law.[32] The current climate crisis goes beyond borders and requires particular consideration.

B. Exacerbation Due to Climate Change

With over fifty percent of the Greek territory covered by woodlands,[33] a significant increase in wildfires since 2007 has pummeled ten percent of those woodlands.[34] The impact of climate change is undeniable. According to a study conducted by the National Observatory of Athens (NOA), climate change is predicted to significantly increase the number of days of heatwaves and decrease the number of days with rainfall annually.[35] In particular, a study led by the independent research center Dianeosis estimated an increase in days per year with heatwaves to be anywhere between fifteen to twenty more days, and an increase in the high risk of fire between fifteen percent to seventy percent.[36] The NOA has also shown that average temperatures in

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2016) (quoting Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Apr. 1938, Mar. 1941) (emphasis added)).

32. *See* Laely Nurhidayah, et. al., *The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in Southeast Asia*, 37 CONTEMP. SE. ASIA 183, 185–186 (2015).

33. *See* Vardis-Dimitrios Anezakis et. al., AIAI Presentation of *A Hybrid Soft Computing Approach Producing Robust Forest Fire Risk Indices*, Democritus University of Thrace, (Sept. 16-18, 2016), https://www.researchgate.net/publication/319036562_A_Hybrid_Soft_Computing_Approach_Producing_Robust_Forest_Fire_Risk_Indices (Presentation reflects concepts found in the Conference Paper); *see also* Vardis-Dimitrios Anezakis et. al., *A Hybrid Soft Computing Approach Producing Robust Forest Fire Risk Indices*, *in* 475 IFIP ADVANCES IN INFORMATION AND COMMUNICATION TECHNOLOGY (IFIPAICT) 191-203 (Lazaros Iliadis, Ilias Madlogiannis Eds., 2016 http://dx.doi.org/10.1007/978-3-319-44944-9_17.

34. *See* AFP, *Experts Blame Poor Government Preparation for Greek Fires' Devastation*, THE HINDU (Sept. 2, 2023, 2:19 PM), https://www.thehindu.com/sci-tech/energy-and-environment/experts-blame-poor-government-preparation-for-greek-fires-devastation/article67262974.ece.

35. *See* Dimitra Angra & Kalliopi Sapountzaki, *Climate Change Affecting Forest Fire and Flood Risk—Facts, Predictions, and Perceptions in Central and South Greece*, SUSTAINABILITY, Oct. 17, 2022, at 1–2, 5 (citing John E. Walsh et al., *Extreme Weather and Climate Events in Northern Areas: A Review*, EARTH SCI. REVS., Oct. 2020, at 1; *Extreme Weather*, NAT'L CLIMATE ASSESSMENT, https://nca2014.globalchange.gov/highlights/report-findings/extreme-weather; *WWA Analyses of Extreme Weather Event*, WORLD WEATHER ATTRIBUTION, https://www.worldweatherattribution.org/analyses/; Virginia H. Dale et al., *The Interplay between Climate Change, Forests, and Disturbances, 262* SCI. OF TOTAL ENV'T 201 (2000); Martin Hanel et al., *Revisiting the Recent European Droughts from a Long-Term Perspective*, SCI. REPS., June 2018, at 1).

36. *See* Marina Rafenberg, *Greece Faces Recurring Fires After Consistent Lack of Prevention*, LE MONDE, (last updated on July 23, 2023, 5:56 PM), https://www.lemonde.fr/en/environment/article/2023/07/20/in-greece-recurring-fires-as-consistent-as-lack-of-prevention_6060966_114.html.

Greece have soared by almost 2 degrees Celsius, or 3.6 degrees Fahrenheit, since 1990.[37] Global warming and extreme unpredictable weather conditions gravely worsened the issue of forest fires.[38] The United Nations (UN) has stated that warming in the Mediterranean region is occurring at twenty percent faster rates than the global average.[39] Dense woodlands of already flammable pine trees become even more flammable following a heatwave, enough to turn a small spark into a massive fire in quick speed.[40] The head of the Greek Fire Service, Yiorgos Pournaras, revealed in a press briefing that in his "[thirty-two] years of service, [he] never experienced similar extreme conditions" to those of the summer of 2023.[41] Greece sustained the worst fire damage out of all of the European nations in 2023 thus far, at an estimated 1.66 billion euros.[42]

In 2023, between July 1 and July 25, wildfires in Greece emitted 1 million tons carbon dioxide, constituting over 350,000 acres of land burned.[43] A Copernicus Atmosphere Monitoring Service (CAMS) senior scientist confirmed that the fires "affecting Rhodes and Attica in July . . . were the highest estimated wildfire emissions for July in the last two decades."[44] Current international environmental agreements, such as the

37. John T. Psaropoulos, *Fires Were Always a Fact of Greek Life, but Now They're Worse,* AL JAZEERA, (July 19, 2023), https://www.aljazeera.com/news/2023/7/19/fires-were-always-a-fact-of-greek-life-but-now-theyre-worse.

38. *See Health in a World of Extreme Heat,* 398 THE LANCET 641 (2021), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01860-2/fulltext.

39. *See Global: Call by Presidents of Five Southern European States to Tackle the Climate Crisis Underscores the Urgent Need to Phase Out Fossil Fuels*, AMNESTY, (Aug. 3, 2023), https://www.amnesty.org/en/latest/news/2023/08/global-call-by-presidents-of-five-southern-european-states-to-tackle-the-climate-crisis-underscores-the-urgent-need-to-phase-out-fossil-fuels/; *see also Climate Change in the Mediterranean*, UN Environment Programme/Mediterranean Action Plan, (last visited Nov. 10, 2024), https://www.unep.org/unepmap/resources/factsheets/climate-change.

40. *See* Associated Press, *Fighting Greek Fire,* THE ECONOMIST, (Aug. 29, 2007), https://www.economist.com/europe/2007/08/29/fighting-greek-fire.

41. *See* Costas Vasilopoulos, *No Respite in Greece as Wildfires Incinerate Ancient Olive Groves in Makri*, OLIVE OIL TIMES, (Aug. 29, 2023, 3:45 PM UTC), https://www.oliveoiltimes.com/briefs/no-respite-in-greece-as-wildfires-incinerate-ancient-olive-groves-in-makri/123444.

42. *See* Elleanor Harmsworth, *Wildfires Cost Europe €4.1 Billion as Temperatures Hit Records*, BLOOMBERG, (Sept. 4, 2023, 3:17 AM), https://www.bloomberg.com/news/articles/2023-09-04/greece-suffers-most-damage-as-wildfires-cost-europe-4-1-billion#xj4y7vzkg.

43. *See* Georgina Rannard & Esme Stallard, *The Extreme Summer Weather That Scorched and Soaked the World*, BBC, (Sept. 2, 2023), https://www.bbc.co.uk/news/resources/idt-8f0357f9-9013-4567-8407-be938c8c70cf.

44. *See August Wildfires Ravage Northern & Central Greece,* COPERNICUS, ATMOSPHERE MONITORING SERVICE (Aug. 23, 2023), https://atmosphere.copernicus.eu/august-wildfires-ravage-northern-central-greece.

Paris Agreement demanding the reduction of carbon dioxide emissions, do not take into consideration ecological disasters such as wildfires and the mass amounts of carbon dioxide emissions they contribute.[45] However, emissions from deforestation and land use changes also cause global warming.[46]

III. ENVIRONMENTAL LITIGATION AS A TOOL

A. Precedent

Litigation in the environmental law sector has been on the rise, paving the way for *Duarte Agostinho and Others*.[47] In 2018, the International Court of Justice (ICJ) awarded its first ever environmental damages award for Costa Rica in a suit brought against Nicaragua for damage to protected wetlands.[48] There, the court stated, "damage to the environment, and the consequent impairment or the loss of the ability of the environment to provide goods and services is compensable under international law."[49]

In 2019, the Supreme Court of the Netherlands upheld the Hague Court of Appeal decision in *Urgenda Foundation v. Netherlands*, holding the Netherlands accountable for acting unlawfully in contradiction of its duty to adequately limit greenhouse gas emissions.[50] The court relied on principles under the ECHR Articles 2 and 8, the "no harm principle" of international law, the doctrine of hazardous negligence, the principle of fairness, the precautionary principle, and the sustainability principle embodied in the

45. *See* Alpo Vuorio et al., *Wildfire-Related Catastrophes: The Need for a Modern International Safety Investigation Procedure*, FRONTIERS IN CLIMATE, May 28, 2021, at 2 (citing Joeri Rogeli et al., *Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2 C* 534 NATURE 631 (2016)).

46. *See* Angra, *supra* note 35, at 1 (first citing *The Causes of Climate Change*, NASA: CLIMATE CHANGE, https://science.nasa.gov/climate-change/causes/ (last visited Jan. 15, 2025); and then citing JOHN T. HARDY, CLIMATE CHANGE: CAUSES, EFFECTS, AND SOLUTIONS (2003)).

47. *See generally* Duarte Agostinho v. Portugal, App No. 39371/20 (Apr. 9, 2024) https://hudoc.echr.coe.int/?i=001-233261.

48. *See* Marlies Hesselman, *International Environmental Law (2018)*, 1 Y.B. OF INT'L DISASTER L. 436, 441–42 (2019) (citing Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgement, 2018 I.C.J. 1 (Feb. 2)).

49. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgement, 2018 I.C.J.1, ¶ 42 (Feb. 2)*; see also* Nilufer Oral, *ICJ Renders First Environmental Compensation Decision: A Summary of the Judgment*, IUCN (Apr. 9, 2018), https://www.iucn.org/news/world-commission-environmental-law/201804/icj-renders-first-environmental-compensation-decision-summary-judgment.

50. *See* HR 20 Dec. 2019, [2015] HAZA 2020, C/09/00456689 m.nt. (Urgenda Foundation/Netherlands) (Neth.).

United Nations Framework Convention on Climate Change (UNFCCC) to make its decision.[51]

In 2020, the Inter-American Court of Human Rights recognized the right to a healthy environment as a human right, as held in *Indigenous Communities Members of the Lhaka Honhat Ass'n v. Argentina*.[52] In its opinion, the court used Article 26 to order recovery of adequate natural resources and indigenous culture, recognizing the importance of protecting nature as its connection to "other living organisms, rather than for its 'usefulness' or 'effects' to human beings."[53]

B. Duarte Agostinho and Others v. Portugal and 32 Others

For the first time in its history, the ECtHR is set to decide by the beginning of 2024 whether countries' failure to adequately minimize their carbon emissions through forest fires is a violation of human rights.[54] For the first time in history, the ECtHR decided on whether countries' failure to adequately minimize their carbon emissions through forest fires is a violation of human rights. One of the three cases consolidated in the decision was *Duarte Agostinho,* stemming from a heatwave- induced wildfire that occurred in Portugal in 2017, burning a record 500,000 hectares of land and claiming the lives of 120 individuals.[55] The applicants argued that heat-induced fires and abrupt increases in temperature increase death rates from respiratory diseases and have affected their living conditions.[56] They claimed that the states are in violation of their rights under Articles 2, 8, and 14 of the Convention of the Protection of Human Rights and Fundamental Freedoms

51. *See id.* at paras. 5.2.4, 5.3.2, 5.7.5 (first citing Budayeva v. Russia, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ¶ 147–158 (Mar. 20, 2008), https://hudoc.echr.coe.int/fre?i=001-85436; then citing Brincat v. Malta, App Nos. 60908/11, 62110/11, 62129/11, 62338/11; ¶ 102 (July 24, 2014), https://hudoc.echr.coe.int/?i=001-145790; and then citing Fadeyeva v. Russia, App. No. 55723/00, ¶ 96 (June 9, 2005), https://hudoc.echr.coe.int/?i=001-69315).

52. *See* Indigenous Cmtys. Members of the Lhaka Honhat Ass'n v. Argentina, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 ¶ 202 (Feb. 6, 2020); Maria Antonia Tigre, *Inter-American Court Recognizes the Right to a Healthy Environment of Indigenous Peoples in First Contentious Case*, IUCN, (May 4, 2020), https://iucn.org/news/world-commission-environmental-law/202005/inter-american-court-recognizes-right-a-healthy-environment-indigenous-peoples-first-contentious-case.

53. *See* Indigenous Cmty. Members of the Lhaka Honhat Ass'n, Inter-Am. Ct. H.R. (ser. C) No. 400, at ¶¶ 202–03; *see also* Tigre, *supra* note 52.

54. *See generally* Duarte Agostinho v. Portugal, App No. 39371/20, ¶ 66 (Apr. 9, 2024) https://hudoc.echr.coe.int/?i=001-233261.

55. *See id.* at ¶¶ 12, 14, 16.

56. *See id.* at ¶ 23.

(Convention).[57] Specifically, Article 2 of the Convention obliges States "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."[58] Further, Article 8 imposes duty to prevent harm associated with environmental hazards where it "attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life."[59] In its first response, Greece stated that "[t]he effects of climate change, as recorded so far, do not seem to directly affect human life or human health."[60]

However, Greece fails to acknowledge that the risk of catastrophic wildfires is heightened by the effects of climate change. More specifically, Greece's current lack of preventative measures, government coordination, and organization directly affects human life, health, and livelihood.

C. Legal Bases for State Obligation

1. Greek Law

"The protection of the natural . . . environment [is] a duty of the [Greek] State and a right of every person," as written in Article 24 of the Greek Constitution.[61] The Greek Constitution further orders the state "to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainable development."[62] Article 24 of the 2001 constitutional revision notably recognized the environment as a right of every person. The "protection of the natural and

57. *See id.* ¶ 3; *see also* Ole W. Pedersen, *Climate Change Hearings and the ECtHR Round II*, EJIL: TALK!: BLOG OF THE EUROPEAN J. INT'L L., (Oct. 9, 2023), https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/.

58. Öneryildiz v. Turkey, App. No. 48939/99, ¶ 89 (Nov. 30, 2004), https://hudoc.echr.coe.int/eng?i=001-67614; *see* Convention for the Protection of Human Rights and Fundamental Freedoms, § 1 art. II, Nov. 4, 1950, E.T.S. No. 5.

59. Dubetska v. Ukraine, App. No. 30499/03, ¶ 105 (Feb. 10, 2011), https://hudoc.echr.coe.int/fre?i=001-103273; *see* Convention for the Protection of Human Rights and Fundamental Freedoms, § 1 art. VIII, Nov. 4, 1950, E.T.S. No. 5.

60. Observations of the Greek Government on the Application ¶ 51.5, Duarte Agostino, App No. 39371/20.

61. *See* 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2 (Greece) ("The protection of the natural and cultural environment constitutes a duty of the State and a right of every person."); *see also* Stelios Dritsas, *Cooperation, Perceived Legitimacy and Accountability in Greek Wildfire Management before and after rescEU introduction*. The Case Studies of Kineta, Gerania, and Vilia wildfires 14 (2022) (Master Thesis Project, Wageningen University and Research) (on file with Wageningen University and Research) ("[W]e can state that the protection of the environment and consequently, wildfire management is a constitutional obligation of the state and at the same time a right of the citizen.").

62. *See* 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2 (Greece), Art. 24.

cultural environment" as a "duty of the State and a right of every person."[63] On May 26, 2022, the Greek Parliament passed law 4936/2022, titled National Climate Law.[64] The National Climate Law aids in adapting to the climate crisis, while protecting the environment by establishing "policies to mitigate the effects of climate change[,] and [improving] air quality at local and national level."[65]

2. European Law

The ECHR obliges states to protect and respect human rights (Article 1), the right to life (Article 2), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), and the right to live free of discrimination (Article 14).[66] Article 191 of the Treaty on the Functioning of the European Union lists some of the objectives of the EU's policy on the environment as "preserving, protecting and improving the quality of the environment, protecting human health . . . [and] combating climate change."[67] Further, Greece has a commitment to the EU Green Deal and a new Forest Plan to implement laws and policies that mitigate against forest fires.[68]

3. International Law

The right to a clean, healthy, and sustainable environment has been recognized as a universal human right by the United Nations (UN) Human Rights Council, and by the UN General Assembly in a resolution passed in July 2022.[69] Article 4 of the Paris Agreement to the United Nations Framework Convention on Climate Change states that parties "shall promote

63. 2001 SYNTAGMA [SYN.] [CONSTITUTION] Art. 24 (Greece).

64. Nomos (2022:4936) Ethnikos Klimatikos Nomos [National Climate Act], Efimeria Tis Kyverniseos [Newspapers of the Government] 2022, A:105 (Greece); *see also* Stephanos Mitsios, *Law 4936 2022: Greek Climate Law*, EY, (Oct. 6, 2022), https://www.ey.com/en_gr/tax/tax-alerts/law-4936-2022-greek-climate-law.

65. Mitsios, *supra* note 64.

66. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, as amended by Protocol No. 15, Aug. 1, 2021, E.T.S. No. 5.

67. *See* Consolidated Version of the Treaty on European Union art. 191, Dec. 13, 2007, 2016 O.J. (C 202) [hereinafter TEU].

68. *See* The Green Tank, *Greece on the Road to the EU Green Deal*, THE GREEN TANK (Feb. 22, 2022), https://thegreentank.gr/en/2022/02/22/greece-eu-green-deal-voice-en/ (describing an article published on this issue).

69. *See generally* G.A. Res. 76/300, The Human Right to a Clean, Healthy, and Sustainable Environment, U.N. Doc. A/RES/76/300 (July 28, 2022); *see also UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right*, UNITED NATIONS: UN NEWS, (July 28, 2022), https://news.un.org/en/story/2022/07/1123482.

environmental integrity."[70] The UNFCCC expressly acknowledges the relationship between human health and the effects of climate change.[71] The UN Committee on Economic, Social and Cultural Rights (CESCR) warned states that the "failure to prevent foreseeable harm to human rights caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach" of their duty to safeguard human rights.[72]

Further, forty-seven members of the UN Economic Commission for Europe are parties to the Aarhus Convention of 1998, which states, "every person has the right to live in an environment adequate to his or her health and well-being."[73] Thus, even if the European Commission itself has not declared an individual right to a safe and healthy environment, it can be implied through the aggregate of other Economic Commission agreements.

In 2021, Greece signed Glasgow's Leaders' Declaration on Forests and Land Use to conserve forests and to invest in sustainable forest management, recognizing forests' many values.[74] The right to health is also expressly protected in the 2015 Paris Agreement, signed by Greece.[75] In early 2023, the UN asked the International Court of Justice to weigh in on what obligations countries have in mitigating the effects of climate change, a rare move considering the infrequency of advisory opinions issued.[76]

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70. Paris Agreement to the United Nations Framework Convention on Climate Change art. 4, para. 13, Dec. 12, 2015, T.I.A.S. No. 16-1104, [hereinafter The Paris Agreement].

71. *See* United Nations Framework Convention, *United Nations Convention on Climate Change*, art.1(1), 4(1)(f) (1992), https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; *see also* Margaretha Wewerinke-Singh & Curtis Doebbler, *Protecting Human Health from Climate Change: Legal Obligations and Avenues of Redress Under International Law,* INT'L J. ENV'T RSCH. PUB. HEALTH, Apr. 28, 2022, at 1.

72. Statement, United Nations Committee on Economic, Social, and Cultural Rights, Climate Change and the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council, E/C.12/2018/1 (Oct. 31, 2018).

73. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

74. *See* Glasgow Leaders' Declaration on Forests and Land Use, UN Climate Change Conference UK 2021, (Feb. 11, 2021), https://webarchive.nationalarchives.gov.uk/ukgwa/20230418175226/https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/.

75. *See* The Paris Agreement, *supra* note 70; *see also* Wewerinke-Singh, *supra* note 71 (citing The Paris Agreement, *supra* note 70).

76. Obligations of States in Respect of Climate Change, 2023 I.C.J. 77, 276 (Mar. 29) (request for advisory opinion).

D. Although Some Argue Against Standing and Causation, That Argument is Not Sound Because of Precedent and the "Loss of Chance" Theory

The main counterarguments brought by Greece in the case of *Duarte Agostinho*, and other entities in similar disputes related to climate change-induced environmental disasters, include justiciability and causation issues. However, this paper aims to take a different approach than the applicants in *Duarte Agostinho* in the hopes of overcoming these counterarguments. Unlike argued in *Duarte Agostinho,* the focus should be on fire prevention, environmental preservation, and forest resilience, rather than the controlling of carbon emissions and the failure to adhere to policies that limit global warming to 1.5 degrees Celsius in accordance with the Paris Agreement.[77]

1. Standing Can Be Found Based on Precedent

To succeed in a legal claim, one must first be able to meet standing requirements, which in the ECtHR context means falling under Article 34 of the Convention: "claiming to be the victim of a violation."[78] The issue regarding standing that often arises in climate change cases is that because climate change is harmful to humanity at large, it is too generalized a grievance to support standing.[79] For instance, in the case of *Cordella and Others v. Italy*, the ECtHR held that a victim who is personally affected by the complaint is one in a situation of "high environmental risk."[80] Additionally, *Massachusetts v. EPA* paved the way for the 2015 Paris accord, now recognized as a landmark environmental case decided by the United States Supreme Court in 2007.[81] In *Massachusetts*, the court held that

77. The Paris Agreement, *supra* note 70.

78. Antoine De Spiegeleir and Anais Brucher, *Climate Docket and the Future in the Case Law of the European Court of Human Rights*, COLUM: CLIMATE LAW (Mar. 20, 2023), https://blogs.law.columbia.edu/climatechange/2023/03/20/climate-docket-and-the-future-in-the-case-law-of-the-european-court-of-human-rights/; *see* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, C.E.T.S. No. 194.

79. *See* Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, INSIGHTS L. SOC'Y, Oct. 9, 2020, https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

80. *See Cordella v. Italy*, 54414/13, 54264/15. (Jan. 24, 2019), https://hudoc.echr.coe.int/eng?i=001-189645; *see also* Evelyne Schmid, *Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case*, EJIL: TALK!: BLOG OF THE EUROPEAN J. OF INT'L L. (Apr. 30, 2022), https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/.

81. *See* Liz Mineo, *How and Why the Supreme Court Made Climate-Change History*, HARV. GAZETTE, (Apr. 22, 2020), https://news.harvard.edu/gazette/story/2020/04/massachusetts-v-epa-

greenhouse gases were commodities that the executive branch could regulate under the Commerce Clause, and that Massachusetts' injury was imminent and actual to support standing.[82] Likewise, the ECtHR should use this reasoning to support standing and set a precedent in *Duarte Agostinho*. A new level of urgency may be implicated by "[v]iewing environmental decisions as directly implicating human rights."[83]

2. Causation Can Be Found Based on "Loss-of-Chance"

Causation is often the cited argument for states and big corporations when confronted with issues involving the failure to mitigate against forest fire-induced environmental harm.[84] In *Duarte Agostinho*, Greece stated that, "there is no causal link" because "Greece has not breached any national, EU or international commitment on greenhouse gas emissions."[85] However, how climate change and the failure to decrease fire risks and hazards caused by increasing global temperatures are linked can be found in the lost chance theory rooted in tort law.[86] For example, in the case of *Guerra v. Italy*, the ECtHR held that Italian authorities had not taken proper actions to reduce risks of chemical pollution and the state failed to provide adequate information to those affected.[87] This legal principle can be a tool to hold states accountable by framing the injury as the lost chance of the enjoyment

opened-the-door-to-environmental-lawsuits/; *see generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

82. Martin, *supra* note 79.

83. *See* Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L., 31, 36 (2015).

84. *See* Calancea c. République De Moldova [Calancea v. Republic of Moldova], App. No. 23225/05, (June 2, 2018), https://hudoc.echr.coe.int/eng?i=001-181419; Mastelica v. Serbia, App. No. 14901/15 (Nov. 17, 2020), https://hudoc.echr.coe.int/?i=001-206841 (finding no causal link between the illnesses and the high-voltage power line); *see also* Tatar v. Romania, App. No. 67021/01, ¶10, 12 (July 5, 2007), https://hudoc.echr.coe.int/eng?i=001-83052 (Decision as to the Admissibility of the Application) (recognizing Serbian government's position that "there could be no causal link existed between the . . . applicant's [asthma] and the use of sodium cyanide during the technological process").

85. Agostinho v Portugal, App. No. 39371/20 (Nov. 13, 2020), https://hudoc.echr.coe.int/eng?i=002-13724.

86. *See* MARK WILDE, CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: COMPARATIVE ANALYSIS OF LAW AND POLICY IN EUROPE AND THE US 95–96 (Kurt Deketelaere ed., Kluwer Law International 2d ed. 2013) ("The lost chance approach reformulates the claim in terms of the extent to which the defendant reduced the plaintiff's prospects of avoiding the harm . . . . A failure to reduce risk clearly equates with increasing a risk").

87. *See Guerra v. Italy*, App. No. 14967/89, (Feb. 19, 1998), https://hudoc.echr.coe.int/en?i=001-62696; *see also* Janina Ciechanowicz-McLean & Maciej Nyka, *Human Rights and the Environment*, 3 PRZEGLAD PRAWA OCHRONY SROWOWISKA, 90–1 (2012).

of life and the environment. Failure to mitigate wildfire risks increases the risk of loss.

The UN International Strategy for Disaster Reduction (UNISDR) defined "wildfire risk" as "the likelihood of a fire occurring, the associated fire behavior, and the impacts of the fire."[88] The "majority of forest fires around the world occur due to anthropogenic causes," however, heat or ignition alone is not the sole source of large forest fires.[89] There needs to be community-focused efforts for public awareness, getting people to make their homes and land more risk averse to fires.[90]

IV. THE GOLDAMMER PLAN OFFERS SOLUTIONS

After analyzing what went wrong during the Mati disaster of 2018, experts drafted solutions within the Goldammer Plan, which was presented to the Greek government.[91] The Goldammer Plan's key findings were that: (1) Greece lacks organized cooperation between the Fire Brigade and forest services; (2) Greece needs to shift the focus from firefighting and suppression to fire prevention; (3) the current lack of a national land registry system enables corruption; (4) the failure to enforce illegal building in the forests is a fatal mistake; and (5) forests are more vulnerable due to abandonment of the countryside for city-living.[92] Though Greece tends to point the blame on climate change or arsonists, going so far as to declare a war against climate change after the fires of 2023,[93] Greece's government and people have the biggest impact on preventing rampant forest fires.[94]

A. Lack of Cooperation and Organization Between Agencies

In 1998, the responsibility of the fire prevention and firefighting mechanism of Greece transferred to the Fire Brigade, a highly criticized move that many scholars and experts believe Greece was not prepared to

88. *See* Angra, *supra* note 35, at 4.

89. *See id.* at 5.

90. Xanthopoulos, *supra* note 18.

91. Goldammer Plan, *supra* note 15.

92. *Id.*

93. Charlotte Elton, *The Greek Prime Minister has Pledged to Fight a 'Climate War' After Floods and Wildfires Devastated the Country*, EURONEWS, (Sept. 18, 2023, 6:04 PM), https://www.euronews.com/green/2023/09/18/greek-pm-says-country-is-fighting-a-war-on-climate-change-after-summer-of-fires-and-floodi.

94. *See generally* Cristina Aponte et al., *Forest Fires and Climate Change: Causes, Consequences and Management Options*, 29 INT'L J. WILDLAND FIRE i, i (2016).

make.[95] Since then, there has been a lack of coordination due to "[seventeen] authorities from six ministries" having to cooperatively work together in managing wildfire disasters.[96] The firefighting service lacks in communication and cooperation with both the forest services, and experts to know which areas are more susceptible to fires and understand the landscape.[97] The Goldammer Plan suggested the formation of a new coordinating body, the Landscape Fire Management Agency (ODIPY). FN95A. ODIPY would provide unified planning in addressing wildfire prevention, "with the mission of developing a national, interagency fire management plan."[98] The battle against forest fires in Greece is in dire need of better planning and organization, along with better cooperation between forest specialists and the fire services; two problems ODIPY has the potential to solve.[99]

In the case of *A.D. v. Greece*, involving the living conditions a pregnant woman faced while lodging at the Samos Reception and Identification Center (RIC), the European Court of Human Rights noted the "most alarming finding [as] the lack of control by the authorities over a large part of the informal camp outside the RIC where security incidents were frequently noted, such as . . . arson for reasons of trespassing of forest land."[100]

B. Lack of Preventative Measures

The Goldammer Plan highlighted the need for a shift in focus from fire suppression to prevention through several methods: (a) creating "fire-smart" landscapes, (b) institutionalizing prescribed burning, and (c) increasing public awareness and deterrence for arsonists.[101]

95. *See* Gavriil Xanthopoulos et al., *Firefighting Approaches and Extreme Wildfires, in* EXTREME WILDFIRE EVENTS AND DISASTERS: ROOT CAUSES AND NEW MANAGEMENT STRATEGIES 117, 123 (Fantina Tedim et al. eds., 2020) (stating that after transition agency received increased funding but lacked knowledge and experience, this created a costly expenditure to provide adequate fire-fighting resources).

96. *See* Johann Georg Goldammer et al., *A Year After Greece's Wildfire Disaster*, 14 CRISIS RESPONSE J. 26, 27 (2019).

97. *See id.*

98. *See* Goldammer Plan, *supra* note 15, at 87.

99. *See* Goldammer et al., *supra* note 96, at 28.

100. *See* AFP, *supra* note 34.

101. A.D. v. Croatia, App. No. 55363/19, ¶¶ 1, 19 (Apr. 4, 2023), https://hudoc.echr.coe.int/?i=001-223931.

1. Fire-Smart Territories

Creating fire-smart landscapes is key in building sustainable fuel management in forests.[102] The European Commission has identified territory resilience as a key target in mitigating climate change.[103] The buildup of biomass in the forests—due to lack of forest management, institutionalized and organized fire prescribing methods, and landscaping strategies—enhanced the risk of disastrous wildfires.[104] One noticeable deficiency is the lack of fire risk management culture in Greece focused on tackling the issue of surface fuel buildup in the forests.[105] As such, the European Commission has proposed a Nature Restoration Law to mitigate the effects of climate change and prevent the spread of forest fires,[106] which comes as a part of its new forest strategy for 2023.[107]

2. Prescribed Burning

Prescribed burning (also known as "controlled burning," "backfire," or "anti-pyr") was legalized in Greece as recently as 2022, only for suppression uses in firefighting, rather than prevention.[108] In other words, prescribed burning is not currently allowed under Greek legislation as a surface fuel reduction tool.[109] However, the use of fire to fight fire should not be restricted to limited conditions pertaining only to the scene of an active fire.[110] The use of thinning and pruning, combined with prescribed fire, as opposed to no

102. *See* Goldammer Plan, *supra* note 15, at 87.

103. *See* Davide Ascoli et al., *Fire-Smart Solution for Sustainable Wildfire Risk Prevention: Bottom-Up Initiatives Meet Top-Down Policies Under EU Green Deal*, INT'L J. DISASTER RISK REDUCTION, Apr. 28, 2023, at 2.

104. *See* Xanthopoulos et al., *supra* note 13.

105. *See* Francisco Moreira et al., *Wildfire Management in Mediterranean-Type Regions: Paradigm Change Needed*, 15 ENV'T RSCH. LETTERS, Jan. 7, 2020, at 3, https://doi.org/10.1088/1748-9326/ab541e.

106. *See* Palaiologos Palaiologou et al., *Socio-Ecological Perceptions of Wildfire Management and Effects in Greece*, FIRE, Apr. 2, 2021, at 3.

107. *See* Regulation (EU) 2024/1991, of the European Parliament and of the Council of 24 June 2024 on Nature Restoration and Amending Regulation (EU) 2022/869, 2024 OJ, art. 15 § (3)(t); *see also* European Commission Press Release IP/23/5662, Commission Welcomes Agreement Between European Parliament and Council on Nature Restoration Law (Nov. 9, 2023).

108. *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: New EU Forest Strategy for 2030, at 18, COM (2021) 572 final (July 16, 2021).

109. *See* Xanthopoulos et al., *supra* note 13.

110. *See Greece: Wildfires*. CLIMATECHANGEPOST, (last visited Nov. 11, 2024), https://www.climatechangepost.com/countries/greece/wildfires/.

treatment, has been shown to provide heightened resilience to wildfires.[111] Great social desire for prescribed burning methods exists, as evidenced by a survey conducted in Crete.[112] Additionally, a two-year pilot project experiment began on the island of Chios in 2021 to provide evidence of the benefits of the use of "backfire" as a fuel management tool.[113] Fire prevention research on Kythira island is also underway, after the island experienced catastrophic fires in 2017 that raged for nearly three weeks.[114] Greece's World Wide Fund for Nature Coordinator of actions for forest fires, Elias Tziritis, said that the group presented draft legislation on prescribed burning to the government for consideration.[115] The group's findings included the fact that prescribed burning actually aided in the preservation of biodiversity, contrary to many critics of the method's concerns.[116] These efforts are being made to increase the resiliency of forests to forest fires.[117]

3. Community Awareness and Deterrence

Prevention is not just preventative activities, but rather "the continuous, repetitive, and mandatory forest and fuel management . . . arson policing, and forest criminality prosecution."[118] Greater public awareness and effort is needed to prevent fires and deter arsonists. The Minister of Climate Crisis

111. *See* Maria Liliopoulou, *Photiés: Ti ínai i méthodos «antipír» pou vrísketai pia sti pharétra ton pirosvestón - Póte tha borí na epharmózetai* [Fires: What is the "anti-fire" method that is now in the quiver of firefighters - When can it be applied], ETHNOS (Greece) (June 25, 2022; 11:16 AM), https://www.ethnos.gr/greece/article/213582/fotiestieinaihmethodosantipyrpoybrisketaipiasthfaretratonpyrosbestonpotethamporeinaefarmozetai.

112. *See* Rodd Kelsey, Wildfires and Forest Resilience: the Case for Ecological Forestry in the Sierra Nevada (Mar. 2019) (unpublished report of The Nature Conservancy Sacramento, California), https://www.scienceforconservation.org/assets/downloads/WildfireForestResilience_2019_Kelsey_2.pdf; *see also Let's Fight Fire with Fire,* THE NATURE CONSERVANCY (July 15, 2022), https://www.nature.org/en-us/about-us/where-we-work/united-states/california/stories-in-california/californias-wildfire-future/ (showing photographic evidence of the various levels of forestland resiliency when treated differently).

113. *See* Haleema Misal, et al., *Assessing Public Preferences For a Wildfire Mitigation Policy in Crete, Greece*, FOREST POLICY AND ECONOMICS, (Aug. 2023), https://doi.org/10.1016/j.forpol.2023.102976.

114. *See* Xanthopoulos et al., *supra* note 13.

115. *See Controlled Burning in Greece Can Help Avoid Wildfires: WWF*, NEOS KOSMOS, (July 5, 2023, 2:04 PM), https://neoskosmos.com/en/2023/07/05/news/greece/controlled-burning-in-greece-can-help-avoid-wildfires-wwf/#:~:text=Greece's%20World%20Wildlife%20Fund%20branch,wildfires%20fuelled%20by%20climate%20change.

116. *See id.*

117. *See* Xanthopoulos et al., *supra* note 13.

118. Andreas Y. Troumbis et al., *Probabilistic Wildfire Risk Assessment and Modernization Transitions: The Case of Greece*, FIRE, Apr. 14, 2023, at 16, https://doi.org/10.3390/fire6040158.

and Civil Protection, Vassilis Kikilias, stated that most forest fires and wildfires in Greece every year are caused by the "human hand," either by negligence or arson.[119] Of the negligent causes, most involved "heat-inducing or agricultural outdoor work."[120] As such, people with homes in the forest should make sure to maintain the land and take precautions to avoid sparks igniting from negligence or recklessness.

Though Greece purported to have arrested roughly one hundred individuals after the 2023 fires in Evros region and others in Rhodes, the number of people actually charged with arson is slim.[121] Nineteen thousand seven hundred and twelve people have been prosecuted since 2000 for arson, but only 564 convicted—a staggering 2.8%.[122] Starting in 2024, Greece will increase its punishment and enforcement thereof for arson and seek to reduce the widespread feeling of impunity among Greek society.[123] The proportion

119. *See* Leslie Eastman, *Authorities Arrest 79 Suspected Arsonists for Igniting Wildfires in Greece*, LEGAL INSURRECTION, (Aug. 28, 2023, 11:00 AM), https://legalinsurrection.com/2023/08/seventy-nine-suspected-arsonists-arrested-for-igniting-wildfires-in-greece/.

120. *See id.*

121. *See Over 100 Arrested for Starting Rhodes Wildfires*, KATHIMERINI GREECE NEWSROOM (Aug. 4, 2023), https://knews.kathimerini.com.cy/en/news/over-100-arrested-for-starting-rhodes-wildfires ("More than 100 people have been arrested for starting fires in 2023, with [only] 10 cases including arson with intent"); *see also* Yannis Elafros & Ioanna Mandrou, *Pirkayiés: Vrakhikiklómata, keravní kai amélia* [Fires: Short circuits, lightning and negligence], Kathimerini (July 24, 2023, 3:19 PM), https://www.kathimerini.gr/society/562533769/pyrkagies-vrachykyklomata-keraynoi-kai-ameleia/ ("19,712 prosecutions for arson, only 564 convictions" and "In particular, the conviction rate for those prosecuted for arson is even lower at 2.6%!"); *see also* Ioanna Mandrou, *Arson and Punishment*, EKATHIMERINI (July 25, 2023), https://www.ekathimerini.com/opinion/1216217/arson-and-punishment/ ("Who knows the elderly gentleman who, five years ago, lit a fire to burn yard waste in Penteli while winds of 9 Beaufort were blowing, inadvertently causing the tragedy in Mati that left 104 people dead and scores suffering from burns? For the record, the man in question is a defendant in the trial over the East Attica blaze and has not once set foot in court, has never apologized to the victims and has not spent a single day in prison"); *see also* Shola Lawal, *While Greece Burned, Politicians Blamed Migrants*, Coda (Sept. 14, 2023), https://www.codastory.com/disinformation/disinformation-greece-wildfires-migrants/ ("The Greek police arrested the man who made the video, and he is currently awaiting trial. The police also arrested the migrants the man claimed he had caught attempting to start fires. They were later released without charges.").

122. *See* Elafros & Mandrou, *supra* note 121.

123. *See Roundup: Greece Boosts Wildfire Prevention Measures Ahead of "Tough" Summer*, Xinhua, (June 5, 2024, 3:56 PM), https://english.news.cn/europe/20240605/091f8c76d0984847807ece8eecca50a6/c.html ("Those starting fires negligently during gardening or work face stricter penalties and fines, Kikilias said recently. From the start of this year, over 300 individuals have been arrested for negligent arson, and perpetrators face up to 10 years in prison and fines of up to 200,000 euros, the official said."); *see also Heftier Penalties and Jail for Wildfires in Greece, Even by Negligence*, KEEP TALKING GREECE, (Aug. 3, 2023), https://www.keeptalkinggreece.com/2023/08/03/wildfires-penalties-jail-greece/ ("The Justice Ministry is in the process of revising the fundamental provisions of the Criminal Code, based on which we will seek to significantly reduce

of environmental crime prosecution in Greece represented the lowest figures from all of the European Member states.[124] Presently, Greece has announced it is planning to increase the fines on arson and do a better job of enforcing them.[125]

C. Government Corruption

At ninety-seven percent, Greece has the highest rating of the public perceiving widespread government corruption in the EU, adding complexity to the situation.[126] Coincidentally, a study conducted at the Athens University of Economics and Business found "striking evidence that around Greek parliamentary elections wildfires and tax evasion increase dramatically."[127] Lawsuits filed against several government heads, such as the governor of Attica and the head of the civil protection agency, indicate that responsible government bodies should be criminally convicted.[128] The Supreme Court of Greece prosecutors submitted requests asking the government to look into a possible criminal organization responsible for starting the fires.[129] Supreme

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the prevailing sense of impunity in Greek society. What do I mean by that? That prison sentences will have to be served.").

124. *See* Secretary-General of the European Commission Martine Deprez, Director, *Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for a Directive of The European Parliament and of the Council on the Protection of the Environment Through Criminal Law and Replacing Directive 2008/99/EC*, at 121, delivered to Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union, SWD (2021) 465 final (Dec. 15, 2021).

125. *See Photiés: Próstima mékhri kai 30.000 evró yia tous empristés* [Prices: Fines of up to 30,000 Euros for Arsonists], IN NEWSPAPER (Aug. 1, 2023, 10:00 AM), https://www.in.gr/2023/08/01/greece/foties-prostima-mexri-kai-30-000-eyro-gia-tous-empristes/ [hereinafter Fines of up to 30,000 Euros for Arsonists].

126. *See* Eur. Comm'n, *Citizens' Attitudes Towards Corruption in the EU in 2023*, at 18 (July 2023), https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=91794 (stating 97% of Greeks consider corruption to be widespread in Greece).

127. Spyros Skouras & Nicos Christodoulakis, *Electoral Misgovernance Cycles: Evidence from Wildfires and Tax Evasion in Greece*, 159 PUB. CHOICE 533, 534 (2014).

128. Helena Smith, *Families of Wildfire Victims File Suit Against Greek Authorities*, THE GUARDIAN, (Aug. 1, 2018, 12:30 PM), https://www.theguardian.com/world/2018/aug/01/greek-wildfire-victims-families-file-suit-against-authorities#:~:text=The%20first%20lawsuit%20was%20filed,outlining%20financial%20relief%20for%20victims.

129. *See Fotiá ston Évro: Diplí parémvasi tou Areíou Págou gia to peristatikó ratsistikís vías kai tis fotiés stin Alexandroúpoli* [Fire in Evros: Double Intervention of the Supreme Court for the Incident of Racist Violence and the Fires in Alexandroupolis], ETHNOS (Aug. 23, 2023, 11:21 AM), https://www.ethnos.gr/greece/article/276451/fotiastonebrodiplhparembashtoyareioypagoygiatoperistatikoratsistikhsbiaskaitisfotiessthnalexandroypolh; *Supreme Court Prosecutor Orders Dual Investigation into Arson and Racist Violence Incidence*, EKATHIMERINI.COM, (Aug. 23, 2023,

Court Prosecutor Georgia Adeilini requested the prosecutor from Alexandroupoli to specifically investigate the 2023 fires in the Evros region and the claims of racism against migrants.[130]

On the other hand, many Greeks believe that the current New Democracy government is behind the fires in order to create wind turbines as an alternate natural power source.[131] In 2021, Environment and Energy Minister Kostas Skrekas demanded that the Energy Regulatory Authority revoke a permit granted for the development of thirteen wind turbines in the fire-stricken northern Evia.[132] Further, another permit was approved in 2023 to a Greek petroleum refiner, Motor Oil Hellas, for six more wind farms on burned land in Evia, contrary to Prime Minister Mitsotakis' assurances of reforestation.[133]

Former environmental inspector Margarita Karavasili said that, while in charge of urban development in Mati twenty-five years ago, there was a lot of pressure to exempt certain parts of the region from the woodland categorization.[134] In 2014, Greece amended its 1978 laws protecting the forest, despite much controversy and dispute by environmental groups, with laws 4280/2014 and 4315/2014.[135] These laws permitted more private

11:36 AM), https://www.ekathimerini.com/news/1218348/supreme-court-prosecutor-orders-dual-investigation-into-arson-and-racist-violence-incidents/.

130. *See* Nektaria Stamouli, *Anger Rises in Greece as Fires Destroy Homes Near Athens*, POLITICO, (Aug. 24, 2023, 10:40 AM), https://www.politico.eu/article/greece-athens-fires-destroy-homes/.

131. *See Oi empristés gia ti Néa Dimokratía eínai mochlós anáptyxis-Állaxe to 2019 to Nómo gia na tous prostatévei* [Arsonists for the New Democracy are a Driver of Development-Change the Law in 2019 to Protect Them], HORA TOU ACHORITOU (July 25, 2023), https://choratouaxoritou.gr/?p=283587&cn-reloaded=1.

132. *See* Athens Bureau, *Minister Skrekas: Wind Turbine Permits in Northern Evia Need to be Revoked*, GREEK CITY TIMES, (Sept. 28, 2021), https://greekcitytimes.com/2021/09/28/minister-skrekas-wind-turbines-evia/.

133. *See Greek Oil Company Gets Permit for Wind Energy Project on Evia*, THE NAT'L HERALD, (Apr. 24, 2023), https://www.thenationalherald.com/greek-oil-company-gets-permit-for-wind-energy-project-on-evia/#%3A~%3Atext%3DATHENS.

134. *See* John Vassilopoulos, *Death Toll Rises from Greek Forest Fires*, WORLD SOCIALIST WEB SITE (Aug. 23, 2018), https://www.wsws.org/en/articles/2018/08/23/fire-a23.html.

135. *See* WWF GREECE, ENVIRONMENTAL LAW IN GREECE 11TH ANNUAL REVIEW: FOCUS ON NATURE AND BIODIVERSITY (2015) ("The draft bill was eventually voted as law 4280/2014, on August 5th. However, following the harsh reaction of various organisations, including WWF Greece and MPs, a roll call vote was requested for article 36 of the draft bill, related to the interventions allowed in forests and forest lands" and "[t]wo recently voted laws (law 4280/2014 and law 4315/2014) amend forestry law 998/79, validating and supplementing a series of scattered legislation provisions that had been approved as part of legislation irrelevant to the environment, such as for example the recent law on tourist investments and the special plan for tourism.").

ownership and development on forest land, leading to laxed regulation of previously protected public forest land.[136]

Adding to the complexity of the issue is the lack of a complete national land registry system, or Cadastre,[137] which makes it easier to encroach forest lands, especially near bigger cities, like the suburbs around Athens.[138] Because Greece does not currently have a completed national land registry, publicly-designated land categorized as forests is targeted by developers or the government.[139] Greece was the first country in Europe to "transition from a person-based to a property-based system by means of re-registration of already registered property rights based on citizens' declarations of rights and not on information kept in the Land Registry."[140] This reliance on citizens' property declarations and ignorance of the previous land registry created many complications in its administration.[141]

Further, the funds allocated to prevention, reforestation, and state aid are not reliably used by the government to accomplish their purported goals. In 2014, the EU began investigations into a state aid case regarding the case of *Soya Hellas SA*.[142] The investigation culminated in a decision that the state aid provided by Greece was "illegal and incompatible with the EU internal market rules."[143] According to Ms. Ferreira on behalf of the European Commission, of the 1.2 billion euros from the European Regional

136. *See* Elisabeth Eleftheriades et al., *Forest Maps The Latest Episode*, SEE LEGAL, https://seelegal.org/news/forest-maps-the-latest-episode/# (last visited Nov. 11, 2024) (stating that Forest Law 998/1979 was amended through Law 4280/2014).

137. *See* George Mourafetis & Chryssy Potsiou, *IT Services and Crowdsourcing in Support of the Hellenic Cadastre: Advanced Citizen Participation and Crowdsourcing in the Official Property Registration Process*, INT'L J. GEO-INFO., Mar. 25, 2020, https://www.mdpi.com/2220-9964/9/4/190, at 1.

138. *See* Ioannis Glinavos, *Greek Fires: the Predatory Political Economy Behind a Recurring Human Disaster*, THE CONVERSATION (July 27, 2018, 6:08 AM), https://theconversation.com/greek-fires-the-predatory-political-economy-behind-a-recurring-human-disaster-100500 (suggesting that people take advantage of Greece's outdated zoning laws to illegally build homes outside the city under the guise that the illegally built family homes were constructed by the "poor living on the city fringes").

139. David Patrikarakos, *Conspiracy Theories Rise from the Ashes of Greece's Fires*, FOREIGN POL'Y MAG. (Aug. 21, 2021, 6:00 AM), https://foreignpolicy.com/2021/08/21/greece-heat-fires-climate-change-conspiracy-theories/.

140. Ioanna Tzinieri, *The Present Landscape of Land Registration in Greece*, EUR. LAND REGISTRY ASS'N, Jan. 1, 2015, https://www.elra.eu/the-present-landscape-of-land-registration-in-greece/, at 4.

141. *See id.* at 5.

142. *See* Sarantis Michalopoulos, *Commission Urges Greece to Recover Illegal State Aid for 2007 Wildfires*, EURACTIV (Apr. 17, 2023, 7:16 AM), https://www.euractiv.com/section/politics/news/commission-urges-greece-to-recover-illegal-state-aid-for-2007-wildfires/.

143. *Id.*

Development Fund and Cohesion Fund earmarked for climate change adaptation measures, prevention, and risk management, 336 million euros are particularly earmarked for fire risk management and prevention.[144]

D. Illegal Construction in the Forests

Building without a permit is not enforced or fined as heavily in Greece than in Western Europe. Under Greek law, Greece is obligated to destroy illegal developments if notice is ignored after a certain amount of time.[145] Currently, Greece must destroy around 3,000 illegal constructions in forests and around 700 on the coast.[146] Greece's lackadaisical attitude towards enforcing against the illegal construction of houses in its forests created a humanitarian crisis, now Greece must show zero tolerance for such buildings to prevent the risk posed to public safety.[147]

The Mati fire was one example of how illegal construction can amplify a wildfire's destruction. First, much of the construction's wiring was faulty and electricity was not done professionally, causing sparks to ignite near homes.[148] Second, there was a failure to ensure safe evacuation routes, demonstrated by lack of land use planning and zoning regulations, and lack of their enforcement.[149] Because of the disorganization of roads, one woman lost her child and husband in the Mati fire.[150] The government's mishandling

144. *See Answer Given by Ms. Ferreira on Behalf of the European Commission*, Answer to *Parliamentary Question E-000986/2023(ASW)*, EUR. PARLIAMENT (May 24, 2023), https://www.europarl.europa.eu/doceo/document/E-9-2023-000986-ASW_EN.html.

145. *See Gov't Issues Decree for Demolition of Illegal Construction*, EKATHIMERINI.COM (Aug. 11, 2018, 4:23 PM), https://www.ekathimerini.com/news/231648/gov-t-issues-decree-for-demolition-of-illegal-construction/.

146. *See* Sara Malm & Reuters, *Families of Teacher, 70, and His 73-Year-Old Neighbour Killed in the Athens Wild Fires Days After Celebrating His Daughter's Wedding sue Greek Authorities over Their Deaths*, DAILY MAIL, (Aug. 1, 2018, 12:20 PM), https://www.dailymail.co.uk/news/article-6014639/Greek-fire-victims-sue-authorities-deaths-Mati.html.

147. *See also Gov't Issues Decree for Demolition of Illegal Construction, supra* note 145.

148. *See* Renee Maltezou & Yannis Soulitois, *Faulty Power Cable May Have Caused Greece's Worst Wildfire This Year, Sources Say*, REUTERS, (Aug. 15, 2024, 5:33 AM), https://www.aol.com/news/faulty-power-cable-may-caused-123332728.html; *see also Dímarchos Pentélis ston Realfm 97.8: H fotiá xekínise apó éna komméno kalódio tis DEI* [Mayor Pentelis on Realfm 97.8: The fire started from a cut PPC cable], ENIKOS, (July 26, 2018), https://www.enikos.gr/society/dimarxos-pentelis-ston-realfm-978-h-fotia-xekinise-apo-ena-kommen/1177763/.

149. *See* Bill Kouras, *Woman Who Lost Family to Deadly Wildfires Sues Greek Officials*, GREEK CITY TIMES, (Aug. 20, 2018), https://greekcitytimes.com/2018/08/20/woman-who-lost-family-to-deadly-wildfires-sues-greek-officials/.

150. *See id.*

of the 2018 Mati fire resulted in lawsuits from families who lost loved ones in the blaze, largely placing the blame on illegal construction.[151]

E. Rural Abandonment

Greece's rural population as a percentage of its total population went from forty-four percent in 1960 to twenty-two percent in 2016.[152] The consequences of rural depopulation include the increase in forest surface fuels and highlights the need for holistic approaches to wildfire prevention. In the past, activities such as agricultural cultivations and extensive livestock grazing helped limit the amount of fuel buildup in the forests from dead leaves and trees.[153] Finding ways to motivate people to return to, or at least not abandon, the countryside lifestyle is one way to protect the environment against fires.[154] Animal grazing is an effective method in combating fire risk, as Imperial College researcher Oliver Perkins explained: "[i]n fire-prone regions of Spain, goat farmers are paid, not to produce food but to reduce fire risk by grazing flammable vegetation."[155] Incentivizing agroforestry such as animal grazing necessitates its revival in society.[156] Examples include implementing a shepherding law for pastures to use shepherds as "operators in fire prevention and control."[157] In this way, "agroforestry landscapes" create a "fire paradox"; allowing smaller, controlled fires can help prevent future megafires.[158]

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151. *See id.*

152. *See* Gavriil Xanthopoulos & Nikola Nikolov, *Wildfires and Fire Management in the Eastern Mediterranean Southeastern Europe, and Middle East Regions*, 77 FIRE MGMT. TODAY 29, 30 (2019).

153. *See* Gavriil Xanthopoulos, *Fires and Agroforestry Landscapes*, *in* REVIVING AGROFORESTRY LANDSCAPES IN THE ERA OF CLIMATE CHANGE: FOR PEOPLE, NATURE AND LOC. ECON. 192, 194 (Rigas Tsiakiris et al. eds., 2023), https://repositorytheophrastus.ekt.gr/theophrastus/bitstream/20.500.12038/278/1/Xanthopoulos%20Fires%20and%20agroforestry%20landscapes%20_ENOP_Reviving%20Agroforestry_%ce%95%ce%9d_2023.pdf.

154. *See id.* at 198.

155. Maanya Sachdeva, *Are Greece Wildfires Caused by Climate Change?*, INDEPENDENT (July 26, 2023, 8:00 AM BST), https://www.independent.co.uk/climate-change/news/wildfires-in-greece-arson-rhodes-b2381937.html.

156. Xanthopoulos, *supra* note 30 at 191.

157. *See* Fantina Tedim et al., *A Wildfire Risk Management Concept Based on a Social-Ecological Approach in the European Union: Fire Smart Territory*, 18 INT'L J. DISASTER RISK REDUCTION 138, 145 (2016).

158. *See* Xanthopoulos, *supra* note 30, at 193.

V. CONCLUSION

Greece's response to escalating forest fires necessitates a comprehensive approach that aligns with human rights and environmental accountability. The failure to implement the Goldammer Plan, despite its clear and actionable recommendations, reflects a critical lapse in governmental responsibility. If Greece does not act immediately to implement policies and strategies for mitigating against wildfires, it is violating the European Convention on Human Rights by risking the loss of more innocent lives, protected forestland, and the last green areas left near major cities, such as Mount Parnitha near Athens.[159]

The acknowledgment of the interdependence of environmental protection and human rights is essential, urging the European Court of Human Rights to intervene and set a precedent for a rights-based approach to environmental disasters such as wildfires. Greece's legal obligations, both under national and international frameworks, require a reevaluation of its strategies for forest fire prevention. Only through a concerted effort that recognizes the intricate link between environmental and human rights can Greece hope to mitigate the impacts of escalating forest fires so that generations can continue to behold the beauty in and around Greece's forests.

159. *See* Elena Becatoros, *More Than 600 Firefighters Backed by Water-Dropping Aircraft Struggle to Control Wildfires in Greece*, ASSOCIATED PRESS, (Aug. 27, 2023, 9:02 AM PDT), https://apnews.com/article/greece-wildfires-evros-alexandroupolis-athens-parnitha-87ba978808ca9d836b733df6b5713083.