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LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers,

As we unveil Volume 14, Issue 2 of our *Journal*, we continue to explore the nuanced aspects of global legal issues. This issue extends our commitment to deepening the discourse on jurisprudence and legislative processes shaping the legal landscape worldwide.

In this issue, J. Mark Ramseyer and Yoshitaka Fukui provide a detailed analysis of the recent educational reforms in Tokyo. Their exploration into the unintended consequences of policy changes intended to democratize access to elite education offers crucial insights into the broader implications of educational policy decisions.

Elaine Kim's Note examines the repatriation of cultural properties, specifically the Benin Bronzes, and delves into the complex interplay of history, ownership, and restitution. Her Note highlights the ethical obligations and legal complexities involved in repatriation and advocates for an updated approach to handling cultural heritage.

Sandra Weir addresses the strategic and legal complexities surrounding the Northwest Passage, emphasizing the need for collaborative governance of this critical international waterway running through the Canadian Arctic. Her Note highlights the pivotal role that international straits play in global maritime navigation.

Ilias Bantekas and Marko Begović analyze the impact of the 2022 FIFA World Cup on labor reforms in Qatar, mainly focusing on the condition of migrant workers. Their joint article illuminates the slower pace of substantive labor rights improvements despite rapid infrastructure development, providing a nuanced understanding of the intersections between international sporting events and labor laws.

Lastly, Cesare Cavallini's proposal to redefine international civil procedure as "Global Civil Justice" suggests a transformative legal education shift. By embracing a comparative and holistic approach, his article prepares legal practitioners for the challenges of navigating an increasingly interconnected global legal system of diverse jurisdictions.

These contributions underscore the importance of thoughtful analysis and dialogue in shaping future legal practices. We are immensely grateful to our contributors for their rigorous scholarship and to you, our readers, for your continued engagement.

As always, we hope this issue inspires further discussion and a deeper exploration of the rich landscape of global legal issues.

Yours in Notre Dame,

Barrett Cole

Editor-in-Chief, Volume 14

DEMOCRACY AND "ELITE" EDUCATION: LESSONS FROM ANOTHER CORNER OF THE WORLD

J. MARK RAMSEYER & YOSHITAKA FUKUI*

Abstract

Adjacent to the recent (and ongoing) legal disputes over admissions to elite university programs, parallel disputes over admission to the most selective high schools continue. New York City operates the best known of these high schools and chooses its students through blindly graded exams. Critics—including prominent scholars like Stanford's Richard Banks and Yale's Daniel Markovitz—argue that the exams favor the wealthy. The Obama administration urged the high schools to replace their blind exams with a random selection mechanism for all applicants who met a minimum competency standard.

For decades, the Tokyo Board of Education had similarly maintained an elite high school and had similarly selected its students through a blind exam. Under similar egalitarian pressure, it replaced the exam with what would in time become the Obama administration template: the combination of a minimum competency exam with random selection. Almost immediately, the most promising students abandoned public high schools entirely. They shifted to what had previously been inferior private schools. The best of these private schools raised their standards in response, and public education in Tokyo never recovered.

Students learn best when taught at their level. The brightest students learn best when taught at a level that challenges them, and with which other students could never keep up. Bright Tokyo students wanted that challenge. When the public schools denied it to them, they left the public schools en masse.

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INTRODUCTION

In its recent decision about Harvard's affirmative action program, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Supreme Court did not question the school's claim—implicit, perhaps, but there all the same—that it conferred a benefit on the students it admitted. Writing for the Court, Justice Roberts referred to the "beneficiaries" of the admissions preferences and spoke of a racial "preference."[1] Justice Gorsuch described Harvard's and UNC's acceptance letter as "a ticket to a brighter future."[2] Plenty of high school students wanted to attend Harvard. If the College admitted a student, it must have benefited him (or her).

The Court took this claim by Harvard College, to be providing a benefit, as given. It asked whether the school could choose the students to whom it offered this benefit differently according to race. Speaking for the Court, Justice Roberts said no.

Call us naive, but we wish the Court had called Harvard's bluff. Graduates of Harvard College do not have the entre that they do because Harvard has a $53 billion endowment. They do not have that entre because some (only some) Harvard professors have international scholarly reputations. And they certainly do not have the entre because Harvard instructors have astounding pedagogical skills.

Instead, graduates from Harvard College have the entre that they do because people see them as smart and hard-working. They did not learn to be smart and hard-working from Harvard. They were smart and hard-working before, and Harvard admitted them, in part, because of that. Largely, in other words, Harvard does not confer prestige on its students. Rather, the students confer prestige on Harvard.

Focusing on the intellectual ability that students bring to Harvard would let us explore how best to teach them. Elsewhere in the educational environment (say, middle school), students and teachers both realize that most students learn best when surrounded by other students of roughly equal intellectual ability. We know of no reason anything would differ at age eighteen.

Indeed, the debate over university admissions does recur over the selection of students for the fastest paced junior and senior high schools. Yale professor Daniel Markovitz and Stanford professor Richard Banks both strongly urge these schools to change the way they select their students. The Obama Justice and Education Departments did so as well.

None of this is peculiar to the U.S. Half a century ago, the Tokyo Board of Education adopted almost exactly the proposal that the Obama administration advocated. In this article, we describe what happened.

We begin with the fights over U.S. high school exam schools (Section I). We describe the Japanese high school market (Section II). Tokyo went through the same fights in the 1960s that are currently buffeting American high schools (Section III). The Tokyo Board of Education eliminated the blind admissions exam to its top high school (known as "Hibiya"), and the brightest students disappeared. Rather than stay with a school that no longer limited admission to the very talented, the top students moved immediately to private and national high schools. The market for private high-school education boomed and has dominated Tokyo education ever since. Hibiya tried to return to its earlier selective policy, but only recently has it even

[1] *Id.* at 212 (Roberts, J.).
[2] *Id*. at 287 (Gorsuch, J., concurring).

started to recover (Section IV). We retrace this history, explaining the lessons from modern cognitive science (Section V).

I. THE AMERICAN CRISIS

A. *THE COMPLAINTS*

1. *The New York Schools*

A dynamic similar to the dispute over Harvard college admissions currently plagues debates about elite high school education in large American cities. The most prominent of the disputes have taken place in New York. For decades, New York City showcased a series of public high schools for the most talented of its students.

For several years now, critics have protested the blind entrance exams by which the city chose the students for these schools. They raise claims similar to those at stake in the Harvard college litigation. Yet, note the differences. New York City does not hold a $53 billion endowment for these schools. It does not provide lavish facilities, squash and crew teams, or gourmet meals. It does not supply instructors with forty-page bibliographies for CVs.

Instead, New York provides its exam high schools with classrooms and reasonably talented teachers. At root, that is all it offers. Through the exams themselves, it fills its classes with extremely talented students. Admission to the city's exam schools is not about facilities, endowments, or Nobel laureates on staff. It is about—it is only about—learning in a classroom with other students just as talented, and with teachers teaching to their particular talent level.

For decades, New York City operated Stuyvesant, Bronx Science, and six other high schools as part of a "specialized high schools" network.[3] For these schools, it picked students exclusively through a blindly graded exam written specifically for the New York schools by a private firm. The city chose by intellectual ability, and nothing else. In addition, the city also offered a ninth school for talented students: Hunter College High School, administered by Hunter College rather than the New York Department of Education. The Hunter school also selected its students through a blindly graded exam.

2. *The Logic*

Students vied for admission to these exam schools because they wanted to study among other equally talented students, and at a pace keyed to their strengths. At the U.S. college level, Harvard's $53 billion endowment obscures the straightforward pedagogical logic involved. Endowment or no endowment, students vary in what they can learn and how quickly they can learn it. Some people will never learn calculus, no matter how it is taught. Others can learn calculus, but only if taught slowly. Still others can learn calculus rigorously and quickly, and would be bored to death if taught in any other way. Some people cannot discuss the Bronte sisters; some can discuss the Brontës but not Shakespeare; some fall in love with the bard.

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[3] *See*, e.g., Joyce Li, *The Stuyvesant Controversy and the Lose-Lose Fight over Educational Access*, MERCER STREET (2022-2023), https://wp.nyu.edu/mercerstreet/2022-2023/the-stuyvesant-controversy-and-the-lose-lose-fight-over-educational-access/ [https://perma.cc/8ARS-VWPF].

At a most basic level, all this is obvious: when we talk to our children, we instinctively talk and explain at a level that they can understand. It does students who can learn if taught slowly no favor to place them in classes where they cannot keep pace. It does the most talented students no favor to place them in classes that move so slowly that they have trouble paying attention. Placing students in classes that teach to their distinctive level facilitates learning by everyone.

The students who pass through the New York exam schools are extraordinarily bright, and upon graduation many go on to prominent positions. Virtually all proceed to college, and a substantial fraction proceed to very selective colleges. Yale law professor Daniel Markovitz writes that "25 percent of the [Hunter] school's graduates are admitted to Ivy League colleges."[4] Joyce Li writes that "in 2017, 17.8% of the Stuyvesant graduating class—a total of 146 students—were accepted into either Stanford, MIT, UChicago, or an Ivy League university[.]"[5] Over the years, eight Bronx High alumni have earned Nobel prizes (seven of these in physics), and nine have won Pulitzers. At Stuyvesant, "only" four have earned a Nobel. Hunter College is smaller, but even it can count two Nobel laureates and five Pulitzer Prize winners.

3. *Income*

Modern critics criticize the implications that (they believe) these schools pose for economic equality. Widely, they complain that the exam schools favor the rich. Yale law professor Markovitz again:

> Simply tallying the colleges attended by graduates of one hundred or perhaps two hundred well-known and named elite high schools accounts for a third of the student bodies at the most prestigious colleges in the country. These high schools . . . overwhelmingly graduate children of very rich parents—perhaps two-thirds of their graduates come from households in the top 5 percent of the income distribution.[6]

The exams reward tutoring, argues Markovitz, and tutoring is expensive:

> Rich parents . . . pay for academic tutoring and test preparation programs . . . . Once again, the families that hire tutors skew overwhelmingly toward wealth. The poor and even the middle class cannot afford extensive tutoring, while it is difficult to find a child of elite professions who has not spent substantial time in the care of a tutor, and usually of multiple specialist tutors.[7]

Stanford professor Richard Banks makes a similar claim:

> Affluent, well-educated parents are able to make investments that include both direct financial investments (e.g., paying for

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[4] DANIEL MARKOVITZ, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITIES, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 151 (Penguin Press 2020).
[5] Li, *supra* note 3.
[6] MARKOVITZ, *supra* note 4, at 135.
[7] *Id.* at 128–29.

> good schools, hiring tutors, enrolling their children in summer camp, and so forth) and also in-kind investments in the form of parental know-how, advice, and help with coursework.[8]

Given these criticisms, some selective public high schools in the U.S. that once chose their students through blind exams have recently dropped them. Most prominently, Thomas Jefferson High School in suburban Washington D.C.—sometimes ranked the best public high school in the U.S.[9]—replaced its exam with a "holistic review" in 2022.[10] San Francisco changed the entry requirements for Lowell High School in 2020 from an entrance exam to a lottery.[11]

B. *TROUBLING INCONGRUITIES*

Focus on this connection between exams and income. The logic—articulated by Markovitz and Banks—might seem straightforward: exams reward tutoring; tutoring is expensive; ergo, exams reward the rich.

In fact, the logic is anything but straightforward. In 2023, Stuyvesant admitted 762 students. Only seven were Black, but the rest were not Caucasians. Instead, 489 were Asian-Americans.[12] What is more, the Asian-American students who attend Stuyvesant are not wealthy. Wealthy New Yorkers do not send their children to Stuyvesant; they send them to private schools. The students who attend Stuyvesant are talented students without money.

Commentator Joyce Li writes:

> The truth is that Asian Americans in New York City have the highest poverty rate out of all ethnic groups, and most students from Asian American communities are able to prepare for the SHSAT not through private tutoring afforded by family wealth but through the group test prep centers concentrated in the Asian enclaves of neighborhoods like Flushing and Sunset Park, usually held in cramped, repurposed offices above souvenir shops and bubble tea stores.[13]

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[8] Ralph Richard Banks, *The New Racial Segregation in Education*, 96 N.Y.U. L. REV. ONLINE 144, 150 (2021).
[9] *Thomas Jefferson High School for Science and Technology*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology-20461.
[10] Emily Leayman, *TJ Admissions Applications to Open with New Policy Continuing*, PATCH, Oct. 21, 2022, https://patch.com/virginia/greateralexandria/tj-admissions-applications-open-new-policy-continuing [https://perma.cc/QT84-VAYA]. The new policy was upheld in Coalition for TJ v. Fairfax Cnty. School Board, 68 F.4th 864 (4th Cir. 2022).
[11] Banks, *supra* note 8, at 153.
[12] Troy Closson, *Stuyvesant High School Admitted 762 New Students. Only 7 Are Black*., N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2023/06/02/nyregion/stuyvesant-high-school-black-students.html [https://perma.cc/TTZ5-NJS6].
[13] Li, *supra* note 3.

Of the students at Stuyvesant during 2022-23, 48% qualified for free or reduced-price lunches (i.e., they came from families with incomes below 185% of the poverty line).[14]

As New York City mayor, Bill de Blasio led an effort to drop the blind exams for the city's specialized high schools. He wanted to award high school seats to the top students at each of the city's middle schools instead. Given that the best students do not distribute themselves randomly across the middle schools, this would not have selected for talent. Parents of high-achieving children organized the opposition. They campaigned hard. And they won. The authority over the entrance exam lay with the state. In 2019, the state legislature adjourned without acting on de Blasio's reform bill, and it died in Albany.[15]

The benefit that students obtain from these exam schools does not come from the resources invested. Obviously, American private schools sometimes provide lavish resources. Perhaps some public exam schools do as well. Yet schools like Stuyvesant do not. The student: teacher ratio at Stuyvesant is 22:1.[16] At Bronx Science it is 21:1.[17] Among New York high schools more generally, the ratio is 13.7:1.[18]

Instead, the benefit from the New York exam schools comes from—comes only from—the pace of instruction and the challenges and support from similarly talented peers and families. For all the talk about the resources and facilities and faculty at Harvard, the New York exam schools provide none of that. They provide only the most basic facilities, and other students who learn at the same pace.

C. *TEACHING TO THE ABILITY LEVEL*

Lost in the American debate over affirmative action at Harvard and elsewhere is some (perhaps more than some) educational common sense: people learn best when taught to their level. Not everyone can learn everything, and even those who can learn something differ in how quickly they can master it. Those who can learn something quickly will learn the subject more deeply and enjoyably, and develop more rigorous habits of the mind, if taught at an appropriately quick pace. Those who require more time and deliberation will learn better if taught more slowly.

Return to calculus. Students cannot study college-level physics, chemistry, or engineering without calculus, and a student who cannot hit 600 on the SAT cannot handle serious calculus. The 550 student will not learn it no matter how carefully an instructor might try to teach it. Yet a 550 is roughly 60th percentile, and a 650 is the 85th percentile. The implication is

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[14] *Stuyvesant High School*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/new-york/districts/new-york-city-public-schools/stuyvesant-high-school-13092; *The National School Lunch Program (NSLP),* in Feeding America (accessed Mar. 30, 2024) (eligibility standards for lunch), https://www.feedingamerica.org/take-action/advocate/federal-hunger-relief-programs/national-school-lunch-program [https://perma.cc/32FQ-J7UD].

[15] Closson, *supra* note 12; Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. TIMES (June 24, 2019), https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html [https://perma.cc/TTZ5-NJS6]; Banks, *supra* note 8, at 153.

[16] *Stuyvesant High School*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/new-york/districts/new-york-city-public-schools/stuyvesant-high-school-13092.

[17] *Bronx High School of Science*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/new-york/districts/new-york-city-public-schools/bronx-high-school-of-science-13207 [https://perma.cc/39GP-YKW4].

[18] *New York City Class Size 2022-23 Report (Updated)*, NYC DEP'T OF EDUC., https://infohub.nyced.org/docs/default-source/default-document-library/2022-23-updated-class-size-report.pdf.

this: roughly 3/4 of the American population—of the world population—cannot learn serious calculus, no matter how well taught. We do no one a favor by trying to pretend otherwise.

What is more, the SAT 650 students cannot keep pace with the 700+ students. Taking calculus as taught to SAT 650 students, the 750 student will be bored. Taking calculus as taught to the 750 students, the 650 student will fail to keep up. Had they taken calculus taught to their level, the 650 students could indeed have learned the material and become engineers. Taking it at too high a level, some will fall out of STEM entirely. Peter Arcidiacono and Richard Sander have studied this phenomenon extensively.[19] Justice Thomas alluded to it in his own *Students for Fair Admissions* concurrence.[20]

Entrance exams sort young people by this ability to learn. Contrary to Banks, they are not "achievement" exams. And contrary to Markovitz, there are serious limits to what tutoring can do. Imperfectly to be sure, these exams (including the now-widely despised SAT) measure a student's ability to learn. Scholars outside of cognitive science have yet to come to terms with the tests, but those in the field understand that the tests capture (with error to be sure) exactly what they purport to capture: cognitive ability.

In large part, the "prestige" to attending an exam school is not a function of the school itself; instead, it reflects the cognitive ability of the students. The prestige, in other words, is "endogenous" to the students. The graduates do well in life because they are bright: they solve difficult questions quickly and correctly. That is a valuable trait in modern society, and one for which profit-maximizing employers happily pay a premium. The prestige of the school reflects this attribute common to most of the students who attend it.

II. SPOTTING ACADEMIC TALENT IN JAPAN

A. *SPOTTING TALENT AT AGE 18*

1. *Introduction*

When American scholars begin to learn about Japan, they find it hard to believe that the University of Tokyo could enroll the bulk of the most talented students in nearly every field. They hear the claim from their peers in Japan, but discount it. After all, bias is bias, and those peers themselves attended the University of Tokyo. American scholars instinctively think of ten to fifteen top schools, each with a (purportedly) different character and set of strengths. To this, they add another twenty to thirty second-tier schools that regularly graduate some exceptionally talented students.

Asked instead where a bright student in the U.S. should go, American scholars reflexively reply that "it all depends." Asked whether a student should choose Harvard over MIT over Chicago, or any of these over Swarthmore and Williams, they reply that each has top faculty and students. Each has its own character and strengths. No one school suits all students. The choice depends on a student's own preferences, strengths, and interests.

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[19] *See, e.g.*, Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Trade-off*, 54 J. ECON. LIT. 3, 7 (2016) ("there is consistent evidence that the fit between the student and the university matters, at least across some dimensions"); Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

[20] 600 U.S. at 231 (Thomas, J., concurring).

2. *The University of Tokyo*

a. Tokyo

Yet the University of Tokyo does indeed enroll a large fraction of the top students in most fields. In large part, on this dimension the difference between the U.S. and Japan follows from simple size: relative to the high school population, the top American universities are far smaller than the University of Tokyo. As a result, they purport to make much finer distinctions than Tokyo ever tries to make. Most of top American schools each enrolls fewer than 2,000 first-year students a year.[21] Cal Tech enrolls fewer than 300.[22] Out of the 3.77 million high school graduates in the U.S., 2,000 is 0.05%.[23] By contrast, the University of Tokyo enrolls 3,000 per year.[24] Out of the 1.1 million Japanese high school graduates, this is 0.3%.[25] Add all the first-year students at Princeton, MIT, Harvard, Stanford, Yale, University of Chicago, and Cal Tech, and the total is still a smaller fraction of U.S. high school graduates than the University of Tokyo class is of all Japanese graduates.[26]

b. The US

And in part, the talent overlap among the top American schools follows from the heavily random character of U.S. undergraduate admissions. Whatever the ultimate reason, American admissions officers at the top schools lack the metrics they need to compare students from the nearly 27,000 high schools across the country, private and public, metropolitan and rural. They even lack the means to discriminate among the top high schools: whether the 5th best student at Bronx High is stronger or weaker than the 3rd best at New Trier or the 6th best at Phillips Exeter. After all, students take different courses. Teachers grade by different curves. And counselors download their recommendation letters from different websites.

c. A caveat

In fact, we do exaggerate a bit the contrast between the University of Tokyo and several of the other top schools. If the University of Tokyo tends to take the most talented of the high school graduates, Kyoto University draws from an overlapping population. In general, the University of Tokyo recruits from eastern Japan, while Kyoto University recruits from the west. Even if the average quality of the Tokyo students may exceed the average quality of Kyoto students, the overlap is large.

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[21] Incoming class sizes for colleges are available at U.S. NEWS.
[22] *California Institute of Technology*, U.S. NEWS, https://www.usnews.com/best-colleges/california-institute-of-technology-1131.
[23] *Table 219.10*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d17/tables/dt17_219.10.asp (accessed Mar. 30, 2024).
[24] Total enrollment for first two years of college was 6647, *see About UTokyo: Enrollment*, UTOKYO, https://www.u-tokyo.ac.jp/en/about/enrollment.html [https://perma.cc/YF2W-YCKE] (accessed Mar. 30, 2024).
[25] *Japan in Terms of Statistics, Search for 2022 Population Estimate as of October 1st of Each Year*, ESTAT, https://www.e-stat.go.jp/stat-search/files?page=1&layout=datalist&toukei=00200524&tstat=000000090001&cycle=7&year=20220&month=0&tclass1=000001011679&tclass2val=0 [https://perma.cc/8QKZ-88XN].
[26] *Best National University Rankings,* U.S. NEWS, https://www.usnews.com/best-colleges/rankings/national-universities.

The difficulty of an entrance exam also varies by department. By one recent estimate, the University of Tokyo medical department (medical school is a six-year undergraduate curriculum in Japan) is more selective than Kyoto University medicine. Yet the latter is still more selective than the physics, chemistry, or biology departments at the University of Tokyo.[27] Similar caveats about ability overlap apply to several of the top schools, for example, Hitotsubashi University in Tokyo, and the Tokyo Institute of Technology.

3. *The SAT*

For American schools at the top level, the SAT is just too easy, and its "subject tests" are not much harder. The College Board writes the test to let admissions officers compare students across different high schools. But it sells the test into the entire national market. Within that market, most schools merely try to distinguish those applicants who can handle basic college material from those who cannot. Students cannot study college-level physics and chemistry without calculus, and a student who cannot score 600 on the SAT cannot handle serious calculus. A student who cannot hit 600 on the verbal section cannot thoughtfully read Thomas Hardy or Jane Austen, and cannot read Proust (in English, much less in French) or James Joyce at all.

As a result, most admissions officers will use the test to sort students in the 550 to 650 range. A 550 is roughly the 60th percentile, and a 650 is the 85th percentile. Given that 1.7 million students take the SAT, approximately 425,000 students will fall in this range.[28] Given that this is the range that will concern most admissions officers, the College Board loads the questions to sort this group. For that task, the questions do exceptionally well.

The top U.S. universities, however, are together trying to locate the brightest 10,000 to 20,000 students. Out of a high school graduating class of 3.77 million students, the top 10,000 constitute 0.27%, close to the 0.3% at the University of Tokyo. The SAT will let admissions officers identify most of the students in the top 15%. It may even identify those in the top 5%. But to identify the brightest 0.3%—or even the top 1%—it offers no questions hard enough. Anyone bright enough to fall within the top 2% of the high school population can answer all of the SAT math questions. If such a student misses two or three questions, he (or she) misses them by the random stroke of bad luck that occasionally hits everyone.

4. *The Japanese Exams*

a. The exam itself

By contrast, to select their undergraduate class, the University of Tokyo faculty write and grade their own exams. They spend an enormous amount of time on this, but by doing so ensure that the school poses the questions that let them select the students that they want. Asked whom they look for,

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[27] Selectivity measures for public universities, as given on website, MANABI BENESSE, https://manabi.benesse.ne.jp/hensachi/kokkoritsudai_index.html [https://perma.cc/VWF3-9TU9].

[28] For percentile ranges *see, e.g.*, Halle Edwards, *SAT Percentiles and Score Rankings (Updated 2023)*, PREPSCHOLAR, https://blog.prepscholar.com/sat-percentiles-and-score-rankings [https://perma.cc/WHR2-GWHN] (accessed Mar 30, 2024); for total SAT population, *see* College Board, *SAT Program Results for the Class of 2023 Show Continued Growth in SAT Participation* (Sept. 26, 2023), https://newsroom.collegeboard.org/sat-program-results-class-2023-show-continued-growth-sat-participation [https://perma.cc/6FVB-NRVM] (1.7 million in 2022 class)

the faculty are upfront: they want students who are extremely smart and curious. They do not want students who can recite endless lists of dates and names. They do not want students who have memorized dozens of solutions to differential equations. They want basic—but extraordinary—cognitive ability.[29]

By all appearances, the University of Tokyo faculty write exams that reward exactly that characteristic. Many of the other schools use exams that do test for lists of names and dates. Many of them let applicants avoid tests in math altogether. The University of Tokyo requires all applicants to take a math test, and gives a brutally hard test. See Figure 1: a recent math question (for aspiring STEM and medical students, to be sure) from the university's undergraduate entrance exam. The closest American equivalent might be the questions students face in the elite high school math team competitions. To be sure, those math team members do prepare for the competitions by reviewing similar questions together. Largely, however, the ability to solve these questions is an ability that most students do not have and cannot learn.

Define the sequence $\{a_n\}$ as follows:

$a_1 = 1,\ a_{n+1} = a_n^2 + 1 \quad (n=1,2,3\ \ldots)$

(1) When positive integer n is a multiple of 3, show that a_n is a multiple of 5.

(2) Let k, n be positive integers. Using k and n, show the necessary conditions under which a_n will be a multiple of a_k.

(3) Find the greatest common divisor of a_{2022} and $(a_{8091})^2$.

[29] As this discussion should make clear, prominent scholars in the field routinely misdescribe Japanese entrance exams. Yoko Yamamoto & Mary Brinton, *Cultural Capital in East Asian Educational Systems: The Case of Japan*, 83 SOCIO. EDUC. 67, 69 (2010), for example, characterize the Japanese university entrance exams as "standardized written exams based on a nationally determined curriculum[.]" The description is wrong on several levels. First, the tests are not "standardized[.]" From time to time, top Japanese universities have experimented with standardized preliminary tests. The crucial exam, however, remains the one taken after a student passes the preliminary tests: the exam written by faculty at the school itself. Often, this test is not even standardized to the school. It is specific to the department or to more basic segments of the university (for example, humanities or STEM).

Second, Yamamoto & Brinton write that "the standardized examinations center on basic skills in mathematics, language, and history[.]" *Id.* at 69. On the one hand, ordinary high school math classes do not use questions even remotely close to the University of Tokyo test given in Figure 1. On the other, some prominent departments (for example, many law departments and even some economics departments) of respectable private universities do not test math at all. For students who decide to focus on those departments in 10th grade, the entire high school math curriculum is effectively optional.

By contrast, Takehiko Kariya, *From Credential Society to "Learning Capital" Society*, *in* SOCIAL CLASS IN CONTEMPORARY JAPAN 87, 89, writes that "the curricular content that constitutes the vast majority of entrance exams is generally acknowledged to have virtually no bearing on any part of students' lives besides the exam-taking itself." What is more, "the relationship between intellectual ability and exam scores remains quite obscure[.]"

Kariya is tendentious, and—like Yamamoto and Brinton—tendentiously wrong. One cannot study modern physics without an extraordinarily high level of mathematics. The University of Tokyo physics department tests for that high level. One cannot work as an engineer without facility in calculus. Engineering departments routinely test facility in calculus. And one cannot enter the world of serious academic research in any field of science or technology without an ability to read sophisticated English prose. The University of Tokyo tests for that ability. Kariya's claims notwithstanding, a student cannot solve the math problems in Figure 1 without extraordinarily high levels of "intellectual ability[.]" Neither can the student read Figure 2 without those high levels of ability.

Figure 1: Sample Question from 2022 University of Tokyo Entrance Exam, *Reiwa 4 nendo dai 2ji gakuryoku shiken shiken mondai* [*Exam Questions for Part 2 of the 2022 Academic Exam*], TOKYO DAIGAKU (SUGAKU EXAM FOR RIKA), available at https://www.u-tokyo.ac.jp/ja/admissions/undergraduate/e01_04_22.html.

We spare readers the often similarly hard verbal questions (since they are not available in English), but in Figure 2, we reproduce one of the questions on the English language segment of the exam. Note that this question is from a university entrance exam. Obviously, the University of Tokyo selects for students who already command an extraordinarily sophisticated reading ability. The university also tests students on both modern and classical Japanese, on both Japanese and world history, on geography, and physics, chemistry, biology, and geology.

Summarize the following English-language into 100-120 characters in Japanese:

The notion of "imagined family" helps us to understand how group feelings can be extended beyond real family. Because humans evolved in small groups whose members were closely related, evolution favored a psychology designed to help out members of our close families. However, as human societies developed, cooperation between different groups became more important. By extending the language and sentiments of family to non-family, humans were able to create "imagined families" — political and social communities able to undertake large-scale projects such as trade, self-government, and defense.

By itself, though, this concept still can't explain why we consider all members of such a community to be equal. Imagined family differs from real family not only by the lack of genetic ties, but also by the lack of distinction between near and distant relatives. In general, all members of a brotherhood or motherland have equal status, at least in terms of group membership, whereas real family members have different degrees of relatedness and there is no fixed or firm way of defining family membership or boundaries. We need to search for a more fundamental factor that unites people and creates a strong bond among them.

At a deeper level, human communities are united by a well-known psychological bias which is believed to be universal. Studies of childhood development across cultures indicate that people everywhere tend to attribute certain essential qualities to human social categories such as race, ethnicity, or dress. This mental attitude has been used to generate notions of "in-group" versus "out-group," and to give coherence to a group where initially there was none, dramatically enhancing the group's chance of survival. However, this can also lead us to see an "out-group" as a different biological species, increasing the risk of hostility and conflict. Throughout history, and likely through human prehistory, people have routinely organized themselves to fight or dominate others by seeing them as belonging to a different species.

Figure 2: Sample Question from 2016 University of Tokyo Entrance Exam, *2016 Exam,* available at https://toudainyuushi.com/core_sys/images/main/2016/q2016eigo.pdf.*

Precisely because most students could never answer questions like these—regardless of preparation—the questions would not work on the SAT. Given that most students would simply draw a zero, the questions will not sort the students who score in the 550 to 650 range. Test writers need questions that sort students near the boundaries of the line they hope to draw. At the University of Tokyo, faculty try to write exams that sort students along that 0.3 percentile line. They write questions that students above that line can sometimes solve (the passing score is typically about 50% to 60%), but those below cannot.

The University of Tokyo faculty do not care about distinguishing the 50th percentile student from the 60th, from the 70th. They do not want to admit any of them. For the SAT, however, the College Board uses questions that distinguish among exactly the half-million students at the 50th, 60th, and 70th percentiles. After all, the universities that need those distinctions are the ones that keep the College Board in business.

5. *Student Satisfaction*

As scholars, we do not give bright Japanese students (or American students, for that matter) their due. American scholars of Japan stress the entre that a University of Tokyo degree gives its graduates.[30] Other scholars make the same claim about Harvard, of course. They attribute the desire among high school students to attend the University of Tokyo (or Harvard) to this job-market premium.[31] The premium is there, and students will pursue it. But we should remember that the most able students enjoy environments that present the hardest challenges for their own sake.

Bright students do well in hard courses, and many of them (whether in Japan, in the U.S., or anywhere else) choose those courses precisely because they are hard. They understand—properly—that the greatest satisfaction comes from tackling and succeeding at the hardest challenges. One can see this in the fact that talented students major in math at the top universities, and within the department take the most difficult courses.

Employers (whether in New York or in Tokyo) are not likely to pay a premium to students just because they took Real Analysis (or simply Analysis) and Theoretical Algebra (or Commutative Algebra, General Algebra, Abstract Algebra, or simply Algebra). At most employers (again, whether in Japan or in the U.S.), the hiring personnel would not realize that "Analysis" and "Algebra" are among the very hardest courses taught at modern universities. During his years on the admissions committee at Harvard Law School, Ramseyer had to intervene when one admissions officer wanted to reject a student because he had chosen "obviously easy" courses in college. Her example: the upper-level "Algebra" course at a top-

* 2022 English exam is not publicly available.

[30] *E.g.*, CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 59 (Stanford Univ. Press 1982).

[31] Kei Ikeda, *Todai sei dakega shitteiru ... [Only U Tokyo Students Know ...]*, PRESIDENT ONLINE (Oct. 13, 2020), https://president.jp/articles/-/39387?page=1 [https://perma.cc/V9PJ-TCEC] (suggesting widespread perception that U Tokyo students find jobs at top firms); *see also Why do so many people want to go to Harvard? What can Harvard offer that other universities cannot?*, QUORA, https://www.quora.com/Why-do-so-many-people-want-to-go-to-Harvard-What-can-Harvard-offer-that-other-universities-cannot [https://perma.cc/R8MZ-6S5K].

tier math department. Courses like Analysis and Algebra are the excruciatingly difficult courses that only serious math students even realize are hard. Yet the very best students everywhere volunteer for these courses. They take them because they want the satisfaction that comes from tackling the hardest challenges.

C. *AT AGE 15 (AND 12)*

At roughly the same time that it created its national universities, the Japanese government began their preparatory programs. Under these programs as originally implemented, the most talented students would study six years at elementary school (mandatory), five in a "middle school," three in a "higher school," and three in a university.[32] The Japanese government created the Tokyo Imperial University in 1877. In time it would create a network of eight other "imperial universities."[33] The government created the second of these universities as the Kyoto Imperial University in 1897, and the last as Nagoya Imperial University in 1939.

After the war, the government merged what had been the principal feeder school to the University of Tokyo, the First Higher School, into the university itself. Undergraduates now spent two years on the campus of the former First Higher School taking the University's general education requirements. They then proceeded to their relevant departments on what had been the pre-war campus of the Tokyo Imperial University.[34]

Modern Japanese high schools inherited the position that the so-called "middle schools" had held before the war. Pre-war, the "middle schools" had provided five years of education. Under the post war reorganization, the government followed the six-year elementary school education with a (compulsory) three years in an institution called a "middle school," and three more years in what it called a "high school." The last two years of the pre-war five-year middle schools, in other words, became the first two years of the post-war three-year high schools.

As of 2020, Japan had 3,500 public (prefectural or municipal) high schools, fifteen laboratory high schools attached to national universities, and 1,300 private high schools. About one quarter of the public high schools were technical schools. In 1950, 43% of Japanese middle-school students proceeded to high school. By 1965 the fraction had climbed to 71%, and by 1974 to 91%.[35]

At the university level, students select into the most intensive high schools through an exam. During the early post-war years, they sorted themselves among public high schools through competitive exams that functioned much like those used by the New York City exam schools. Alternatively, Japanese students can choose to attend private schools. Some private schools offer a three-year high school curriculum. Others offer a six-year combined middle and high school program. For the former, students take an exam at the end of middle school. For the latter, they take an exam at the end of sixth grade.

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[32] *E.g.*, THOMAS P. ROHLEN, JAPAN'S HIGH SCHOOLS Ch. 2 (Univ. Cal. Press 1983).
[33] Kazuo Yawata, *Zenkoku ni 7tsu aru ...* [*The Seven within the Country ...*], PRESIDENT ONLINE (Feb. 24, 2024), https://president.jp/articles/-/78847?page=1 [https://perma.cc/V9PJ-TCEC].
[34] *See* the website of the first higher school, available at http://museum.c.u-tokyo.ac.jp/ICHIKOH/home.html [https://perma.cc/D9FT-W72J].
[35] Monbu kagaku sho, *Koto gakko kyoiku no genjo ni tsuite* [*Regarding the Status of High School Education*], (Mar. 2022), https://www.mext.go.jp/a_menu/shotou/kaikaku/20210315-mxt_kouhou02-1.pdf.

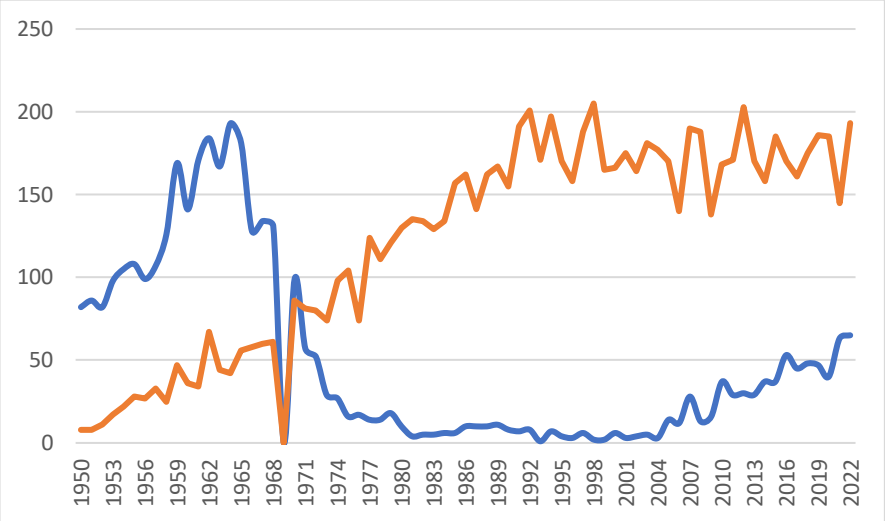
III. THE FALL OF HIBIYA

A. *WHAT HIBIYA HAD BEEN*

1. *The Performance*

During the early post-war years, the Hibiya High School in Tokyo functioned as the preeminent high school in the country.[36] The Tokyo prefectural government had created it in 1878 as the "First Middle School."[37] After the war, it became the Hibiya High School. Until the mid-1960s, it selected its students by competitive examination.[38]

For years, Hibiya High School placed more graduates at the University of Tokyo than any other high school (see Figure 3). In 1950, 82 Hibiya graduates went on to the University of Tokyo, in 1955 108 graduates, in 1960 141 graduates, and in 1964, 193.



[36] Hibiya students did not necessarily pass the University of Tokyo entrance exam on their first try. Especially during the early post-war years, some students passed only after spending an extra year (or more) preparing for the exam. To help them pass, Hibiya teachers provided (gratis, on their own) special seminars for graduates studying for an extra year.

Of the students admitted to the University of Tokyo in 1958, only 542 were still enrolled in high school; 1,533 (73.9%) had graduated a year or two earlier. From this peak, the fraction of University of Tokyo who passed the exam only after at least an extra year (or more) gradually fell. By 1965, the fraction had fallen below half: that year, 56.7% of those admitted had passed while still in high school. This fraction rose to 65% in 1996, and to 69.5% by 2006. *See* TETSUO KOBAYASHI, TODAI GOKAKU KOKO SEISUI SHI [THE VICISSITUDES OF THE HIGH SCHOOLS THAT PLACED GRADUATES IN THE UNIVERSITY OF TOKYO] (Kaitei ban) 36, 52, 136, 158 (Kobunsha 2023) [hereinafter THE VICISSITUDES OF THE HIGH SCHOOLS].

For reasons not obvious, these numbers vary modestly from source to source. Within the University of Tokyo, the fraction who pass while still enrolled in high school is highest in the most difficult department—the medical school. *See 2022 University of Tokyo entrance examination status*, UNIV. OF TOKYO LABORATORY, https://juken.y-sapix.com/articles/24215.html [https://perma.cc/3HV8-6EPU].

For another description of the fall of Hibiya, *see* Takehiko Kariya & James E. Rosenbaum, *Bright Flight: Unintended Consequences of Detracking Policy in Japan*, 107 AM. J. EDUC. 210 (1999).

[37] *E.g.*, *Hibiya koko no rekishi* [*The History of Hibiya High School*], TOKYO METROPOLITAN HIBIYA HIGH SCHOOL, https://hibiya-h.metro.ed.jp/Introduction/History.html [https://perma.cc/KWZ8-RPAA].

[38] *E.g., id.*

Figure 3: Hibiya and Kaisei Graduates Admitted to the University of Tokyo, AKIRA TAKEUCHI, HIBIYA KOKO NO KISEKI [THE LEGACY OF HIBIYA HIGH SCHOOL] 42–43 (SHODEN SHA 2017); Ikutaro Tanaka, *Hibiya koko no Todai gokakusha su "fukkatsu" ...* [*The Recovery of the Number of Hibiya High School Graduates Entering University of Tokyo ...*], NIKKAN GENDAI, Nov. 10, 2019; Tetsuo Kobayashi, *Todai gokakusha ha 193 nin - 1 nin ni gekigen ...* [*University of Tokyo Passers Plummets from 193 to 1 ...*], PRESIDENT ONLINE (Jan. 31, 2022); *Shingakko deeta meikan* [*Directory of Data on Feeder Schools*], SHINDEME, https://www.shindeme.com/school/pass/13234K/.*

Predictably given its selectivity, over the course of its history Hibiya graduated many students who went on to become prominent in their fields. Obviously, they included scholars and scientists. They also included writers, government officials, and senior business executives.[39]

Post-war, the Tokyo prefectural Board of Education had divided the prefecture into several high school districts. Hibiya's district covered the downtown areas (Chiyoda, Minato, Shinagawa, and Ota districts). Under the post-war system, students took the exam for their favored high school in their district. Different schools had different passing scores, and students went to their top choice among the schools whose exam score cut-off they had exceeded.

In fact, given Hibiya's reputation, students outside the school's nominal district attended it as well. They came to Hibiya from across Tokyo and in fact across the country. How they did so seems to have varied over time, but giving a nominal address within the district seems to have worked.[40] Hibiya faculty wanted the best students they could find, and during the early post-war years seem not to have enforced the district rules very strictly.

Within Hibiya's catchment area, parents with the most talented children eventually converged on the Kioi-cho middle school. Within the Kioi catchment, they converged on the Ban-cho elementary school. To proceed through what became the favored route, many parents with talented children either rented (or pretended to rent) an apartment within the Ban-cho district. They then moved their official residency there. By some accounts, in 1965 60% of the 1700 students at Ban-cho commuted to the school from outside the district.[41]

From 1950, Hibiya admitted girls as well as boys. That year, it admitted 400 students per class. In 1963, it increased the class size to 470.[42]

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* Blue—number of Hibiya graduates admitted to the University of Tokyo; orange—number of Kaisei graduates admitted to the University of Tokyo. University of Tokyo did not hold entrance exams in 1969.

[39] AKIRA TAKEUCHI, HIBIYA KOKO NO KISEKI [THE LEGACY OF HIBIYA HIGH SCHOOL] 38–39 (Tokyo: Shodensha 2017).

[40] KOBAYASHI, THE VICISSITUDES OF THE HIGH SCHOOLS, *supra* note 36, at 6, 139–40.

[41] Tetsuo Kobayashi, *Katsute wa Todai sotsu yorimo kachi ga atta* [*It Used to Have More Value than Having Graduated from the U Tokyo*], PRESIDENT ONLINE, Jan. 29, 2022, https://president.jp/articles/-/61241?page=1; Tetsuo Kobayashi, *Todai gokakusha wa 193 nin - hitori ni gekigen* [*U Tokyo Passers Plummet from 193 to 1*], PRESIDENT ONLINE (Jan. 31, 2022), https://president.jp/articles/-/54184?page=1 [hereinafter *U Tokyo Passers Plummet from 193 to 1*].

[42] *Hibiya koko no rekishi* [*The History of Hibiya High School*], in TOKYOTORITSU HIBIYA KOTO GAKKO, https://www.hibiya-h.metro.tokyo.jp/Introduction/History.html.

2. *Exam Preparation*

Hibiya teachers made it a point of pride not to structure their classes around university entrance examinations. Some private schools did—most notably Nada (located in Kobe city)—which finished the high school curriculum by grade eleven and devoted the entire grade twelve to entrance exam preparation.[43] In 1966, Hibiya provided students with no exam preparation except three practice exams during the second semester of their last years.[44]

One teacher explained: "high school is where we teach the foundations. What house to build on them is up to the student."[45] Hibiya teachers focused on the foundations. In fact, said the teacher in charge of university counseling in 1963, Hibiya was trying hard to reduce the number of tests. "To have regular tests tends to get in the way of self-directed learning," he explained, and Hibiya was trying to train students to educate themselves.[46]

B. *THE PSYCHOLOGY*

Its alumni do not describe Hibiya as having been a grind populated by hyper-competitive professionally ambitious students. Even less do they describe it as a school for the children of Amy Chua's famously brand-obsessed "tiger moms."[47] Take published alumni recollections with a grain of salt, of course. But Hibiya alumni describe the school as having been a haven for (those who 21st century children in the U.S. call) "geeks" and "nerds." Hibiya attracted, in other words, the relatively more intellectually inclined, thoughtful adolescents. Necessarily, it was a sanctuary for boys and girls who would not have weathered an ordinary high school well.

Hibiya teachers taught at a high level.[48] By almost all accounts, they taught at a rigorous level significantly beyond that of the official textbooks. Students studied five to six hours a day outside of class,[49] but they tended to enjoy the classes, and to enjoy them precisely because they were hard.[50]

Naokatsu Sudo, class of 1923 at Hibiya (then still called the Tokyo First Middle School), describes the students as having had non-aristocratic, decidedly middle-class roots.[51] In 1994, he traced his class: they had gone on to jobs, and done extremely well. Of the 158 graduates in his class, he located ninety-six. Of this group, forty-eight—half—had gone into business. Twenty of the forty-eight had become directors or senior officers of exchange-listed companies. Of the remainder of the class, twenty-four—a quarter of the ninety-six classmates—became university professors. Eight became physicians, seven went into the government bureaucracy, four became writers, three went into law, and three became architects.[52]

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[43] THOMAS P. ROHLEN, JAPAN'S HIGH SCHOOLS 20 (Univ. Cal. Press 1983).
[44] *Seito wa subete shinshi atsukai* [*Students Treated as Gentlemen*], ASAHI SHIMBUN, Mar. 24, 1966.
[45] *Id.*
[46] Tetsuo Kobayashi, *Katsute wa Todai sotsu yorimo kachi ga atta* [*It Used to Have More Value than Having Graduated from the U Tokyo*], PRESIDENT ONLINE, Jan. 29, 2022.
[47] AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2011).
[48] Juntaro Kawakami, *Higoho datta yakyubu* [*The Illegal Baseball Team*], ASAHI SHIMBUN, July 1, 1963.
[49] *Students Treated as Gentlemen*, *supra* note 44.
[50] Kawakami, *supra* note 48.
[51] NAOKATSU SUDO, TOKYO FURITSU DAIICHI CHUGAKKO [TOKYO PREFECTURAL FIRST MIDDLE SCHOOL] 140 (Kindai bungei sha 1994); *See* HIBIYA KOKO HYAKUNENSHI [A 100-YEAR HISTORY OF HIBIYA HIGH SCHOOL] 161 (Hibiya koko hakunenshi kanko iinkai ed., 1979).
[52] SUDO, *supra* note 51, at 260–62.

Not all pre-war First Middle School students had middle-class roots. One alumnus recalled studying at night by sneaking outside to read under a street lamp.[53] He had come from a rural farm village, he explained, and his father had forbidden him from going to middle school. When he begged, his father had relented and told him he could attend middle-school if he could pass the exam to the preeminent First Middle. Most of the students who passed that exam had come from elementary schools in comfortable urban areas, he noted. His local teacher discouraged him from even trying. But he took the exam, and passed. He remembered how he had enjoyed reading physics, math, and classics books in the library. And he remembered how shocked he had been when he stayed overnight with a friend from school and woke up to a breakfast that included an egg and dried fish.[54]

Shoji Fukuda was Hibiya class of 1956.[55] In 1969, he wrote a novel (*Akazukinchan ki wo tsukete* [*Be Careful Little Red Riding Hood*]) about a Hibiya student, a novel often described as "*Catcher in the Rye* set in 1969 Tokyo."[56] In a collection of alumni essays, Fukuda describes what it had been like to study at Hibiya. He himself identified with the self-consciously Bohemian students who regularly tried to intimidate their more strait-laced and hardworking classmates. He had edited the student literary magazine, he said. The magazine, as he put it, specialized in stories and poems so obscure that no one could understand them. To the student editors and authors—of course—the fact that no one could understand them simply reinforced their sense of their own brilliance.[57]

Fukuda had also served on a committee to choose a new school song. The school had given the committee a budget, he recalled, so they met often—and met at coffee shops. The members of the committee had composed pieces with (they said) more notes than Richard Strauss, and symphonies (always in progress) that would (they were sure) be longer than Mahler's. Dissatisfied with Schoenberg's 12-tone atonality, one committee member had created a 60-tone composition. Another had written a sonata he called *Opus 21-13*.[58]

Fukuda himself had been part of an especially militant Schoenberg faction. They debated relentlessly, Fukuda said. But they never did decide anything about a new school song.

C. *THE COLLAPSE*

1. *The Pressure to Restructure*

The 1960s were a time of change in the U.S. and Western Europe, and they were a time of change in Japan. In this world, some political leaders pushed for measures that would—they argued—eliminate hierarchical institutions and restructure society upon more egalitarian, "democratic" foundations.[59] For some activists, this democratization entailed the elimination of educational hierarchies. For over half a century, the prefectural First Middle Schools had served as the gateway to elite social

[53] Shigeru Fukuzawa, *Icchu jidai no omoide* [*Memories of First Middle School*], in HIBIYA (1979).
[54] *Id*. at 301–02.
[55] Shoji Fukuda (aka Kaoru Shoji), *"Tensai" ga ippai datta koro* [*When There Were Many "Geniuse"*], *in* HIBIYA (1979).
[56] KAORU SHOJI, AKAZUKINCHAN KI WO TSUKET [BE CAREFUL LITTLE RED RIDING HOOD] (Shinchosha, reprint 2012).
[57] Fukuda, *supra* note 55.
[58] *Id*.
[59] *E.g.*, MICHAEL J. HEALE, THE SIXTIES IN AMERICA (Edinburgh Univ. Press 2001).

circles. Necessarily, for some, democratization entailed eliminating their elite status.

2. *The Hibiya "Reform"*

a. Introduction

Ryotaro Azuma had served as Tokyo prefectural governor from 1959 to 1967.[60] He brought little experience to the job. By some accounts, he focused on the 1964 Olympics and left governing to his lieutenant governor. In 1967, Ryokichi Minobe would succeed Azuma.[61] Son of a well-known liberal professor, Minobe himself taught Marxist economics for several years before losing his job in an anti-communist purge in 1938. He returned to the academy after the war and taught until 1967, when he successfully ran for office as governor of Tokyo under a combined Communist-Socialist ticket.[62]

It was to a public that would soon elect this Marxist professor that the Tokyo Board of Education offered the changes that would drive the most talented students away from public high schools. Heading the Board was Torao Obi. He was not a particularly effective board chair, and is not known for much else besides destroying Hibiya.[63] Writers describe him as a man without obvious principles who followed popular opinion.[64] In the mid-1960s, that meant eliminating elite education.

For Obi and the Tokyo Board of Education, democratization required two changes. The first (in 1963) entailed enforcing the high-school district lines more strictly than before. The second (in 1967) entailed the Obama administration's random assignment. The Board imposed both at about the same time. The result was a disaster for Hibiya specifically, and for public high schools more generally.

b. Cross-district registration

In the mid-1960s, the Tokyo Board of Education began to enforce the high-school district lines more strictly. Hibiya was convenient to multiple subway lines and had for years enrolled students from areas outside their districts. In some cases, the school seems to have permitted outsiders to register forthrightly. In some cases, parents had rented apartments they did not use.[65]

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[60] *E.g.*, *Azuma Ryotaro [Azuma Ryotaro]*, in *Kindai Nihon jin no shozo* [*Images of Modern Japanese*], NAT. DIET LIBRARY, https://www.ndl.go.jp/portrait/datas/4095/.
[61] *E.g.*, *Minobe Ryokichi [Minobe Ryokichi]*, obituary available at TAMA REIEN, http://www6.plala.or.jp/guti/cemetery/PERSON/M/minobe_r.html.
[62] *E.g., id.*
[63] For background, *see generally* Tomohiro Makino, "*Toritsu shingakko" ga kono 30 nen de gekihen shita wake* [*Why "Public Prep Schools" Have so Radically Changed Over the Past 30 Years*], PRESIDENT ONLINE (Jan. 26, 2019), https://president.jp/articles/-/27311; NAOOMI NAGASAWA & RYUSUKE SUZUKI, MEIMON FUKKATSU: HIBIYA KOKO [THE REBIRTH OF THE FAMED SCHOOL: HIBIYA HIGH SCHOOL] Prologue (Gakken shinsho 2009).
[64] NAOOMI NAGASAWA, HIBIYA FUKKEN NO SHINJITSU [THE TRUTH OF THE HIBIYA REBIRTH] 26, 32 (Gakuji shuppan 2010); NAGASAWA & SUZUKI, *supra* note 63, at Prologue.
[65] *E.g.*, Tetsuo Kobayashi, *Jimoto dewa Todai sotsu yori meiho datta ... [In the Provinces They Were More Prestigious than Graduation from the University of Tokyo ...]*, NEWSWEEK (Feb. 5, 2022), https://www.newsweekjapan.jp/stories/lifestyle/2022/02/47-6_4.php [hereinafter *In the Provinces*]

As part of its efforts to democratize, Tokyo schools now began to enforce the district lines.[66] As they did, the most promising students left. In Figure 4, we give the number of students from (any) Tokyo-area public high schools admitted to the University of Tokyo. Note that the number begins to fall in 1964. The traditionally second-ranked Nishi High School was not conveniently located for train or subway commutes. As a result, the ban on cross-district registration had little effect. For Hibiya, however, the effect was major. The first class affected by the cross-district restrictions graduated in 1966, and the drop in University of Tokyo admits followed. If the board did not permit students to cross district lines to attend the school they preferred, the affected students simply enrolled in private schools.

Figure 4: Tokyo Public School Students Admitted to the University of Tokyo, *based on* TETSUO KOBAYASHI, TODAI GOKAKU KOKO SEISUI SHI [THE VICISSITUDES OF THE HIGH SCHOOLS THAT PLACED GRADUATES IN

[66] *See generally, e.g.*, *To no "ekkyo nyugaku" boshi saku kimaru [Prefecture's "Cross Border Entrance" Prevention Plan Decided]*, ASAHI SHIMBUN, Dec. 17, 1955; *Bancho sho wa hansu ijo [Over Half at Bancho Elementary]*, ASAHI SHIMBUN, Feb. 16, 1958; *"Ekkyo nyugaku" de kyokucho tsutatsu [Bureau Chief Circular on "Cross Border Entrance"]*, ASAHI SHIMBUN, Mar. 13, 1958; *Hyaku sanju yo nin ni tenko kankoku [134 Students Ordered to Transfer Schools]*, ASAHI SHINBUN, Aug. 9, 1958; *Kyomyoka su "ekkyo nyugaku" [Increasingly Clever "Cross Border Entrance"]*, ASAHI SHIMBUN, Nov. 18, 1958; *Yumei ko niha 2-4 wari [20-40 Percent at the Well-known Schools]*, ASAHI SHIMBUN, Jan. 13, 1959; *Ekkyo nyugaku [Cross Border Entrance]*, ASAHI SHIMBUN, Oct. 15, 1959; *Ekkyo nyugaku okotowari [Cross Border Entrance Declined]*, ASAHI SHIMBUN, Aug. 5, 1960; *"Ekkyo nyugaku" wo do kangaeru ka [How to Think About "Cross Border Entrance"]*, ASAHI SHIMBUN, Feb. 24, 1961; *Kyu icchu monogatari [Tales of the Former First Middle]*, ASAHI SHIMBUN, Nov. 7, 1961; *"Ekkyo nyugaku" matta! [Hold It, "Cross Border Entrance"!]*, ASAHI SHIMBUN, Oct. 25, 1962; *Jogai tokurei wo sebameru [Special Exceptions Narrowed]*, YOMIURI SHIMBUN, Oct. 22, 1962; *Shinsei kyoka wazuka 25 ken [Only 25 Petitions for Permission Granted]*, YOMIURI SHIMBUN, Jan. 29, 1963.

THE UNIVERSITY OF TOKYO] (Kaitei ban) (Kobunsha 2023) and reports in the Tokyo daigaku shimbun and the Sandee mainichi.*

c. The "gun" structure

The second change came in 1967. Under this new system, Tokyo students applied to a set (called a "gun") of two or three grouped high schools. If they passed the threshold for the set, the board assigned them to one of the high schools at random. The Tokyo Board of Education grouped Hibiya with two much less selective high schools—Kudan and Mita.[67]

Eventual Nobel Prize winner Oe Kenzaburo apparently spoke for many intellectuals when he praised these 1967 reforms: "For as long as possible, children should go to university after spending time with and learning together with many different kinds of people. That's a more effective way of raising a person who is not like everyone else. So I'm in favor of the gun system." [68]

Under Obi's "gun" structure, a student who wanted to attend Hibiya applied to the set that included Hibiya, Kudan, and Mita.[69] If he passed, the school board decided which of the three he would attend.

Recall the Obama administration recommendation discussed earlier: specify a set of "minimum academic qualifications and talent" and then choose students to admit by "lottery."[70] This is effectively what the Tokyo government did in 1967.

The student exodus that begun with the ban on cross-border enrollments now accelerated. One Hibiya alumnus recalled: "A lot of students in my class had wanted to go to Hibiya. They passed the exam, but then got shunted to Kudan or Mita. They didn't want that, so they left for a private high school."[71] More precisely, in 1967 120 students admitted to the gun that included Hibiya turned down their admission offer.[72] Prior to Obi's reform, schools like the private Kaisei and the university-lab school Tsuku-Koma had served as "safeties" for students intent on Hibiya. Now, Hibiya would become (at best) the "safety" for students aiming for those schools.

In 1964, 193 of the roughly 470 Hibiya graduates passed the University of Tokyo entrance exam. By 1973, only twenty-nine could, by 1981 only four, and by 1993 only one.[73] Obi would later, in 1976, explain that he thought that "through the gun system I would increase the number of schools" that could prepare students for university.[74] In fact, he simply pushed the most talented students out of public schools entirely.

3. *The Hibiya That Remained*

* 1969 omitted because University of Tokyo did not hold entrance exams that year.
[67] Kobayashi, *In the Provinces*, *supra* note 65.
[68] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41.
[69] *Id.*
[70] Mike Petrilli, *The Obama Administration's War on Stuyvesant and Thomas Jefferson*, EDUC. NEXT (Dec. 9, 2011), https://www.educationnext.org/the-obama-administrations-war-on-stuyvesant-and-thomas-jefferson/.
[71] Ikutaro Tanaka, *Hibiya koko no Todai gokakusha su* [*The U Tokyo Passers from Hibiya High School*], NIKKAN GENDAI, Nov. 10, 2019.
[72] *Hibiya mo taiin ika* [*Even Hibiya Falls Below Allotted Number*], ASAHI SHIMBUN, Mar. 10, 1967.
[73] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, supra note 41; KOBAYASHI, THE VICISSITUDES OF THE HIGH SCHOOLS, *supra* note 36.
[74] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41.

As the talented students left, the atmosphere within Hibiya changed. Hibiya had been a school for the extraordinarily bright students who wanted a demanding education. Adolescents to be sure, they were students who (usually) enjoyed learning and (often) wanted to study. As a result, by tradition dating back to the pre-war years, Hibiya had operated within a pedagogically liberal atmosphere. On many dimensions, the faculty had let students govern themselves.[75]

After 1967, all this began to change. Increasingly, Hibiya started enrolling very mundane students.[76] Ordinary high school students do not show the curiosity and drive that many extraordinarily bright students bring. Being good at solving hard problems, many bright students enjoy the challenge. More ordinary high school students are not (by definition) good at solving these problems, and (consequently) do not enjoy trying. Most do not want to study. Even the number of books borrowed from the school library fell.[77]

Faced with a large cohort of ordinary high school students, Hibiya teachers found that they could no longer trust student self-governance. To the teachers, nothing was the same. Commenting in 1977, one teacher tried to forget what it had been like: "There's no point in counting how old your dead child would be."[78] "When I started teaching" in 1950, said another, "it was a place for geniuses. Lots of students were stronger [i.e., brighter] than the teachers. Now? It's no use saying anything."[79]

The bright students who remained resented the change. The teachers resented the change. And the ordinary students resented the contempt that the teachers and bright students could barely conceal.[80]

During the 1950s and early 1960s, Hibiya teachers had fought reassignment. After the 1967 reforms, they began to leave.[81] In 1994, one alumnus recalled: "After the gun system went into effect, it seemed like a different school. And the teachers took the chance to move to universities. It's hard for me to care [anymore]. If someone wants to be there, let him."[82]

Note the central observation: when Tokyo eliminated the Hibiya-specific entrance exam in 1967, talented students left the public school system in droves. In 1960, of the twenty schools sending the most students to the University of Tokyo, all were public schools except for the two Tsukuba University lab schools and Azabu (forty-eight students), Nada (thirty-eight students), and Kaisei (thirty-six students).[83] By 1970, six of the top twenty schools were private, and four were university affiliated (two of them the Tsukuba schools). The six were Nada (151 students), Kaisei (eighty-six students), La Salle (fifty-nine students), Musashi (fifty-three students), Eiko gakuen (forty-eight students), and Aiko (thirty-four students).[84]

In a given year, the University of Tokyo now admits about 3,000 undergraduates.[85] Of these, in 2022, 892 came from one of ten high schools;

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[75] EIJI OGUMA, 1968 (GE) [1968, PART 2] 29–30, 58 (Shin'yo sha 2009).
[76] NAGASAWA, *supra* note 64, at 9.
[77] *Gun no tanima ni "meimon" kieru* [*Famous School Disappears in Valley of the Districts*], ASAHI SHIMBUN, May 31, 1977.
[78] *Id.*
[79] *Hibiya koko* [*Hibiya High School*], ASAHI SHIMBUN, Oct. 14, 1978.
[80] OGUMA, *supra* note 75, at 29–30, 58–60.
[81] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41.
[82] *Id.*
[83] *Id.* at 41.
[84] KOBAYASHI, THE VICISSITUDES OF THE HIGH SCHOOLS, *supra* note 36 at 73.
[85] Nyūgaku-sha-sū shigan shasū, THE UNIV. OF TOKYO (May 1, 2023), https://www.u-tokyo.ac.jp/ja/about/overview/e08_01.html, translation at: https://www.u-tokyo.ac.jp/en/about/applications_admissions.html.

1,317 came from one of twenty high schools.[86] By 2022, the revitalized Hibiya High School (discussed below) ranked eighth among the schools sending graduates to the University of Tokyo—sixty-five students. The Yokohama Suiran High School (former Yokohama Second Middle School) came in thirteenth with fifty-two students, and Asahigaoka High School in Nagoya—founded in 1871 and with roots in the First Middle School for Aichi prefecture during the pre-war period—came in 19th with thirty-one students.[87] Other than those three schools, none of the 2022 top twenty schools were local public high schools. Other than the two Tsukuba affiliated high schools, all fifteen were private.[88]

D. *THE PRIVATE SCHOOLS*

1. *The Transition*

Like Stuyvesant in New York, the pre-1967 Hibiya had been a school that wealthy students largely skipped. Instead, rich students had gone to private high schools like Azabu and Musashi. Hibiya students had been decidedly middle-class.

It took several years for the best Tokyo-area middle-class students to converge on a set of favored private schools. Necessarily, talented students who want a rigorous education will look for schools with other similarly motivated students. After 1967, the talented students and their parents played something of a coordination game. Within the greater Tokyo area, some talented boys looked to the more aristocratic Azabu and Musashi.[89] Girls looked to Oin, Joshi gakuin, and Futaba.[90]

Consider again the simple metric: how many graduates pass the University of Tokyo exam. From 1961 to 1967, Kaisei, Azabu, and the Tsukuba University Laboratory School in Otsuka placed among the top fifteen high schools every year.[91] The Tsukuba University Laboratory School in Komaba (Tsuku-Koma) placed in that group six times, and Musashi three.

Nada is a school in suburban Kobe. Given its location in western Japan, many of its students focus on the University of Kyoto. Many also focus on medical schools. Nonetheless, Nada dominated the University of Tokyo admissions race for most of the 1970s, taking the lead for eight of the years from 1970 to 1981.

2. *Kaisei and Tsuku-Koma*

[86] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41, at 201.
[87] *Id.*
[88] *Id.*
[89] *See, e.g.*, KOHEI YANO, DANSHI GOSANKE [THE TOP THREE BOYS' HOUSES], (Bungei shunju 2019).
[90] *See, e.g.*, KOHEI YANO, JOSHI GOSANKE [THE TOP THREE GIRLS' HOUSES], (Bungei shunju 2020).
[91] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41.

Eventually, exceptionally talented middle-class Tokyo boys converged on two schools: Kaisei and Tsuku-Koma.[92] Both schools (boys only) offer a consolidated six-year junior and senior-high-school experience. Both schools also accept junior-high grads for three-year high-school only education. And both schools focus on exceptionally bright students. Indeed, in 1982 Kaisei took first place among high schools for placing the most graduates at the University of Tokyo, and has held that first place ever since.[93] In 1998, 205 of its graduates passed the exam—a record that still stands.[94]

Located in a working class neighborhood north of central Tokyo, Kaisei dates from 1871.[95] Before the 1967 rule changes, it was good but not great. It regularly placed a respectable number of graduates with the University of Tokyo. It did not dominate the market in the way it has since.[96]

Kaisei teachers claim not to teach to any test, and alumni often confirm their claim. The instructors instead teach broadly and deeply, recalled one graduate. Sometimes they teach at a graduate school level.[97] What matters, one teacher told a journalist, was to teach students to learn to fail, to teach them to teach themselves, and to teach them to look for an answer different from everyone else's.[98]

Tsuku-Koma is a different beast. Tsukuba University is a national university. It had been the Tokyo University of Education and was located in central Tokyo (Bunkyo ward). In 1973, it relocated to suburban Tsukuba and changed its name.[99]

In fact, Tsuku-Koma more successfully places its graduates at the University of Tokyo than even Kaisei.[100] Kaisei consistently places more graduates there, but Kaisei is more than twice as big. With 400 students a year, Kaisei dwarfs Tsuku-Koma's 160.[101] Kaisei sends more total students to the University of Tokyo, but Tsuku-Koma places a higher fraction. For many students that makes Kaisei a "safety."[102]

Both Kaisei and Tsuku-Koma have spartan physical plants with a surfeit of reinforced concrete, and charge very little. They do not resemble Harvard; they resemble Stuyvesant. Upon entry, new Kaisei students pay an entry fee of 320,000 yen ($2,207, at the 145 yen/dollar exchange rate at the end of the summer 2023) and a facilities fee of 120,000 yen ($828). Annually, they pay tuition and fees of 676,200 yen ($4,663).[103] As befits a laboratory school attached to a national university, Tsukuba-Komaba charges even less. New

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[92] *Kako 52 nen no Todai gokakusha rankingu besuto 10* [*Best 10 Ranking of University of Tokyo Exam Passers Over Past 52 Years*], CHUGAKU KOKO SAGASHI NABI, available at https://www.univpress.co.jp/wp-content/uploads/2021todai_ranking.pdf [hereinafter *Best 10 Ranking of University of Tokyo Exam Passers Over Past 52 Years*].
[93] *Id.*
[94] *Id.*
[95] *See* Kaisei school website, available at https://kaiseigakuen.jp/about/history/150th_celebration/.
[96] *Best 10 Ranking of University of Tokyo Exam Passers Over Past 52 Years*, *supra* note 92.
[97] YANO, THE TOP THREE BOYS' HOUSES, *supra* note 89, at 104–06, 148.
[98] TOSHIMASA OTA, KAISEI, NADA, AZABU, TODAIJI, MUSASHI WA KOROBASETE NOBASU [KAIEI, AZABU, TODAIJI, AZABU AND TODAIJI KNOCK THEM OVER AND MAKE THEM GROW 52–54, 70–72 (Shodensha 2018).
[99] *See, e.g.*, websites for the university: https://www.tsukuba.ac.jp/about/outline-history/; and for Tsuku-koma: https://www.komaba-s.tsukuba.ac.jp/about/principal/.
[100] *Best 10 Ranking of University of Tokyo Exam Passers Over Past 52 Years*, *supra* note 92.
[101] *See* Kaisei school website, available at https://kaiseigakuen.jp/about/history/150th_celebration/; Tsuku-koma school website, available at https://www.komaba-s.tsukuba.ac.jp/about/principal/.
[102] YANO, THE TOP THREE BOYS' HOUSES, *supra* note 89, at 139–40; Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41, at 7, 80.
[103] *Gakuhi*, KAISEI JUNIOR & SENIOR HIGH SCH. (2022), https://kaiseigakuen.jp/about/expenses/.

high school students pay an entry fee of 56,400 yen ($389) and annual tuition and fees of 115,200 yen ($794); the middle school is free.[104]

These prices are not out of line for private Tokyo high schools. Bear in mind that Philips Exeter charges $65,000 per year (2023-24).[105] Tsukuba-Komaba's fees are lower than average for Tokyo, and Kaisei is higher than average. In 2017, the Tokyo city government surveyed private high school fees. It found that the private high schools charged a mean entry fee of 250,026 yen ($1,724, at 145 yen/dollar), a facilities fee of 47,822 yen ($330), and mean annual tuition of 448,862 yen ($3,096).[106] The most expensive school was the relatively low-performing Tamagawa gakuen high school, with an entry fee of 1.886 million yen ($13,007), and annual tuition of 1.332 million yen ($9,186).[107]

Like Hibiya in the 1960s, the top modern private high schools pride themselves on enrolling eccentric geniuses. "There were lots of obsessives,"[108] recalled one Kaisei alumnus. "There were lots of people who stuck out in some field like sports or music. There weren't any people who were obsessive about studying. You took it for granted that everyone was good at school work."[109] "What I thought when I first showed up at the school," said another Kaisei alumnus, "was boy, there're a lot of weirdos at this school."[110]

3. *The Others*

The other elite high schools at least describe themselves similarly. "It didn't seem like a university prep school at all," said one Musashi alumnus.[111] "It was more like a zoo. Everyone was in-your-face about his eccentricities."[112]

Like those at the old Hibiya, the teachers at these elite schools ignore university exams. Musashi has fallen in the rankings and no longer competes in the Kaisei league,[113] but another alumnus of Musashi recalled that "the teachers completely ignored college entrance exams."[114] When one student requested permission to use a classroom for an entrance exam study group, the teacher said no: "You don't study for entrance exams at school. This is a place for scholarship. If you want to study for entrance exams, do it on your own."[115] Another Musashi alumnus recalled: "I still remember what a teacher told me when I started school here. It was, 'don't believe what a teacher tells you.' That wasn't all. Don't believe what you see on television or in the newspapers either. Gather your own information, and figure it out

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[104] *Junior & Senior High School at Komabu, University of Tsukuba*, https://www.komaba-s.tsukuba.ac.jp.
[105] *Tuition & Payment Options*, PHILLIPS EXETER ACAD. (2023), https://www.exeter.edu/admissions-and-financial-aid/tuition-financial-aid/payment-options.
[106] *Regarding the Status of tuition fees for private high schools in Tokyo (full-time) in 2020*, TOKYO METRO. GOV'T, https://www.metro.tokyo.lg.jp/tosei/hodohappyo/press/2023/12/22/16.html.
[107] *Kaigai daigaku gōkaku jisseki ga takaku, IB kyōiku ga tsuyoi Tamagawagakuen chūgaku tte don'na gakkō?*, TCK EDUC. COMMC'N (2021), https://www.tckwshop.com/tckblog/schoolinfo-tamagawa-jhs/#:~:text=玉川学園は玉川大学,顕著に見られます%E3%80%82.
[108] YANO, THE TOP THREE BOYS' HOUSES, *supra* note 89, at 106-09.
[109] *Id.* at 106.
[110] *Id*. at 107.
[111] *Id*. at 182.
[112] *Id.* at 182.
[113] *Best 10 Ranking of University of Tokyo Exam Passers Over Past 52 Years*, *supra* note 92.
[114] YANO, THE TOP THREE BOYS' HOUSES, *supra* note 89, at 168.
[115] *Id.* at 168.

yourself."[116] Relentlessly, the teachers at these schools claim to encourage their students to learn to think for themselves, to teach themselves, and to question what they hear.[117]

That the high schools themselves do not focus on university entrance exams does not mean the students ignore them; it means that exam preparation is not what the schools are about. They are about teaching students to think. Exam preparation is something students do on their own. By one estimate, Azabu students begin attending private after-school review sessions by the time they enter high school. By the second or third year, ninety percent of the students attend these review sessions.[118]

IV. THE PARTIAL REBIRTH

It took several years, but Tokyo eventually recognized the disaster it had caused. In 1982, it formally abolished the 1967 gun system, and by 1994 had returned to the earlier regime: students chose the school to which to apply.[119] Since 2003 they have been able to apply to Hibiya from all across Tokyo.[120]

In 2001, the Tokyo Board of Education assigned Naoomi Nagasawa to Hibiya with a mission to return it to its earlier glory.[121] Nagasawa did not operate by consensus, or by quiet and slow politics. He understood that consensus is not a way to instigate radical change, and he wanted radical change.[122] He did not try to make friends among his reluctant faculty. He ordered them about, and if they left—so much the better.[123]

Nagasawa claimed not to want hard-studying conformist students.[124] He wanted individualists, smart students who wanted to think. Toward that end, he did not admit on the basis of recommendations, extra-curricular activities, essays, or any of the other American measures. Instead, he simply admitted by what was (at least in aspiration) an I.Q. exam.

Under Nagasawa, in 2001 Hibiya introduced its own entrance exams.[125] It continued to use the standard municipal exams for science and social studies, but wrote its own for math, Japanese, and English.[126] The standard exams were good tests, noted Nagasawa, and many people (including many Hibiya teachers) opposed the change.[127]

But Nagasawa insisted. For one thing, the task of writing the exam forced Hibiya teachers to study the extant middle school texts to determine what the students had been learning before they arrived. For another, it then required them to work together as a team. They had to discuss with each other the kind of students they wanted, and how they might measure those attributes.[128]

In other words, the test let Hibiya select for the qualities it wanted in its students. For Nagasawa, that meant students who were smart, creative, and expressive. He did not want students who had simply learned a large amount

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[116] *Id*.
[117] *Id*. at 17–19, 77–78.
[118] *Id*. at 85.
[119] NAGASAWA & SUZUKI, *supra* note 63, at 137.
[120] Kobayashi, *U Tokyo Passers Plummet from 193 to 1*, *supra* note 41; Nagasawa, *supra* note 64, at 20, 23.
[121] NAGASAWA, *supra* note 64, at 9.
[122] *Id.* at chs. 1, 3.
[123] *Id.*
[124] *Id.* at ch. 2.
[125] NAGASAWA & SUZUKI, *supra* note 63, at ch. 4; NAGASAWA, *supra* note 64, at 31.
[126] NAGASAWA, *supra* note 64, at 31.
[127] *Id.* at 31–32.
[128] NAGASAWA, *supra* note 64, at 34–35.

of material. Toward that end, Hibiya teachers wrote questions where the process mattered more than the final answer. Rather than multiple-choice math questions, for example, they required students to show their work.[129]

What is more, the test let Hibiya invest in questions at the ability line it wanted to impose. Like any school, Hibiya wanted to know whether an applicant was above the minimum admission level, or below it. It did not care how far above the line a student was, provided he was above it. If an applicant was below the minimum line, it did not care how far below he was. By writing its own exam, Hibiya could use an exam that placed all its questions at that minimum ability line.[130]

And Hibiya seems to have succeeded. In 2022, sixty-five of its graduates passed the University of Tokyo entrance exam.[131] But this focus on the University of Tokyo obscures the broader way it has helped prepare students for selective universities. In 2010, thirty-seven Hibiya graduates were admitted to the University of Tokyo. Seventy-five graduates were admitted to one of the four most selective national universities (or a public medical school): the University of Tokyo, Kyoto University, Hitotsubashi University, and the Tokyo Institute of Technology. 158 graduates were admitted to a public university. And 363 graduates were admitted to one of the top three private universities: Keio University, Waseda University, and Jochi (Sophia) University.[132]

V. THE SCIENCE AT STAKE

A. *INTRODUCTION*

Stuyvesant offers no lavish lunches, facilities, or buildings. Neither did Hibiya. Neither does Kaisei. Yet talented New York students have fought hard for the right to study at Stuyvesant, just as Tokyo students fought hard for the right to attend Hibiya in the 1950s and early 1960s. In 1967, the Tokyo Board of Education replaced Hibiya's blind entrance exam with a variant on the randomized process often suggested for Stuyvesant—and talented students disappeared. Rather than learn at a school where the teachers went too slow and did not challenge them, they turned to private schools. Eventually, they converged on Kaisei. Half a century later, the most talented Tokyo students remain at Kaisei.

Consider why talented students found the blind exam so important.

B. *THE EMPIRICAL EVIDENCE*

1. *Egalitarian Origins?*

During the first decades after the war, scholars observing Japan often celebrated the equality they saw. Japan had become, they wrote, a place where people faced equal opportunities. Schools admitted students on the basis of blindly graded examinations. Employers hired graduates on the

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[129] *Id*. at 32– 33.
[130] *Id*. at 33.
[131] *Sokuho: 2023nen Todai Kyodai ...* [*News Flash: 2023 U Tokyo UKyoto ...*], available at https://www.inter-edu.com/univ/2023/schools/431/jisseki/.
[132] *Id*. at 99–100. Note that the numbers of Hibiya graduates will include graduates from prior years. Note also that because private universities offer department-based exams, many students take several departmental exams and are accepted by several departments. In addition, many departments offer several types of exams on different days. It is not rare that one student passes not just all three universities but several different departments of each school.

basis of the schools they attended. What a student achieved counted. Who bore and raised the student did not.

Sociologist Ronald Dore found this education-based egalitarianism already in place by the last decades of the 19th century.[133] He would turn more cynical later in life,[134] but in 1965 he still wrote: "Education seems to have become the major mechanism of social selection at an earlier stage of industrialization in Japan than in Western countries. Learning was the royal road not only to the professions and to government, but also to business success as well . . ."[135]

Harvard historian (and one-time U.S. ambassador to Japan) Edwin Reischauer was famous for the way he celebrated Japanese achievements. In 1978, he found in Japan a "steadily growing social mobility ever since the Meiji Restoration" of 1868.[136] By the mid-1970s, he declared that "the shift from a hereditary to an educational system for determining hierarchical status is now virtually complete."[137] He explained: "The Japanese achieve their various functions in society and find their respective status levels, not chiefly through inheritance or class and family considerations, but through formal educational achievements, followed by rigorously equal qualifying examinations for most of the positions of greatest prestige."[138]

2. *The Shift to SES*

By the end of the twentieth century, Western scholars of Japan were describing early post-war Japan in nearly elegiac tones. During those first years after the war, they wrote, Japan had been egalitarian. Northwestern sociologist James Rosenbaum and Oxford sociologist Takehiko Kariya declared that the educational system in the early post-war years had been "ruthlessly severe but also unwaveringly fair."[139] As Kariya would later explain it:

> From its very inception then, the secondary education system in post-war Japan has been characterised by a lack of obstacles to the expansion of access to higher education: if students could score well on the entrance exams and their families could pay there was, in theory, no limit to the number of students who could gain access.[140]

Yet if they described Japan as egalitarian in years past, late-twentieth century scholars thought Japan was so no longer. "[A]mong all OECD countries," wrote Takehiko Kariya, "Japan [had been] one of the most equal societies in terms of income-distribution in 1970s and 1980s[.]"[141] But by the 1990s, its "unique feat had started to unravel, in particular in its

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[133] RONALD P. DORE, EDUCATION IN TOKUGAWA JAPAN (Berkely Univ. of Cal. Press 1965).
[134] *See generally*, Takehiko Kariya & Ronald P. Dore, *Japan at the Meritocracy Frontier: From Here, Where?*, 77 POL. Q. 134–56 (2006).
[135] DORE, *supra* note 133, at 293.
[136] EDWIN O. REISCHAUER, THE JAPANESE 161 (Harvard Univ. Press 1978).
[137] *Id.* at 61.
[138] *Id*. at 161.
[139] Takehiko Kariya & James E. Rosenbaum, *Stratified Incentives and Life Course Behaviors*, *in* HANDBOOK OF THE LIFE COURSE 51, 56 (Jeylan T. Mortimer & Michael J. Shanahan eds., 2003).
[140] Takehiko Kariya, *Japanese Solutions to the Equity and Efficiency Dilemma? Secondary Schools, Inequity and the Arrival of 'Universal' Higher Education,* 37 OXFORD REV. EDUC. 241, 247 (2011).
[141] Takehiko Kariya, *Education and Social Disparities in Japan*, *in* OXFORD RSCH. ENCYC. EDUC. (2018).

egalitarian dimensions." Harvard sociologist Mary Brinton concurred: "Despite the widespread perception both inside and outside Japan that it is a 'credential society' where education is the key to socioeconomic success . . . Japan is actually quite *unexceptional*: opportunities for intergenerational mobility via educational attainment in Japan are no more open than in other societies."[142]

This putative shift should leave readers puzzled. The institutional structure of Japanese education and recruitment had not changed. Schools continued to select (mostly) by exam, and firms continued to hire by school. But scholars like Kariya and Brinton now claimed that the egalitarian institutions merely reproduced inherited privilege. The students who won the tournaments were those raised by privileged parents. Through the nominally egalitarian mechanisms, students replicated the class in which their parents had raised them.

3. *The SES Empirics*

a. In the West

This shift in the academic consensus (if that is what it is) reflects at most a shift in research design. It does reflect anything on the ground in Japan. Modern scholars of Japanese education regress a variety of measures of academic achievement on a variety of measures of "socio-economic status" (SES). They obtain statistically significant positive coefficients: students from higher-status homes do better in school. From this, they infer causation: students from high-status homes do better in school <u>because</u> of their high-status.

In following this research design, observers of Japan follow their Western peers. To measure SES, Western scholars in sociology and education typically turn to some mix of parental education, parental occupation, and family income. In 2005, Selcuk Sirin reported a meta-analysis of studies exploring the connection between SES and academic achievement. He concluded that scholars had reached an "agreement" on a "tripartite" definition of SES. It would, he continued, "incorporate[] parental income, parental education, and parental occupation[.]"[143] For their very recent meta-analysis, Paul Westrick and his co-authors, in 2015, simply measured SES through parental income.[144] Back in 1982, Karl White reported a meta-analysis of 143 studies in which eighty-eight used parental occupation, fifty-seven used parental education, and forty-seven used family income. The next most commonly used variable was housing quality, with thirty-nine studies.[145]

b. In Japan

To study education in Japan, modern scholars use the same template. Consider three of the better known scholars. First, take University of Tokyo

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[142] Mary C. Brinton, *Social Class and Economic Life Chances in Post-Industrial Japan: The "Lost Generation"*, *in* SOCIAL CLASS IN CONTEMPORARY JAPAN 114 (2009).
[143] Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. EDUC. RES. 417, 418 (2005).
[144] Paul A. Westrick et al., *College Performance and Retention: A Meta-Analysis of the Predictive Validities of ACT Scores, High School Grades, and SES*, 20 EDUC. ASSESSMENT 23 (2015).
[145] Karl R. White, *The Relation Between Socioeconomic Status and Academic Achievement*, 91 PSYCH. BULL. 461 (1982).

sociologist Hiroshi Ishida.[146] Using a 1975 national survey, Ishida regresses educational outcomes for Japanese children on (i) family income, (ii) father's education, (iii) mother's education, (iv) father's occupation, (v) whether a student comes from an urban home, and (vi) the presence of siblings. On the dependent variables of (a) whether a person finishes high school, and (b) whether he attends college, the calculated coefficients were statistically significant on all six independent variables.

Ishida does not even pretend to measure a student's cognitive ability. Apparently asked whether some of his six independent variables might correlate with intelligence, Ishida briefly alludes to an article by another scholar.[147] That scholar seems to have shown that high school grades in Japan do not explain much of the variation in whether a student attends college. Ergo, Ishida dismisses considerations of intelligence and infers causation from SES. Growing up in a high-status home contributes to later academic success.[148]

Oxford sociologist Takehiko Kariya uses a similar research design to reach a similar conclusion: competitive high schools select their students through a formally egalitarian process, but one that replicates substantive inequality.[149] Kariya writes: "Research shows that students from families with fathers having professional/managerial jobs, as well as those with highly educated parents, are more likely to attain higher education credentials (bachelor's degrees or above) as compared with others[.]"[150]

A student's "academic achievement," Kariya continues, is "significantly influenced by [his or her] family background through economic, cultural, and social capital embedded in the family[.]"[151] As a result, "the meritocratic selection of students into the hierarchy of high schools . . . reflect[s], to some extent, inequality in education as influenced by students' socioeconomic status."[152]

Once again, show correlation and conclude causation. Kariya suggests two at-least-superficially plausible reasons for inferring that causality.[153]

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[146] HIROSHI ISHIDA, SOCIAL MOBILITY IN CONTEMPORARY JAPAN: EDUCATIONAL CREDENTIALS, CLASS AND THE LABOUR MARKET IN A CROSS-NATIONAL PERSPECTIVE (Stanford Univ. Press 1993).

[147] *Id* at 76–77.

[148] Social and economic inequality, *Id.* at 8, concludes, cause the observed unequal levels of academic achievement:

> When various factors of social background (such as family income, urban origin and father's and mother's education) are included in the model, these background characteristics together play at least as important a role as education in the process of socioeconomic attainment in Japan.

Social, economic, and cultural "capital" each matters, explains Ishida. Consider social background, *Id*. at 67: "The advantages and disadvantages associated with the social environment in which men grow up are evident in [Japan]."

Consider wealth, *Id*. at 66: "The amount of family wealth and property, independent of other background characteristics, influences schooling beyond the minimum level, high school completion and college attendance in Japan[.]"

And consider culture, *Id*. at 68: "Cultural capital, measured by parental education, plays a crucial role in determining the success of sons in Japan[.]"

Blindly graded exams do not reward students on the basis of intellectual ability and effort, concludes Ishida. They reproduce inherited status, *Id*. at 102: "Families with considerable resources are able to pass on their advantages directly to their offspring independent of the offspring's own achievement."

[149] Kariya, *supra* note 141.

[150] *Id*. (citations omitted).

[151] *Id.* (citations omitted).

[152] *Id*.

[153] *Id*.

First, higher education is expensive. Wealthier families are better able than poor families to afford it. Per Kariya:

> [S]ome argue that economic capital (i.e., family income) still either has a direct influence on university attendance by affecting a family's ability to afford tuition fees (especially for private institutions) or exerts indirect effects by determining whether the family can pay for private tutorials (i.e., shadow education) that enhance children's academic achievement . . . [154]

Second, richer families can afford to provide a more stimulating experience outside of school. They can take their children to museums and concerts. They can buy books. Again, Kariya writes: "others argue that a family's cultural and social capital influences children's academic achievement through their learning in varied ways (e.g., providing family environments that encourage children to work diligently, cultural resources transformable into higher academic achievement, and incentives to aspire to attain higher education)."[155]

Working with Brown University education scholar Yoko Yamamoto, Harvard sociologist Mary Brinton repeats the same exercise.[156] She explains that they "use three measures to control for respondents' socioeconomic background: father's occupation, parents' education, and family assets."[157] She writes that "students with more educated parents and more financial assets demonstrate higher academic performance when other variables are controlled . . ."[158] And once again, she straightforwardly infers causation: "Students with managerial/professional fathers have a distinct advantage in entering higher quality high schools . . ."[159]

C. *COGNITIVE ABILITY*

1. *The Elephant in the Room*

In fact, these various regressions ignore an obvious and obviously massive omitted variable—cognitive ability. People vary in their ability to solve difficult problems quickly and accurately. With error to be sure, Japanese high schools and universities use entrance exams that measure that ability. Because workers who can solve hard questions quickly and accurately raise firm profits, employers bid for them, and pay them high wages. And according to modern genetics, the ability to solve hard problems quickly and accurately is an ability children inherit—in part—through their genes.

The resulting logic is straightforward: to do well in school, children need to be smart; for the same reason that athletic children tend to have athletic parents, smart children tend to have smart parents; and smart parents tend to have attended competitive universities, to work in high-prestige jobs, and to earn high salaries. As a result, social or economic status might or might not

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[154] Kariya, *supra* note 141.
[155] *Id*.
[156] Yoko Yamamoto & Mary C. Brinton, *Cultural Capital in East Asian Educational Systems: The Case of Japan*, 83 SOC. EDUC. 67, 73 (2010).
[157] *Id.*
[158] *Id*. at 75.
[159] *Id*.

affect a child's academic achievement, but these regressions will not show it. At root, they show only that smart children tend to have smart parents. As behavioral geneticist Robert Plomin explained it:

> In relation to education, what look like environmental effects of schools on children's achievement are actually genetic effects. Examples include the correlation between student achievement and types of school and the correlation between parent and offspring educational achievement. Both correlations are usually interpreted as being caused environmentally but both are substantially mediated by genetics . . . [160]

Cognitive scientist Steven Pinker was more blunt: "[A]ny study that measures something in parents and something in their biological children and then draws conclusions about the effects of parenting is worthless, because the correlations may simply reflect their shared genes[.]" [161]

2. *The Logic*

a. The Phenomenon of Intelligence

The logic involved begins with the concept itself: cognitive ability is a coherent and (with error to be sure) measurable attribute. It measures a person's ability to follow logic, to solve hard and complicated problems, to move been abstract ideas and concrete applications. In turn, cognitive ability predicts a wide range of phenomenon. "IQ tests predict performance in school and on the job," writes Pinker.[162] And "standardized tests," explains fellow psychologist Christopher Chabris (with Jonathan Wai), "mainly measure general cognitive ability . . ."[163] In turn, that "general cognitive ability is highly predictive of educational and occupational success in the broad population."[164]

Given the way they run regressions that exclude any reference to "cognitive ability," sociologists seem uncomfortable with the concept. Sociologists in education seem especially reluctant. "Education is the field that has been slowest to absorb the messages from genetic research," observes behavioral geneticist Robert Plomin.[165] "Genetics is by far the major source of individual differences in school achievement, even though genetics is rarely mentioned in relation to education."[166]

As a cognitive scientist, Pinker loses patience with scholars who try to present a world without a measurable variable for intelligence: "I find it truly surreal to read academics denying the existence of intelligence. Academics are obsessed with intelligence. They discuss it endlessly in considering student admissions, in hiring faculty and staff, and especially in their gossip about one another."[167]

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[160] ROBERT PLOMIN, BLUEPRINT: HOW DNA MAKES US WHO WE ARE 88 (MIT Press, 2018).
[161] STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 375 (2002).
[162] *Id*. at 373.
[163] Christopher Chabris & Jonathan Wai, *Hire Like Google? For Most Companies, That's a Bad Idea*, L.A. TIMES (Mar. 9, 2014),.
[164] *Id.*
[165] PLOMIN, *supra* note 160, at 82.
[166] *Id*. at 88.
[167] PINKER, *supra* note 161, at 149–50.

The evidence, he writes, is straightforward:

> [T]here is now ample evidence that intelligence is a stable property of an individual, that it can be linked to features of the brain . . . , that it is partly heritable among individuals, and that it predicts some of the variation in life outcomes such as income and social status.[168]

b. The Genetic Connection

Like the color of his (or her) eyes, the shape of his nose, and his athletic prowess, a child's cognitive ability reflects in part the genes he inherits from his parents. Intelligence is a function of the brain, and the brain—like a child's eyes and nose—is a biological organ. Cognitive ability is heritable for the simple reason, as Pinker put it, that "[a]ll human behavioral traits are heritable." [169] Plomin summarizes the research: "[G]enetic research consistently shows that performance on tests of school achievement is 60 per cent heritable on average. That is, more than half of the differences between children on how well they do at school is due to inherited DNA differences."[170]

Counter-intuitively, perhaps, the genetic component of cognitive ability increases over a person's lifespan.[171] That ability is not a phenomenon where the influence of one's social and family environment eventually crowds out the impact of one's basic genetic endowment. Instead, that genetic endowment gradually crowds out environmental influences. "The heritability of intelligence," writes Pinker, "increases over the lifespan, and can be as high as .8 late in life."[172] Although "IQ is affected by shared environment in childhood, . . . over the years the effect peters out to nothing."[173]

The phenomenon of increasing heritability with age is general, but especially pronounced with respect to cognitive ability. [174] "[G]enetic influences become more important as we grow older," explains Plomin, and "the domain where heritability increases most dramatically during development is cognitive ability."[175] In his general genetics text, he writes:

> A recent report on a sample of 11,000 pairs of twins, . . . showed for the first time that the heritability of general cognitive ability increases significantly from 41 percent in childhood (age 9) to 55 percent in adolescence (age 12) and to 66 percent in young adulthood (age 17) . . . the trend of increasing heritability appears to continue throughout adulthood to about 80 percent at age 65 . . . [176]

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[168] *Id.*
[169] *Id.* at 373.
[170] *Id.* at 10.
[171] PLOMIN ET AL., BEHAVIORAL GENETICS 201 (6th ed. 2012) ("Genetic factors become increasingly important for g throughout an individual's life span.")
[172] PINKER, *supra* note 161, at 375 (emphasis in original).
[173] *Id*. at 379.
[174] *See generally* Daniel A. Briley & Elliot M. Tucker-Drob, *Explaining the Increasing Heritability of Cognitive Ability Across Development: A Meta-Analysis of Longitudinal Twin and Adoption Studies*, 24 PSYCH. SCI. 1704 (2013); PLOMIN, *supra* note 160, at 52.
[175] PLOMIN, *supra* note 160, at 52.
[176] PLOMIN ET AL., *supra* note 171, at 202.

c. Cognitive Ability and Academic Performance

Given that schools are about teaching and intelligence is about learning, students will not do well in school without a commensurately high level of cognitive ability. Extremely bright students do not necessarily do well in school. Educational achievement requires more than cognitive ability. It requires conscientiousness. It requires perseverance. And it requires emotional stability.[177] But it does require appropriately high levels of cognitive ability.

d. Cognitive Ability and SES

What one can say about the role of cognitive ability in educational achievement, one can say about its role on the job. Workers with low levels of cognitive ability almost always earn low wages, while workers with high levels cover the range from high down to low. Provided a worker with a high level of cognitive ability is willing to work conscientiously, to persevere, and to keep a level emotional keel, firms will bid for him. Employees who can solve hard problems quickly and accurately raise firm profitability. The higher this ability, the scarcer it is; the scarcer it is, the more firms pay for it.

"[H]aving an idea of how well a candidate thinks abstractly, solves novel problems and learns new things is important," notes Chabris, "no matter what the job or situation."[178] The research is extensive: "[D]ecades of quantitative research in the field of personnel psychology have shown that across fields of employment, measures of 'general cognitive ability' . . . are consistently the best tools employers have to predict which new employees will wind up with the highest performance evaluations or the best career paths."[179]

Necessarily, as Plomin put it, "intelligence is one of the best predictors of educational achievement and occupational status."[180] And occupational status, in turn, will correlate with income and wealth.

CONCLUSION

When observers argue that the selective schools should replace their blindly graded entrance exams with lotteries or subjective measures, they miss the very basic implications of modern genetics and cognitive science. Schools like Stuyvesant (and Hibiya) do not confer prestige on students; students confer prestige on the school. Prestigious schools have the prestige they do because they have the students they do. Change the metric by which a school chooses its students, and the level and type of prestige will change with it. The modern Stuyvesant (and the pre-1965 Hibiya) has the prestige it has because the very brightest students attend it.

Exceptionally bright students want to study with other exceptionally bright students. Students learn best when taught at their own level. Ordinary students do not profit from being placed in classes that move too fast for them. And bright students do not profit from being placed in a class that is too slow. They will become bored, and they do not like to be bored. Very bright students tend to enjoy school. After all, they do well at it. They want

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[177] *See, e.g.*, PLOMIN, *supra* note 160, at 158–59.
[178] Chabris & Wai, *supra* note 163.
[179] *Id*.
[180] PLOMIN, *supra* note 160, at 53.

to be challenged—and this desire to be challenged is wholly independent of whether their mother is an Amy-Chua-Tiger-Mom look-alike. Bright students tend to enjoy challenge.

For nearly a century, the Hibiya High School (and the Tokyo First Middle School that preceded it) provided that challenge. Bright students sought out the school, and sacrificed to attend it. In 1967, for straightforwardly egalitarian reasons, the Tokyo government took the approach often pushed for Stuyvesant: they set a minimum passing grade, and then chose by lottery. The exceptional students deserted the school en masse. They left for private schools instead, and—half a century later—public education in Tokyo has yet to recover.

RETURNING THE BENIN BRONZES: AN ANALYSIS UNDER INTERNATIONAL AND U.S. LAW

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* J.D. Candidate, Notre Dame Law School, 2024. The author would like to thank her parents for all their support. She would also like to thank Caroline Fitzpatrick for sparking her love for art history, the Art History Department at Washington University in St. Louis, specifically Professors Elizabeth C. Childs and John Klein for fostering it, and Professor Mary Ellen O'Connell at Notre Dame Law School for encouraging it.

INTRODUCTION

On October 11, 2022, the Smithsonian's National Museum of African Art transferred ownership of twenty-nine Benin Bronzes in their collection to the National Commission for Museums and Monuments in Nigeria in a formal ceremony in Washington D.C.[1] Two months later, on December 14, the University of Cambridge announced that they would be returning more than one hundred and sixteen Benin Bronzes to Nigeria.[2] One week later, Germany handed over twenty-two Benin Bronzes to Nigeria, the first step in fulfilling an agreement between the two nations in which Germany agreed to gradually return all one thousand one hundred and thirty Benin Bronzes in their possession.[3] These events are the beginning of a greater movement on the part of Western museums to repatriate stolen goods from Africa.

Nigeria, specifically, has long sought the return of the Benin Bronzes, objects looted by the British in 1897 from land that is now within their territorial sovereignty. But were the Benin Bronzes actually looted? The facts surrounding the events that resulted in the removal of the Benin Bronzes are not disputed. However, under international law, the question becomes complicated. This is commonplace when it comes to formally colonized nations and their various efforts to establish their national identity, construct a history, and assert their autonomy on the international stage.

In this note, I will discuss the legal implications of Nigeria's claims to the Benin Bronzes and evaluate the merits of those claims under both international and U.S. law. In exploring the nuances of this issue, I will emphasize the importance of repatriation to Nigeria's independence and cultural identity, as well as highlight the inadequacies of both international law and U.S. law when it comes to facilitating the return of cultural property taken during the colonial era. In Part I, I provide a brief history of the Benin Bronzes, their significance, when they were taken, and how they became scattered around the world. In Part II, I will evaluate Nigeria, the United Kingdom, and the United States' claims to the Bronzes and how they conform to cultural international or cultural national perspectives on cultural property. I will also discuss the continued harm of the status quo, why Western ownership over the Benin Bronzes is damaging, and the history that underlies that damage. In Part III, I will provide an overview of cultural property management under Nigerian law. In Part IV, I will look at the international legal framework for the return of stolen cultural property and evaluate whether they provide Nigeria with a legal basis for repatriation. In Part V, I will look at the U.S. legislative framework for the return of stolen cultural property and whether it provides Nigeria with any avenues to retrieve Benin Bronzes located in the U.S. Lastly, In Part VI, I will look at the ethical standards museums in the western world have recently established and highlight the reasons why they provide Nigeria with solutions that neither international nor U.S. law have or can.

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[1] *See* Press Release, Smithsonian Institute, Smithsonian Returns 29 Benin Bronzes to the National Commission for Museums and Monuments in Nigeria (Oct. 11, 2022), https://www.si.edu/newsdesk/releases/smithsonian-returns-29-benin-Bronzes-national-commission-museums-and-monuments [https://perma.cc/2VSA-8E3B].

[2] Jane Clinton, *Cambridge University to return over 100 looted Benin Bronzes to Nigeria*, THE GUARDIAN (Dec. 14, 2022), https://www.theguardian.com/culture/2022/dec/14/cambridge-university-to-return-over-100-looted-benin-Bronzes-to-nigeria.

[3] Ashley Ahn, *Germany returns looted artifacts to Nigeria to rectify a 'dark colonial history'*, NPR (Dec. 21, 2022), https://www.npr.org/2022/12/21/1144666811/germany-nigeria-returns-benin-Bronzes-looted [https://perma.cc/WC9E-W6WG].

I. HISTORY

A. *THE PUNITIVE EXPEDITION*

The Kingdom of Benin was established in 1200s CE by the Edo people. Benin was located in modern Edo State in Southwestern Nigeria.[4] By the 1800s, Benin held both significant wealth and political power.[5] Trade was Benin's primary source of wealth.[6] Benin traded material goods, primarily art, gold, ivory, and pepper, with European countries like Portugal, England, the Netherlands, and France. Most notably, Benin was also a major participant in the West African slave trade, capturing rivals and selling them to European and American buyers.[7]

Violence between the Kingdom of Benin and Britain broke out in 1897.[8] The conflict began when unarmed British men, en route to meet with the Oba, or king, of Benin, were "massacred" by Benin "tribesmen" along the Niger coast.[9] When word of the "massacre" reached England, instructions were given to British soldiers to embark on a punitive expedition to punish the Oba.[10] However, it has been reported that, regardless of the "massacre," the British would have still sent an armed expedition to Benin to (1) stop the "cruelty and brutality of the King of Benin" towards the British protectorate and (2) gain control of the West African Trade by annexing the Benin territory.[11] Under these orders, twelve hundred British soldiers and African auxiliaries captured and eventually burned down Benin City, the capital of the Kingdom of Benin.[12] In the course of this punitive expedition, the British looted hundreds[13] of bronze plaques, brass sculptures, ivory, and other royal and sacred materials from the Oba's palace.[14]

B. *WHAT ARE THE BENIN BRONZES?*

The Benin Bronzes served important documentary functions. In the Kingdom of Benin, the act of casting in bronze and other metals was a form of both remembrance and recollection.[15] In Edo, the language spoken in the Benin Kingdom and now in Edo State, Nigeria, the verb 'se-e-y-ama,' which means 'to remember,' directly translates to 'to cast a motif in bronze.'[16] The majority of the stolen sculptures and plaques from the Oba's palace depict specific individuals, identifiable by their clothing and physical attributes, who held historically significant positions in the Benin court. [17] Collectively,

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[4] Afolasade A. Adewumi, *Possessing Possession: Who Owns Benin Artifacts*, 20 ART ANTIQUITY & L. 229, 230 (2015).
[5] *The Kingdom of Benin*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/kingdom-benin [https://perma.cc/M39Z-33H6].
[6] Adewumi, *supra* note 4, at 230.
[7] *The Kingdom of Benin*, *supra* note 5.
[8] Adewumi, *supra* note 4, at 230.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] David Frum, *Who Benefits When Western Museums Return Looted Art?*, THE ATLANTIC, https://www.theatlantic.com/magazine/archive/2022/10/benin-Bronzes-nigeria-return-stolen-art/671245/ [https://perma.cc/QUE2-G6MM].
[13] Adewumi, *supra* note 4, at 230.
[14] DAN HICKS, THE BRUTISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION 143 (Pluto Press 2020).
[15] HICKS, *supra* note 14, at 139.
[16] *Id.*
[17] Adewumi, *supra* note 4, at 230.

the Bronzes serve as a "chronological record" of the Benin Kingdom's history.[18]

C. *WHERE ARE THE BENIN BRONZES NOW?*

The taking of the Benin Bronzes was initially justified as an exercise of artistic and historical preservation.[19] However, it is clear from the haphazard manner by which the Bronzes were sold and distributed throughout the Western world that the British did not seek to preserve the Bronzes but committed an "act of vandalism cultural destruction." [20] While some of the Bronzes were sold to fund pensions for soldiers killed during the expedition, their movement was primarily unrecorded;[21] the majority of them were presumably distributed privately among British officers.[22] Many of these officers enlisted the help of dealers and auctioneers to sell their Bronzes.[23] Other officers kept their Bronzes and, upon their passings, the Bronzes were either donated or sold through the liquidation of their estates.[24] In her book, *The Benin Plaques: A 16th-Century Imperial Monument*, Kathryn Wysocki Gunsch [25] has located eight hundred and sixty-eight bronze plaques distributed throughout ninety-five private and public collections: three hundred and thirty in Germany, two hundred and twenty-three in the UK, one hundred and twenty in the United States, seventy-eight in Nigeria, and the rest in Austria, Russia, Sweden, Holland, Belgium, Switzerland and Canada.[26]

II. CULTURAL PROPERTY AND CLAIMS

A. *DEFINING CULTURAL PROPERTY*

The definition of cultural property continues to be widely debated. On one hand, the term 'property' contemplates the existence of a singular owner. On the other hand, 'culture' is an amorphous concept that loosely refers to the work product of a collective, the scope of which is difficult to discern. On its own, 'culture' refers to the work product of the *human* collective. However, when modified by the word 'property,' it commonly refers to the work product of a single people and their descendants. This dichotomy is reflected in the debate between cultural internationalists and cultural nationalists.

The concept of culture as the work product of the human collective is the foundation for the theory of cultural internationalism. For cultural internationalists, cultural property is the "product of a common human culture, independent of a particular national interest." [27] Cultural

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[18] Folarin Shyllon, *Cultural Heritage Legislation and Management in Nigeria*, 5 INT'L J. OF CULTURAL PROP. 243 (1996).
[19] HICKS, *supra* note 14, at 142.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 147.
[24] HICKS, *supra* note 14, at 146.
[25] Kathryn Wysocki Gunsch is the Teel Curator of African and Oceanic Art at the Museum of Fine Arts, Boston in Boston, Massachusetts.
[26] HICKS, *supra* note 14, at 145 (citing KATHRYN WYSOCKI GUNSCH, THE BENIN PLAQUES: A 16TH-CENTURY IMPERIAL MONUMENT (Routledge, 1st ed. 2017)).
[27] Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L. J. 145, 147 (2003).

internationalists argue that all people of all nations have a collective interest in the preservation of cultural property; therefore, the "claims of individual states are . . . subordinate to the common global interest."[28] Cultural nationalists subscribe to a narrower definition of culture. Under the theory of cultural nationalism, cultural property belongs to a specific "cultural heritage within the territorial borders of a particular nation."[29] For cultural nationalists, cultural property belongs to one nation because the object was found within its borders, made by their ancestors, or is in some other way important to the formation of the nation's collective identity. Over the past one hundred years, the overall approach to cultural property has shifted from a cultural internationalist one to a cultural nationalist one. Much of international, U.S., and Nigerian law on the protection and return of cultural property rests on cultural nationalist perspectives.

B. *NIGERIA'S CLAIMS TO THE BENIN BRONZES*

Both the Nigerian federal government and the royal family of Benin claim ownership over the Benin Bronzes.[30] Nigeria has made repeated requests to museums across Europe and North America for the return of the Benin Bronzes and other objects taken in the punitive expedition.[31] These claims of ownership are supported by cultural nationalist perspectives as well as other normative arguments that highlight Nigeria's unique cultural identity and long colonial history.

From a cultural nationalist perspective, the Benin Bronzes belong to Nigeria because they were simply created and taken from within their national borders, as the Benin palace, from which the Bronzes were stolen, stood in what is now modern-day Edo State in Southwestern Nigeria. Beyond geographic boundaries, the Benin Bronzes possess an important position in Nigeria's communal identity. Nigeria, Africa's most populous country,[32] is a poly-ethnic nation comprised of a wide diversity of communities and historical legacies.[33] The country is composed of over 250 ethnic groups,[34] and over 500 languages are spoken within its borders.[35] In the late twentieth century, these groups were consolidated under one nation state[36] after achieving independence from British colonial rule in 1960.[37] In the words of Afolasade A. Adewumi, a law professor at the University of Ibadan, Nigeria "use[s] cultural heritage to find expression for their contemporary nationalism from a combination of historical cultures."[38] Cultural property is a centerpiece, a representation of a common past and

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[28] *Id.*
[29] *Id.*
[30] Frum, *supra* note 12.
[31] Shyllon, *supra* note 18, at 248.
[32] *The Republic of Nigeria*, U.S. GEOLOGICAL SURVEY (May 30, 2018), https://eros.usgs.gov/westafrica/country/republic-nigeria [https://perma.cc/LQE7-ZHC7].
[33] Adewumi, *supra* note 4, at 236.
[34] *Ethnicity in Nigeria*, PBS NEWS HOUR (Apr. 5, 2007), https://www.pbs.org/newshour/arts/africa-jan-june07-ethnic_04-05 [https://perma.cc/H74M-BHCS].
[35] *Language Data for Nigeria*, TRANSLATORS WITHOUT BORDERS, https://translatorswithoutborders.org/language-data-nigeria#:~:text=Nigeria%20is%20one%20of%20the,people%20with%20lower%20education%20levels [https://perma.cc/RM4C-AJFJ].
[36] *Background Notes: Nigeria*, U.S. DEP'T OF STATE (Aug. 2000), https://1997-2001.state.gov/background_notes/nigeria_0008_bgn.html [https://perma.cc/G849-5BJG].
[37] Frum, *supra* note 12.
[38] Adewumi, *supra* note 4, at 236.

unifying identity, that gives Nigeria a greater sense of legitimacy in the Westphalian system.[39]

The Benin Bronzes are unique from other cultural objects because they signify a secondary, but equally important, history: the collective suffering of ethnic communities for decades under the British colonial rule.[40] While a largely dark time in Nigerian history, it nevertheless binds the many ethnic groups in the country together. As objects of historical significance, the Benin Bronzes, plundered from Nigerian lands and displayed in western museums, epitomize the lasting harms of the colonial period, degrees of which all Nigerians, regardless of their group affiliations, endured. The Benin Bronzes unite by representing a long history of wrong that Nigeria, collectively, continues to grapple with and move on from.

C. *THE UK AND THE U.S.'S CLAIMS TO THE BENIN BRONZES*

The British, who possess one of the largest collections of Benin Bronzes in the world, have furthered various arguments for why the objects should remain in their possession. British claims to the Benin Bronzes are best supported by cultural internationalist perspectives on ownership and preservation. First, the British have argued that the Benin Bronzes should stay in British museums as a mere practical matter. They have asserted that they are the most capable of protecting and preserving the Benin Bronzes, as their museums are equipped with the security, conservation expertise, and tools to keep the aging objects safe and in good condition.[41] Second, the British have argued that the Benin Bronzes will be seen and admired by more people in Britain than in Nigeria.[42] Scholars in the U.S. had put forth similar arguments.[43] In his article *Who Benefits When Western Museums Return Looted Art?*, David Frum of The Atlantic presents a "defense of [this] existing[,]" regime. While Frum does not explicitly challenge Nigeria's ability to preserve and exhibit their cultural property, he makes a point to emphasize in great detail the Nigerian National Museum's "crumbl[ing]" building, "many burned-out light fixtures" and "[t]he huffing and puffing sound of the museum's weak electrical generator."[44] He juxtaposes these descriptions with the marvel of western museums, celebrating their equalizing effect that "allow tens of millions of people to enjoy what were once the personal pleasures of a wealthy, powerful, titled few."[45] However, Frum's argument rests on two false assumptions: first, that Nigerian cultural institutions are not capable of properly protecting and preserving the Benin

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[39] The "[Westphalian state system] is generally held to mean a system of states or international society comprising sovereign state entities possessing the monopoly of force within their mutually recognized territories. . . . The term implies a separation of the domestic and international spheres, such that states may not legitimately intervene in the domestic affairs of another[.]" *Overview: Westphalian state system*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803121924198.

[40] For more on British colonial rule in Nigeria, *see generally* MAX SIOLLUN, WHAT BRITAIN DID TO NIGERIA: A SHORT HISTORY OF CONQUEST AND RULE (2021); *see also* TOYIN FALOLA, COLONIALISM AND VIOLENCE IN NIGERIA (Indiana Univ. Press 2009).

[41] Luke McGee, *Britain can't decide whether it should send its looted treasures back to their rightful owners*, CNN STYLE (Oct. 31, 2021), https://www.cnn.com/style/article/benin-bronze-returns-britain-intl-cmd-gbr/index.html [https://perma.cc/YWB5-88PN].

("The British government believes that the [British Museum] is the right home for the Bronzes as it . . . has the best facilities for their upkeep.")

[42] *Id.*

[43] *See* Frum, *supra* note 12.

[44] *Id.*

[45] *Id.*

Bronzes, and second, that the Benin Bronzes will become inaccessible to the greater public if returned to Nigeria.

The first assumption is grounded in some truth; Nigerian museums and cultural institutions have long lacked the funds and resources to properly care for and protect their cultural objects.[46] The looting of cultural objects from museums remains an ongoing issue in the country.[47] Although this looting problem can be attributed to corruption and the lack of adequate security,[48] Zacharys Gundu, a professor in the Department of Archaeology at Ahmadu Bello University, has argued that "it is undoubtedly clear" that these problems "in the African museum environment are directly linked to the Western museum and art establishment that is a major patron of the African illicit antiquities market."[49] In other words, the very western institutions that challenge Nigeria's ability to protect their peoples' cultural heritage are largely contributing to the criminal activity that is making it difficult for them to do so. Despite these challenges, the Nigerian government has made considerable efforts to promote the protection of cultural heritage in the country. The National Commission for Museums and Monuments (NCMM) has taken gradual steps to improve upon Nigeria's cultural heritage regime over the past few decades. For example, the NCMM continues to partner with local governments and cultural institutions in other countries to educate the public on the importance of their work and train their own officials to properly care for and protect the cultural objects in the country's possession.[50]

As for the second assumption, American and British museums, where many Benin Bronzes are housed, are undoubtedly the world's largest and most frequented cultural institutions. Under a theory of cultural internationalism, cultural objects belong to all people and therefore should be kept and displayed where the greatest number of people can see and access them. From this perspective, the sheer number of visitors that museums like the Metropolitan Museum of Art and the British Museum host daily is sufficient to justify keeping the Bronzes in the U.S. and the U.K. However, it is important to note that returning the Benin Bronzes to Nigeria does not necessarily mean the public will have difficultly accessing them. In the art and museum industry, exhibitions are possible because museums around the world collaborate and lend each other pieces from their collections.[51] Therefore, the Benin Bronzes may be returned to Nigeria and, on Nigerian government's accord, be lent out to museums around the world to be exhibited and admired. Repatriation is not about where the objects are physically located, but who has ownership and therefore control over where, how, and when they are exhibited.

In his essay, *Art Museums, Archaeology and Antiquities in an Age of Sectarian Violence and Nationalist Politics*, James Cuno, an American art historian and curator, pushes back against cultural nationalist arguments that

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[46] Shyllon, *supra* note 18, at 248.
[47] Erik Nemeth, *Art Sales as Cultural Intelligence*, 4 AFR. SEC. 127, 139 (2011).
[48] Zacharys A. Gundu, *Looted Nigerian heritage – an interrogatory discourse around reputation*, 7 CONTEMP. J. OF AFR. STUD. 47, 56 (2020).
[49] *Id.* at 56.
[50] *Functions of the NCMM*, NAT. COMM'N FOR MUSEUMS AND MONUMENTS, https://museum.ng/functions-of-ncmm/ [https://perma.cc/RAW3-YMWB].
[51] *See generally* Tamar Chute, *What Do You Mean the Museum Went Bankrupt?: Lending Artifacts to Outside Institutions*, 74 THE AM. ARCHIVIST 312 (2011); B.D.D., *The Lending Collection of the Museum*, 13 THE METRO. MUSEUM OF ART BULL. 205 (1918); Jill Hasell, *Opening the Boxes: A Lending Curator's Perspective*, 21 J. OF MUSEUM ETHNOGRAPHY 80 (2009); Craig Ulrich, *Fair Lending Law Developments*, 45 BUS. LAW. 1807 (1990).

call for the return of cultural objects taken before a nation's founding. He accuses these nations of "hoarding" heritage to which, Cuno argues, they have no legitimate claim.[52] This line of argument largely attacks nations that were former colonies of Western empires and did not gain independence until the mid to late-twentieth century. Frum's line of argument provides the British with a reason to keep the Benin Bronzes on the sole basis of their own national interests. For example, the British argue that they have a legitimate claim to the Bronzes because they (1) have been exhibited in the country for more than a century, (2) provide revenue for the country by attracting tourists, and (3) instill in the British a sense of pride in their ability to collect and display cultural objects from around the world.[53] Some Americans have presented similar arguments that will be discussed later in this note.

D. *CONTINUED HARM OF WESTERN POSSESSION*

The initial harms inflicted in the violent taking of the Benin Bronzes have persisted in the continued possession and display of these objects by the UK the U.S. While Nigeria has been an independent nation state since the late twentieth century, the UK and U.S.'s long refusal to return the Bronzes constitute, what Adewumi labels, "a claim on an ancient past"[54] that undermines Nigeria's ability to develop and strengthen its national identity. As Adewumi pointed out, "politics and political power are displayed when a government, having sovereign authority to regulate and enforce its claims, claims antiquities as its cultural property rather than the world's common artistic and cultural legacy."[55] The UK and U.S.'s claims on the Bronzes deprive Nigeria of its sovereign authority to claim objects created and taken from within its borders as its own property.

In his book, *The Brutish Museums*, Dan Hicks, Professor of Contemporary Archaeology at the University of Oxford, presents a similar argument. Hicks claims that the "continued display" of the Bronzes "in [British] museums and its hiding-away in private collections, is not some art-historical incident of 'reception,' but an enduring brutality that is refreshed every day" when British and American museums "opens its doors."[56] Hicks' use of the word "brutality" is intentional; it refers not only to the actions of the British and Americans, but also the damaging ways the colonial powers perceived, and continue to perceive, non-western nations. The West's fascination with African art is not new. At the turn of the century, modern artists, most notably Pablo Picasso and Paul Gaugin, looked to 'primitive' cultures as a form of rebellion towards classical forms of western art.[57] This fascination is often misconstrued as a commendable form of admiration and respect. Frum highlights the "enormous effort" it took "to overcome the view that African art was inferior to European art, or that it was not art at all[,]" and "celebrate[] the cultural achievements of Africa and the artistic genius of Benin."[58] While the West's relatively newfound

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[52] James Cuno, *Art, Museums, Archaeology and Antiquities in an Age of Sectarian Violence and Nationalist Politics* in THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES, 11-14 (R.F. Rhodes ed., Univ. of Notre Dame Press 2007).
[53] *See* Adewumi, *supra* note 4, at 236.
[54] *Id.* at 238.
[55] *Id.*
[56] HICKS, *supra* note 14, at 137.
[57] *See generally* Patricia Leighten, *The White Peril and L'Art nègre: Picasso, Primitivism, and Anticolonialism*, 72 THE ART BULL. 609 (1990).
[58] Frum, *supra* note 12.

recognition of the aesthetic value of African artifacts is preferrable to the alternative, for example, a complete dismissal of African artistic achievements, it is by no means commendable. Fascination does not indicate respect. Following the punitive exhibition, the Benin Bronzes were distributed so widely because of a Western fascination in the objects' appearance and history, a history that is founded in a curiosity in the 'other' that is inferior to the Western 'classic.'[59] Additionally, the clear disregard the many art dealers, museums, and private collectors had towards the brutal means through which they were acquired indicate a clear lack of respect for the people who made them.[60]

E. *BLACK AMERICANS AND THE BENIN BRONZES*

When the Smithsonian Institute announced that it would be returning twenty-nine Benin Bronzes to Nigeria, the Restitution Study Group (RSG), a New York-based non-profit, filed suit; seeking a preliminary and permanent injunction to prevent the objects' return.[61] In its complaint, RSG maintains that the Benin Bronzes "are not simply valuable *objects d'art*" but "have a unique and special historical relationship to descendants of enslaved African-Americans whom Europeans forcibly brought to North America."[62] RSG argues that the Smithsonian Institute, in returning the Bronzes, are depriving descendants of enslaved African Americans in the U.S. of the opportunity to see the Bronzes and connect with their own history.[63] As a part of its argument, RSG points to Benin's participation in the slave trade, stating that many of the Bronzes "were crafted from metal ingots, melted down from a currency called manillas, that European slave traders paid to the oba . . . of the Kingdom of Benin, or to members of the Benin nobility, in exchange for abducted and enslaved neighboring non-Beni people."[64]

While the British and RSG both assert cultural internationalist arguments for keeping the Bronzes, the interests each put forward are vastly different. The interests the British claim in the Benin Bronzes were formed *after* they were looted; any connections formed between British public and the Benin Bronzes were incidental to, and partially founded in, the punitive expedition. The interests RSG put forth in its complaint imply the existence of a connection to the objects long before the punitive expedition, formed through the slave trade before the Bronzes were ever looted and brought to the U.S. When closely examined, RSG's argument, while seemingly cultural internationalist, falls more in line with cultural nationalist perspectives of cultural heritage. Although the court declined to grant RSG the preliminary injunction and the Bronzes were returned to Nigeria, RSG's suit continues to be litigated; the Smithsonian Institute is still in the process of reviewing

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[59] *See generally* Jean-Loup Amselle et al., *Primitivism and Postcolonialism in the Arts*, 118 MLN 974 (2003); Susan Mullin Vogel, *Baule: African Art Western Eyes*, 30 AFR. ARTS 64 (1997); Claudia Mattos, *Whither Art History?: Geography, Art Theory, and New Perspectives for an Inclusive Art History*, 96 THE ART BULL. 259 (2014); Lois J. Gilmore, *"But Somebody You Wouldn't Forget in a Hurry": Bloomsbury and the Contradictions of African Art, in* CONTRADICTORY WOOLF 66–73 (Derek Ryan and Stella Bolaki eds., 2012).

[60] HICKS, *supra* note 14, at 146.

[61] Francesca Aton, *Restitution Organization Sues to Keep Smithsonian's Benin Bronzes From Returning to Nigeria*, ARTNEWS (Dec. 6, 2022), https://www.artnews.com/art-news/news/smithsonian-sued-over-benin-Bronzes-return-to-nigeria-1234649314/ [https://perma.cc/7MMT-57L5].

[62] Complaint at 2, Farmer-Paellmann v. Smithsonian Inst., No. 1:22-CV-3048 (CRC), 2022 WL 17976505 (D.D.C. Oct. 14, 2022).

[63] *See id.*

[64] *Id.*

the status of six Bronzes in its collection and the court invited RSG to file an amended complaint.[65] In deciding this case, the court may have to tackle the difficult task of deciding whether the interests RSG present are greater than Nigeria's interests in the Bronzes' return.

III. CULTURAL HERITAGE AND NIGERIAN LAW

Understanding Nigeria's dedication to the preservation of its cultural heritage, particularly its long efforts to reclaim the Benin Bronzes, is central to the debates surrounding the objects' return. The first law adopted in Nigeria on the preservation of cultural property was an ordinance promulgated by the British colonial government in 1924.[66] The 1924 ordinance was aimed at stopping the exportation of cultural objects, particularly bronze objects, from the colony without government permission.[67] While the 1924 ordinance demonstrated an effort and desire to protect cultural property, its effect was minimal, if not non-existent.[68]

A. *ANTIQUITIES ACT OF 1953*

In 1953, the British colonial government implemented the Antiquities Act, a more comprehensive regulation of cultural property in Nigeria. The Antiquities Act of 1953 was promulgated in response to a growing trade in antiquities that inadvertently encouraged the demolition of historical sites.[69] The law primarily placed restrictions on the exportation and search of antiquities.[70] An antiquity was defined as an "object of archaeological interest or land[,]"[71] and included: "fossil remains . . . site, trace or ruin of an ancient habitation . . . any cave or natural shelter, or engraving, drawing, inscription, painting or inscription on rock or elsewhere, or any stone object or implement believed to have been used or produced by early man . . ." as well as relics of "early European settlement or colonisation" and "any work of art or craftwork . . . of indigenous origin" that "was made or fashioned before the year 1918" or "is or has been used at any time in the performance, and for the purposes of, any traditional African ceremony."[72] The Antiquities Act of 1953 also established the Antiquities Commission, a colonial entity responsible for the preservation and management of antiquities and monuments in the colony. No one could search for or export an antiquity without a permit issued by the Antiquities Commission *and* the consent of the relevant local government entity.[73]

Despite these new protections and safeguards, the Antiquities Act of 1953 largely failed to stop the smuggling and export of Nigerian antiquities. Colonial authorities who oversaw the enforcement of the statute took advantage of their power to violate the law or aid others in doing so; permits

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[65] Taylor Dafoe, *A New York Nonprofit Has Filed a Lawsuit to Block the Smithsonian From Repatriating Its Benin Bronzes to Nigeria*, ARTNEWS (Dec. 2, 2022), https://news.artnet.com/art-world/benin-bronze-lawsuit-restitution-study-group-smithsonian-2221312#:~:text=Earlier%20this%20fall%2C%20the%20Smithsonian's,1897%20raid%20on%20Benin%20City [https://perma.cc/Q966-46RJ].
[66] Shyllon, *supra* note 18, at 236.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *See id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 237.

and waivers to search for and export antiquities were freely issued.[74] The Antiquities Act also failed to regulate the sale of antiquities; people were still free to sell and buy antiquities at any place and any time.[75]

B. *ANTIQUITIES (PROHIBITED TRANSFERS) ACT OF 1974*

With the rise of African nation states in the 1970s, there was a shift in attitude towards cultural heritage; Africans in search of identity rooted in history and antiquity began to regard their cultural resources with a sense of pride.[76] The ineffectiveness of the Antiquities Act of 1953, as well as a newfound pride in cultural property, necessitated a new legislative scheme: the Antiquities (Prohibited Transfers) Act of 1974.[77] The purpose of the Antiquities (Prohibited Transfers) Act of 1974 was to outlaw the buying and selling of Nigerian antiquities that the 1953 law failed to regulate.[78] Under the Antiquities (Prohibited Transfers) Act of 1974, people were prohibited from buying or selling any antiquity to any person other than the Director of the Federal Development of Antiquities or a person or body authorized by him.[79] Additionally, "persons in possession or control of antiquities were to register such antiquities when approached for the registration by accredited agents[.]"[80] However, the Antiquities (Prohibited Transfers) Act of 1974 contained a number of internal contradictions and, like the Antiquities Act of 1953, was largely considered ineffective.[81]

C. *NATIONAL COMMISSION FOR MUSEUMS AND MONUMENTS ACT OF 1979*

In 1979, Nigeria adopted the legislative scheme that governs cultural heritage in the country today: the National Commission for Museums and Monuments Act. This law retained the same definitions for antiquities, monuments, and objects laid out in the 1953 act, but increased the penalties for their unauthorized destruction, alteration, or removal.[82] The Antiquities Commission was abolished and replaced with the National Commission for Museum and Monuments (NCMM).[83] Much like the old commission, the NCMM is responsible for the conservation, preservation, and restoration of Nigeria's historical, cultural, artistic, and scientific relics.[84] When it comes to the prohibited transfers of antiquities, the text of the National Commission for Museums and Monuments Act is largely indistinguishable from the text of the Antiquities (Prohibited Transfers) Act of 1974.[85] However, with the current growth of the illegal antiquities market and the cultural needs of a new Nigerian nation state, the National Commission for Museums and Monuments Act of 1979 was the first to recognize that the NCMM must operate with some degree freedom and independent authority for any of its efforts to protect Nigeria's cultural heritage to succeed.[86]

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[74] *See id.* at 238.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 239.
[79] *Id.* at 238.
[80] *Id.* at 239.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 240 ("The provisions of the repealed Antiquities (Prohibited Transfers) Act 1974 are re-enacted in Part III of the new Act[.]").
[86] *Id.* at 241.

Unfortunately, the NCMM's achievements have been less than ideal. In his essay *Cultural Heritage Legislation and Management in Nigeria*, Folarin Shyllon, Dean of the Faculty of Law at the University of Ibadan, attributes the NCMM's struggles to "the uncomfortable fact that in the early fifties those who were armed with some learning in the English language and were destined to constitute the Nigerian power and ruling elite never really had faith or saw anything good and positive in their ancient culture."[87] When the NCMM was established, cultural institutions in Nigeria were treated as "marginal institution[s]" and were grossly underfunded.[88] Without sufficient resources, the NCMM has not been able to provide for adequate maintenance and security in Nigeria's museums. Particularly, in the late twentieth century, when Shyllon's article was published, Nigeria's economy was "[i]n a period of unprecedented collapse" and lacked the financial means to support the Commission, which "never occupied a priority slot in federal allocation of resources[,]" in the first place.[89]

Although the NCMM has made strides in the past two decades, the conditions of Nigeria's museums today remain sub-par.[90] However, as of January 2022 China has pledged to support Nigeria financially in preserving cultural heritage and improving its museums.[91] This new partnership may give Nigeria the opportunity to credibly counter any accusations that its museums are not capable of properly preserving and exhibiting its own cultural heritage.

IV. CULTURAL HERITAGE AND INTERNATIONAL LAW

There are two primary sources of international law that govern the global protection and management of cultural property: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[92] and the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[93]

A. *1954 HAGUE CONVENTION*

The 1954 Hague Convention was adopted shortly after the Second World War in response to the mass destruction and looting of cultural property by Nazi Germany.[94] The treaty was focused on preventing military use of force against cultural property, monuments, and objects, and promoting the

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[87] *Id.* at 247.
[88] *Id.* at 248.
[89] *Id.*
[90] *See* Gregory Austin Nwakunor, *Scenes of forgotten past: Nigerians ditch ageing museums for cinemas, recreation centres*, THE GUARDIAN NIGERIA NEWS (Aug. 11, 2023) ("An inventory of Nigerian museums today will reveal a sad and pitiful treatment of the country's historical monuments and heritage.").
[91] Enehua Ojiah, *China pledges to support Nigeria in preserving, developing museums*, TIMELINE NEWS NIGERIA (June 9, 2022), https://timeline.ng/index.php/news/international/8081-china-pledges-to-support-nigeria-in-preserving-developing-museums [https://perma.cc/4BXX-N5UG].
[92] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].
[93] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].
[94] Adewumi, *supra* note 4, at 231.

principle of individual international responsibility, as first introduced at Nuremburg, for such violative actions.[95] Under the 1954 Hague Convention, cultural property is defined as "movable or immovable property of great importance to the cultural heritage of every people."[96] This definition aligns with a cultural internationalist perspective of cultural heritage as it does not reference the specific origin of a cultural object but instead emphasizes the object's importance to all people. In other words, the 1954 Hague Convention frames the destruction and looting of cultural property during wartime as harms on one large human collective.

B. *1970 UNESCO CONVENTION*

Sixteen years after the 1954 Hague Convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) was adopted. While the 1954 Hague Convention concerned the protection of cultural property during wartime, the 1970 UNESCO Convention addressed the illegal exchange of cultural property during peacetime.

After the 1954 Hague Convention went into effect, there remained a clear need for international measures to combat the global theft and trade of cultural property. Mexico and Peru were early champions of the cause.[97] Mexico, in particular, took the lead and eventually received authorization to convene a special committee to draft a convention on the matter.[98] Delivering a final draft was no easy task, as the committee had to reconcile the diversity of views and interests of all nations involved. The U.S. and Mexico were crucial to the eventual success of the convention.[99] The U.S., in particular, raised numerous objections that influenced the final text of the treaty.[100] For example, per the U.S.'s request, several provisions of the treaty were amended to include language like "consistent with national legislation" or "as appropriate for each country" that offered the U.S. and other nations flexibility when implementing treaty measures.[101]

The 1970 UNESCO Convention follows a more cultural nationalist approach to cultural property regulation. The text of the treaty defines cultural heritage as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[102] Most notably, the treaty highlights the importance of context to an object's value, asserting that cultural property "can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."[103] However, this specificity is offset by the broad authority the treaty provides each signatory; the preamble to the treaty states that it is "incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export."[104] The

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[95] *Id.* at 231–32.
[96] 1954 Hague Convention, *supra* note 92, at art. 1.
[97] Mexico and Peru had previously entered negotiations with the United States to address the illegal export of pre-Columbian objects. *See* Jowers, *supra* note 27, at 149.
[98] *Id.*
[99] *Id.* at 147.
[100] *Id.* at 149.
[101] *Id.* at 150.
[102] 1970 UNESCO Convention, *supra* note 93, at art. 1.
[103] Jowers, *supra* note 27, at 150 (citation omitted).
[104] 1970 UNESCO Convention, *supra* note 93, pmbl.

categories of objects laid out in the treaty were left ambiguous so that states have the discretion to classify what objects are important to their cultural heritage and why.[105]

The purpose 1970 UNESCO Convention is to "inhibit the illicit international trade in cultural objects, which was declared to be 'one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property.'"[106] Of the twenty-six articles in the treaty, three are of particular importance and relevance to this note: Articles 3, 7, and 9. Under Article 3, any "import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under [the] Convention by the States Parties thereto" is considered "illicit."[107] The provision not only requires states to prohibit the illegal exportation of its own cultural property but also imposes on each state an "obligation[] . . . to facilitate recovery of any illicitly imported cultural property within their territory." [108]

Articles 7 and 9 highlight the necessity of international cooperation to further the treaty's purpose. Under Article 7(a) states are obligated to "prevent museums and similar institutions within their territories from acquiring cultural property" that has been illegally exported.[109] Similarly, Article 7(b) imposes on states a duty to "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution"[110] and, if and when items are discovered to have been stolen, "to take appropriate steps to recover and return" the stolen property.[111] For an object to obtain protection under this provision, it must have been (1) stolen after the ratification of the 1970 UNESCO Convention, (2) removed from a museum or similar institution, *and* (3) documented as belonging to the inventory of that museum or institution. Upon the discovery and return of stolen property, innocent purchasers, under Article 7, are entitled to compensation.[112]

Article 9 more expressly calls for multilateral action when a state's cultural patrimony is threatened. Under Article 9, states have a duty "to participate in a concerted international effort to determine and to carry out . . . necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned."[113] Yet, Article 9 fails to impose strict obligations on states to adopt import restrictions; its loose language was the direct result of the objections raised by the U.S. during the drafting of the treaty.[114]

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[105] *See* Jowers, *supra* note 27, at 150.
[106] *Id.*
[107] 1970 UNESCO Convention, *supra* note 93, art. 3; Article 3 is best understood in relation to Article 6, which prohibits the export of cultural property without the accompaniment of an export certificate.
[108] Emily Behzadi, *His Ship Has Sailed–Expelling Columbus from Cultural Heritage Law*, 56 VAND. J. OF TRANSNAT'L L. 315, 343 (2023) (citing 1970 UNESCO Convention, *supra* note 93, at art. 13(d)).
[109] 1970 UNESCO Convention, *supra* note 93, at art. 7(a).
[110] *Id.* at art. 7(b)(i).
[111] *Id.* at art. 7(b)(ii).
[112] *See id.* ("The requesting party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return.").
[113] *Id.* at art. 9.
[114] *See* Jowers, *supra* note 27, at 153.

C. *CHALLENGES UNDER INTERNATIONAL LAW*

Africa's long colonial history, as well as the international community's delayed response to the looting and destruction of cultural property, present Nigeria with unsurmountable challenges in their efforts to recover the Benin Bronzes. While Nigeria, the UK, and the U.S. are all signatories to both the 1954 Hague Convention and the 1970 UNESCO Convention, formal legal principles and ambiguous definitions of identity prevent their application to the matter of the Benin Bronzes.

1. *Non-Retroactivity*

Non-retroactivity is the legal principle that laws, treaties, and other binding agreements do not apply retroactively. Under this principle, acts committed before a treaty came into force cannot be considered violations of that treaty.[115] This applies to the 1954 Hague Convention; while the treaty prohibits the seizure and destruction of cultural property during armed conflict, it only applies to acts committed after August 7, 1956, the date the treaty came into force.[116] The Benin punitive expedition took place in 1897, fifty-nine years prior to 1956. The burning down of the Benin Palace and taking of the Benin Bronzes may qualify as the seizure and destruction of cultural property during armed conflict, as the conduct is defined in the 1954 Hague Convention, however, because the acts took place long before August 7, 1956, they fall outside the scope of the treaty and are not considered violations of international law. Specifically, Article 7(b) of the 1954 Hague Convention requires conduct to have taken place "after entry into force of the Convention" to be qualify as violations of the treaty.[117] Therefore, regardless of the atrocities committed, "the Benin collections in foreign museums might be said to have been acquired legally on the terms that applied at the time of the expedition when a transfer of power over the antiquities occurred as a result of war which was not illegal or uncommon."[118]

2. *Identity Problem*

Even if the principle of non-retroactivity did not apply, Nigeria's claims to the Benin Bronzes remain shaky. Although it is relatively clear that the Bronzes do not belong to the British, it is not entirely clear that the Bronzes belong to Nigeria. While both Nigeria and Benin have claimed ownership in the Bronzes, at the time they were taken there were no laws vesting ownership in the objects to either country.[119] Although the Kingdom of Benin was formally located on land that is now within Nigeria's territorial boundaries, Nigeria itself did not become an independent state until the 1960s. While Benin takes its name from the Kingdom of Benin, the country is not a continuation the Kingdom of Benin nor located in the same territory. There is no question that Benin Bronzes are considered cultural property under both the 1954 Hague Convention and the 1970 UNESCO Convention;

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[115] *See generally*, Yarik Kryvoi and Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT LAW REV. 46 (2021).
[116] S. REP. NO. 110-26 (2008) (Conf. Rep.).
[117] 1970 UNESCO Convention, *supra* note 93, at art. 7(b)(i).
[118] Adewumi, *supra* note 4, at 240.
[119] Afolasade A. Adewumi, *Benin Objects: Return of Stolen Objects or Restitution of Objects of Cultural Value?*, 1 IRLJ 177, 182 (2019).

specifically, the Benin Bronzes are movable property that is both "of great importance to the cultural heritage of every people" *and* designated by Nigeria "as being of great importance for" Nigerian archaeology, history, and art.[120] However, it cannot be said that the Bronzes, under either treaty, belonged to and were taken from any state other than the now non-existent Kingdom of Benin.[121] While Nigeria has repeatedly claimed ownership in the Bronzes,[122] and has provided legitimate reasons for doing so, it did so long after their claims could have any effect under international law.

V. CULTURAL HERITAGE AND U.S. LAW

As previously discussed, the U.S. played a key role in the drafting of the 1970 UNESCO Convention. Negotiations, and later agreements, between the U.S. and Mexico concerning the illegal trade of pre-Columbian objects were the first of its kind.[123] That is not to say that the U.S. always modeled good behavior as to the protection of cultural heritage. U.S. history is wrought with numerous instances of Americans taking and destroying the cultural property of native peoples.[124] However, beginning in the late twentieth century, the U.S. has adopted a cultural nationalist view of cultural property; both Congress and U.S. courts have consistently recognized claims by foreign nations over cultural property and, if deemed stolen, facilitated their return. In this section, I will discuss two pieces of U.S. legislation under which foreign nations and citizens have successfully adjudicated their claims and recovered their cultural property: the Cultural Property Implementation Act of 1970[125] and the National Stolen Property Act of 1934.[126]

A. *CULTURAL PROPERTY IMPLEMENTATION ACT (CPIA)*

Although the 1970 UNESCO Convention was signed in November of 1970, it is not, as previously discussed, self-executing; implementing legislation is required for the treaty to have its full effect. In the U.S., it took ten years of advocacy and debate before Congress passed the Cultural Property Implementation Act (CPIA) and become a full signatory state to 1970 UNESCO Convention.[127] The CPIA empowers the executive branch to combat the illegal importation of cultural property in two ways. First, the executive may impose import restrictions on designated materials and objects that belong to a state party of the UNESCO Convention.[128] Second,

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[120] 1954 Hague Convention, *supra* note 92, at art. 1.
[121] *The Kingdom of Benin*, *supra* note 5 ("Benin City was burned by the British, who then made the kingdom part of British Nigeria (which became Nigeria after the country gained independence in 1960).").
[122] *See* Frum, *supra* note 12.
[123] *See generally* Christina Luke, *U.S. Policy, Cultural Heritage, and U.S. Borders*, 19 IJCP 175 (2012); Magdalena Morales Rosas & Kimberly Shmeitz, *Preservation of Mexico's Cultural Heritage*, 7 ART ANTIQUITY & L. 281 (2022).
[124] *See generally*, Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129 (2007); Maria P. Kouroupas, *Combatting Cultural Property Looting and Trafficking: the US Experience*, 20 UNIF. L. REV. 528 (2015).
[125] Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* (1970).
[126] National Stolen Property Act, 18 U.S.C. §§ 2314 *et seq.* (1934).
[127] Jowers, *supra* note 27, at 155.
[128] Behzadi, *supra* note 108, at 22 (citing 19 U.S.C. §2607 ("No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.")).

the executive, at the request of a foreign state, may also enter into bilateral agreements or memoranda of understandings to restrict the importation of cultural property.[129]

The CPIA implemented both Articles 9 and 7 of the UNESCO Convention *but* with important modifications.[130] Article 9 was implemented under Section 2602 of the CPIA.[131] While under Article 9 an object must be designated as a cultural property by its country of origin to receive protection, under the CPIA, specific designation is not necessary.[132] After a formal request is submitted under Article 9 of the 1970 UNESCO Convention, the "President of the United States may enter into bilateral agreements to apply import restrictions on archaeological or ethnological material in jeopardy of pillage, or multilateral agreements under which the United States will apply similar restrictions to those applied by other countries."[133] The President's powers, however, are not unlimited. Before entering into such an agreement, the President must determine that: (1) the state's cultural patrimony is in danger from pillage or archaeological materials, (2) the state has taken measures to protect their cultural patrimony consistent with the Convention, (3) import restrictions would substantially deter "a serious situation of pillage," (4) less drastic remedies are not available, and (5) the application of the import restrictions would be consistent with the interests of the international community in cultural exchange.[134] If the requesting nation's crisis is urgent, the President may provide emergency relief under Section 2603.[135] The requesting nation must first present the President with documentation that establishes an emergency condition exists as to their cultural patrimony.[136] If the President determines that an emergency condition does exist, he may impose temporary restrictions on the import of certain objects from that nation.[137] While emergency relief is limited to five years, the protection may be renewed for another three years if emergency conditions have continued.[138]

Article 7 was loosely implemented under Section 2607 of the CPIA. Section 2607 of the CPIA prohibits the importation of cultural property stolen from a museum or other public institution, if that object was, at the time it was taken, documented as inventory of that museum or public institution.[139] Like the 1970 UNESCO Convention, Section 2607 only applies to property that was stolen after either the CPIA went into effect, 1983, or the UNESCO Convention entered into force in the foreign nation in which the museum or public institution is located, whichever comes later.[140] Cultural property found to have been imported in violation of Section 2607 is subject to seizure and forfeiture.[141] The recovery and return provision under Article 7(b)(ii) of the UNESCO Convention are notably

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[129] *Id.* (citing 19 U.S.C § 2603(b) (". . . if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material.")).
[130] Jowers, *supra* note 27, at 155.
[131] *Id.*
[132] *Id.* (citing 19 U.S.C. §2601(6)).
[133] *Id.* at 156 (citing 19 U.S.C. § 2602(a)(2)(A)–(B)).
[134] 19 U.S.C. § 2602(a)(1)(A)–(D).
[135] 19 U.S.C. § 2603.
[136] 19 U.S.C. § 2603(c)(1).
[137] Jowers, *supra* note 27, at 156 (citing 19 U.S.C. §2603(c)(3)).
[138] *Id.* (citing 19 U.S.C. §2603(c)(3)).
[139] 19 U.S.C. § 2607.
[140] *Id.*
[141] Jowers, *supra* note 27, at 157.

absent from the CPIA.[142] However, the U.S. has submitted an understanding to UNESCO that states that the U.S. is prepared to provide for the recovery and return of property contemplated in Article 7(b)(ii), provided that other states agree to do the same for U.S. museums and cultural institutions.[143] However, the treatment of claims by foreign nations and individuals over stolen cultural property by U.S. courts has demonstrated that the judiciary is, at least, nevertheless willing provide such recovery and return.

1. *CPIA – Case Law*

Despite noticeable differences between the CPIA and 1970 UNESCO Convention, U.S. courts have largely honored the purposes and values embodied in the treaty. These efforts are exemplified in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*.[144] The case concerned a replevin action brought by the Republic of Cyprus and the Church of Cyprus to recover four Byzantine-era mosaics that had been stolen from the Greek-Orthodox church against Peg Goldberg, an American citizen who bought the mosaics from European dealer and displayed them in her Indiana museum.[145] The district court awarded possession of the mosaics to Cyprus and the Court of Appeals for the Seventh Circuit affirmed.[146] While the case was decided under Indiana law and did not implicate the CPIA, Judge Chuday asserted that courts, in reviewing such cases, "should certainly attempt to reflect in its decisionmaking the spirit as well as the letter of an international agreement to which the United States is a party."[147] While this does not demonstrate a specific commitment to respecting foreign nations' claims to cultural property, it does demonstrate a desire and willingness to uphold the commitments the U.S. made in signing the 1970 UNESCO Convention as well the values the treaty exemplify.

B. *NATIONAL STOLEN PROPERTY ACT (NSPA)*

The National Stolen Property Act (NSPA) was passed in 1934 as an extension of the National Stolen Motor Vehicle Act of 1919.[148] While not originally intended to facilitate the return of stolen art, the NSPA has served as the basis for every criminal prosecution of art theft in the U.S. in the past eighty years.[149] Under the NSPA, it is a federal crime to knowingly transport or receive, in interest or foreign commerce, stolen goods worth more than $5,000; violations are punishable by fine and/or imprisonment.[150] As most cultural property is worth more than $5,000, U.S. courts may apply the NSPA to claims brought by foreign states to recover objects removed from their territorial boundaries.[151] If a foreign state asserts legal title to an object removed from their land, a court may find those who knowingly imported

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[142] *Id.*
[143] *Id.*
[144] *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*, 917 F.2d 278 (7th Cir. 1990).
[145] *Id.* at 279–84.
[146] *Id.* at 279.
[147] *Id.* at 296 (Chuday, J., concurring).
[148] Ryan D. Phelps, *Protecting North America's Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them*, 94 TEX. L. REV. 785, 798 (2016).
[149] *Id*.
[150] Jowers, *supra* note 27, at 168.
[151] *Id.*

and possessed the stolen object criminally liable under the NSPA;[152] if a conviction results, the status of the object is determined in a forfeiture proceeding that can result in seizure.[153]

While the NSPA is an effective means of adjudicating art theft claims, the burden of proof may be difficult to establish. The NSPA contains a scienter requirement that the government must satisfy by presenting evidence that demonstrates that the defendant had knowledge that the object they imported and/or in their possession was stolen.[154] Meeting this requirement is especially difficult when it comes to art and cultural property because such objects are usually sold and bought through art dealers and auction houses, most of which do very little to verify the provenance of the objects they sell.[155] As a result of the "lack of diligence"[156] exercised by these intermediaries, a person who possesses a stolen object often has no knowledge that that object was stolen and good reason to have relied on the reputation and good will of the dealer or auction house from whom they purchased the object. The government is then obligated to conduct the difficult task of figuring out who in the object's chain of custody had sufficient knowledge of the object's stolen status to meet the scienter requirement.

1. *NSPA – Case Law*

There are two federal cases that have clarified the NSPA as it applies to art theft cases in which the object in dispute has been stolen from a foreign nation: *United States v. Hollinshead*[157] and *United States v. McClain*.[158]

i. *United States v. Hollinshead*

United States v. Hollinshead explains the government's burden of proof under the NSPA as it relates to the statute's scienter requirement.[159] In *Hollinshead*, the defendants were convicted by jury under the NSPA for conspiracy to transport and causing the transportation of a pre-Columbian stele stolen from a Mayan ruin in the jungles of Guatemala.[160] The defendants appealed, arguing that the district court judge erroneously instructed the jury in failing to clarify that there was no presumption that the defendants knew the stele 'stolen' as defined under Guatemalan law.[161] The Court of Appeals for the Ninth Circuit upheld the conviction, finding that, while the district court judge's failure to clarify the proof of knowledge on Guatemalan law may have been erroneous, it was not prejudicial.[162] In the majority opinion, Judge Duniway explains that the NPSA, when applied to such cases involving stolen cultural property from a foreign nation, does not require the government "to prove that [the defendants] knew where it was stolen," and that it is therefore also "not necessary for the government to

[152] *Id.*
[153] *See id.*
[154] Phelps, *supra* note 148, at 798.
[155] *Id.*
[156] *Id.*
[157] 495 F.2d 1154 (1974).
[158] U.S. v. McClain (*McClain I*), 545 F.2d 988 (1977) and U.S. v. McClain (*McClain II*), 593 F.2d 658, 670 (1979).
[159] *See* Hollinshead, 495 F.2d 1154 (1974).
[160] *Id.* at 1155.
[161] *Id.*
[162] *Id.* at 1156.

prove that [the defendants] knew the law of the place of the theft."[163] While museums and private collectors may know that an object they possess or wish to buy was stolen, they may remain unaware of the object's legal status under the laws of the source nation. The Ninth Circuit opinion in *Hollinshead*, while short, lightens the government's burden of proof, allowing them to prosecute such individuals by recognizing that the criminality of the conduct defined in the NSPA lies in the specific intention to trade or possess a *stolen* object, regardless of whether a defendant made the effort to learn the object's formal classification under another country's laws.

ii. *United States v. McClain (I & II)*

United States v. McClain defined the limitations on the scope of a foreign government's ownership rights over property under the NPSA.[164] In *McClain* the defendants were convicted by jury under the NPSA for conspiring to transport and receiving through interstate commerce a number of pre-Columbian artifacts stolen and exported from Mexico.[165] On appeal, the Court of Appeals for the Fifth Circuit reversed the conviction, holding that the district court erroneously instructed the jury that Mexican law had "declared pre-Columbia artifacts . . . to be the property of the Republic of Mexico" since 1897, when, in actuality, Mexico had not declared "all archaeological objects within its jurisdiction" until 1972.[166] On remand, the defendants were, for a second time, convicted by jury and, again, appealed their conviction to the higher court. In the first opinion, Judge Wisdom asserted that Mexico has the "sovereign right . . . to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction," and that such a declaration is recognizable as a valid ownership claim under the NPSA.[167]

However, Judge Wisdom's opinion from the first appeal, in combination with Judge Gee's opinion from the second appeal, established two requirements under the NPSA: a court may only recognize and apply such a declaration if (1) the declaration was expressed with sufficient clarity[168] and (2) the stolen object or objects in dispute were exported after the effective date of the declaration.[169] As to the first requirement, Judge Wisdom suggests that, while evidence of a nation's control over the disputed objects is preferred, a "clear and unequivocal" declaration of ownership may operate in lieu of actual control to satisfy the NSPA's requirement that the foreign property be 'stolen.'[170] However, the appellate court's first decision did not rest on this first requirement; Judge Wisdom stated that, although Mexico's declaration of ownership was sufficiently "clear and unequivocal," the defendants' conviction must be reversed because "the jury was not told that it had to determine when the pre-Columbian artifacts had been exported

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[163] *Id.*
[164] *See McClain I*, 545 F.2d 988 (1977).
[165] *Id.* at 992.
[166] *Id.* at 991.
[167] *Id.* at 992.
[168] *See McClain II*, 593 F.2d 658, 670 (1979).
[169] *See McClain I*, 545 F.2d at 1003.
[170] Phelps, *supra* note 148, at 800 (citing *id.* at 996 (explaining that a sovereign may declare ownership of property within its jurisdiction; however, "possession is but a frequent incident, not the sine qua non of ownership.")).

from Mexico."[171] As with the 1954 Hague Convention and the 1970 UNESCO Convention, the timing of the conduct was decisive here.

C. *APPLYING U.S. LAW*

U.S. law offers some avenues for foreign nations to recover and protect their cultural property. However, like international law, U.S. law provides little to no remedies for countries like Nigeria from recovering cultural property taken from them territory while under colonial rule.

1. *Applying the CPIA*

On January 20, 2022, the U.S. and Nigeria signed a bilateral agreement pursuant to the CPIA and in accordance with Article 9 of the 1970 UNESCO Convention: the Memorandum of Understanding between the United States of America and the Federal Republic of Nigeria Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Materials of Nigeria.[172] Prior to signing, the U.S. made several determinations about the status of Nigeria's cultural patrimony. The U.S. found that (1) the cultural patrimony of Nigeria is in jeopardy from the pillage of certain types of archaeological material representing Nigeria's cultural heritage, (2) the Nigerian government has taken measures consistent with the 1970 UNESCO Convention to protect its cultural patrimony, (3) import restrictions imposed by the U.S. would substantially deter "the serious situation of pillage" and less drastic remedies are not available, and (4) the application of the import restrictions are "consistent with the general interests of the international community."[173] Pursuant to the agreement, the U.S. placed import restrictions on certain categories of materials, including bronze and brass, deemed important to or representative of Nigeria's cultural heritage; these restrictions are effective for five years from the date of signing and may be extended if factors which warrant such protections persist.[174]

However, this bilateral agreement does not provide for the return of objects already in the U.S. prior to January 20, 2022; Nigeria therefore cannot use the agreement as a basis for retrieving the Benin Bronzes currently in American museums and private collections. The principle of non-retroactivity is, again, at play here. Most of the Benin Bronzes in the U.S. were imported prior to, and therefore cannot be deemed violations of, the bilateral agreement. Additionally, as previously discussed, Nigeria still lacks the funds and infrastructure to protect their cultural heritage;[175] the looting and destruction of cultural property in museums remain ongoing issues in the country today. While this bilateral agreement with the U.S. may not help Nigeria in their efforts to retrieve more Benin Bronzes, it will certainly help ensure that no more of them leave the country.

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[171] *McClain I*, 545 F.2d 996.

[172] Memorandum of Understanding between the United States of America and the Federal Republic of Nigeria Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Nigeria, U.S.-Nigeria, Jan. 20, 2022, https://www.govinfo.gov/content/pkg/FR-2022-03-17/xml/FR-2022-03-17.xml [https://perma.cc/8J68-X932]. [hereinafter Import Restrictions MOU].

[173] 19 C.F.R. §12 (2022).

[174] *Id.*

[175] *See infra* p. 8.

2. *Applying the NPSA*

The principle of non-retroactivity also prevents Nigeria from retrieving any Benin Bronzes through convictions under the NPSA. For a declaration of ownership by a foreign nation to be recognized under the NSPA, it must have (1) been expressed with sufficient clarity[176] and (2) gone into effect before the objects in dispute were exported.[177] With Nigeria's claims of ownership, clarity is not an issue; in both the Prohibited Transfers Act of 1974 and the National Commission for Museums and Monuments Act of 1979, the Nigerian legislature listed in great detail what objects belong to the state and why. However, like at issue in *McClain I* and *McClain II*, both statutes, the Prohibited Transfers Act of 1974 and the National Commission for Museums and Monuments Act of 1979, were passed long after the Benin Bronzes left the country. The Prohibited Transfers Act of 1974 was passed seventy-seven years after the punitive expedition and, moreover, Nigeria was not an independent state until the 1960s.

Even if the principle of non-retroactivity did not apply, Nigeria would still have difficulty retrieving the Benin Bronzes under U.S. law. First, as previously discussed, the Bronzes were stolen long before looting during armed conflict was outlawed under international law. Second, the scienter requirement under the NSPA would be very difficult if not impossible to meet. The majority of the museums and individuals in the U.S. that possess Benin Bronzes are good faith purchasers. Many of the objects have a clear chain of custody that trace back to European dealers and auction houses who sold the objects before the 1954 Hague Convention went into effect.[178] Very few museums that possess these objects acknowledge that the Benin Bronzes they own were stolen; but even if they did, that acknowledgement would have no legal consequences because the Benin Bronzes are not considered stolen objects under either U.S. or international law.

VI. ETHICAL OBLIGATIONS

In 2021, a group of museum curators and collection specialists at the Smithsonian Institute formed the Smithsonian Ethical Returns Working Group to develop a formal policy that encouraged shared stewardship arrangements and facilitated the return of objects based on ethical considerations.[179] The working group's recommendation was formally adopted in April 29, 2022 as a part of the Smithsonian's Collections Management policy.[180] Under this new policy, Smithsonian museums are

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[176] *See McClain II*, 593 F.2d 658, 670 (1979).
[177] *See McClain I*, 545 F.2d at 1003.
[178] Many American museums that own Benin Bronzes have provided provenance information on their websites; most of them do not indicate that they were taken by from the Kingdom of Benin during the punitive expedition, *see generally Carved stone (atal or akwanshi)*, MFA BOSTON, https://collections.mfa.org/objects/4773/carved-stone-atal-or-akwanshi?ctx=10649760-e5b9-4e24-bb46-57feff13fffc&idx=0 [https://perma.cc/UL53-Q565] (last visited Apr. 14, 2024), *Mounted ruler (so-called Horseman)*, MFA BOSTON, HTTPS://COLLECTIONS.MFA.ORG/OBJECTS/558345/MOUNTED-RULER-SOCALLED-HORSEMAN?CTX=10649760-E5B9-4E24-BB46-57FEFF13FFFC&IDX=11 [https://perma.cc/F9SL-X2HG] (last visited Apr. 14, 2024), *Reliquary Guardian Figure (mbulu nglu)*, ST. LOUIS ART MUSEUM, https://www.slam.org/collection/objects/17493/ [https://perma.cc/5X5D-M2DK] (last visited Apr. 14, 2024).
[179] Press Release, Smithsonian Institute, Smithsonian Adopts Policy on Ethical Returns (May 3, 2022), https://www.si.edu/newsdesk/releases/smithsonian-adopts-policy-ethical-returns [https://perma.cc/CB5Z-9SDF].
[180] *Id.*

not just permitted but called upon to return objects based on ethical considerations, taking into account the context of an object and the manner by which it was acquired.[181] Each Smithsonian museum is responsible for implementing criteria and procedures for the deaccessioning and return of stolen objects.[182] If an object in question is of significant monetary, research, or historical value, or of significant public interest, approval by the Smithsonian's Board of Regents may be required.[183]

Through the adoption of the Smithsonian Ethical Returns Working Group's recommendations, the Smithsonian Institution takes accountability for the troubling collecting practices exercised in their museums' past and commits to remedying the harms caused by those practices. The Smithsonian Institution has committed themselves to, "implement[ing] policies that respond in a transparent and timely manner to the requests for return or shared stewardship" and providing "opportunities to address the ethical return of human remains and objects of cultural heritage in the Smithsonian's care."[184] In the same statement, the Smithsonian Institution makes a distinction between "legal and ethical norms[,]" recognizing that "while an object may have been legally acquired, continued control . . . may not be consistent with current ethical practice and principles."[185] In making these promises, the Smithsonian Institute envisions a museum industry that acts with caution and treats other nations with greater mutual respect.

The Smithsonian Institution's new approach to their ethical responsibilities has served as a kind of call to action to museums across both the U.S. and Europe to reevaluate their collecting and curating practices and reexamine their role as stewards of history and culture. As previously discussed, Nigeria's efforts to retrieve the Benin Bronzes under both international and U.S. law will most likely fail. However, the lack of legal basis for Nigeria's claims does not negate the reality that Nigerians suffered harm and have continuously been denied remedy. Although museums do not have a legal obligation to return the Benin Bronzes, they certainly have an ethical responsibility to do so. Policies like the Smithsonian Institute's make that responsibility into an obligation.

CONCLUSION

The Benin Bronzes are central to the cultural identity and history of Nigeria. The Benin Bronzes were looted from the country's territory more than a century ago and Nigeria has sought the objects' return since gaining independence from the British in the 1960s. However, established legal principles and technicalities have undermined Nigeria's efforts. International and U.S. law do not recognize that, despite its colonial history, Nigeria has maintained a cultural identity separate from its colonizers; the failure of international and U.S. law to provide for the return of the Benin Bronzes is a denial of this reality. While Nigeria may not be able to recover the Benin Bronzes under either international or U.S. law, developments in

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[181] *Id.*
[182] *Id.*
[183] *See* Press Release, Smithsonian Institute, Smithsonian Adopts Policy on Ethical Returns (May 3, 2022), https://www.si.edu/newsdesk/releases/smithsonian-adopts-policy-ethical-returns [https://perma.cc/Z92V-LNQ8].
[184] *Id.*
[185] *Id.*

the museum world provide hope. The Smithsonian Institute's new approach to collection and curation fills this gap in the law and imposes new ethical obligations on Western museums. The success of the Smithsonian Institute's efforts may signal a shift in the museum industry, one that forces curators and collectors to remedy the harms caused by their predecessors.

OH CANADA: WHY CANADA SHOULD RECOGNIZE THE NORTHWEST PASSAGE AS AN INTERNATIONAL STRAIT

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INTRODUCTION

The ownership status of the Northwest Passage has become a highly contested topic in the recent decade. Running through the Canadian Arctic and connecting the Atlantic and Pacific Oceans, the Northwest Passage provides an extremely efficient sea shipping route that cuts days from the travel time of ships carrying cargo between hemispheres. The novelty of this issue exists due to the waterway being located in the Arctic, which was traditionally frozen through for the great majority of the calendar year. As global warming intensifies and the Arctic ice continues to melt, the Northwest Passage can be travelled through with greater ease. This makes the use of it a highly attractive route for foreign ships as it is shorter and thus cheaper.

The increased use of the waterway brings about issues of debated ownership as well as issues surrounding safety and maintenance of the waterway. Canada claims that the Northwest Passage is their internal waters and thus it has full ownership. Other countries, including the United States, claim that it is an international strait subject to the Law of the Sea thus giving foreign vessels the right of transit passage. Regardless of what the status of the Northwest Passage is now, after the prolonged use that is anticipated in the future, the argument for an international strait will prevail. In order for all parties to gain the most benefit possible, Canada's control and maintenance of the waterway is essential. This paper will argue that Canada should concede that the Northwest Passage is an international strait that is subject to the Law of the Sea in order to gain uncontested control of the waterway.

I. WHAT IS THE NORTHWEST PASSAGE?

Running through and along the top of Northern Canada and the Arctic, the Northwest Passage is a sea route that connects the Atlantic and Pacific oceans.[1] Historically, the landscape of the Northwest Passage has been frozen in the Arctic Ocean.[2] The traditional shipping route used for sea transportation between the Atlantic and Pacific oceans is the Panama Canal.[3]

Prior to the Panama Canal being built, to travel by sea, ships transporting goods between the east and west coasts of North America had to go all the way

[1] Hobart M. King, *What is the Northwest Passage?*, GEOLOGY.COM, https://geology.com/articles/northwest-passage.shtml [https://perma.cc/ZH8M-STST]
[2] *Id.*
[3] Burton L. Gordon, et al., *Panama Canal*, ENCYCLOPAEDIA BRITANNICA (Mar. 3, 2023), https://www.britannica.com/topic/Panama-Canal [https://perma.cc/B62E-Z74F].

around the island of Cape Horn, Chile – the southernmost point of South America.[4] The construction of the Panama Canal eliminated thousands of miles from the routes of ships travelling between the Atlantic and Pacific oceans.[5] The Panama Canal is a widely used shipping route today, moving 516.7 million tonnes of goods in 2021, which accounts for 3.5% of all global maritime trade.[6] While still thriving today and the ability to incur 30% more traffic before hitting capacity, finding a shorter alternative to the Panama Canal is something that would benefit global commerce via cheaper transportation costs.[7] Climate change is an important consideration in modern times and the use of fuel-powered cargo ships to transport goods accounts for more greenhouse gas emissions than all airline transportation and travel.[8] Finding the shortest, most fuel-efficient route is crucial as the global climate worsens. The climate crisis impacts every corner of the globe, with Panama being no exception.[9] Climate change is placing strain on the Panama Canal and its operations, with rainfall in the tropical country 20% less than what it was prior to 2019.[10] The irregular weather patterns and more intense periods of rainfall accounting for less total rainfall can cause the locks in the Panama Canal to overflow and pose more issues.[11] Many potential solutions have been proposed that include deepening and widening the locks,[12] but it is clear that an alternative that not necessarily replaces, but can at least lessen the burden on the Panama Canal is necessary.

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[4] *Id.*
[5] *Id.*
[6] David Alire Garcia, *Flow of goods through Panama Canal hits record*, REUTERS (Oct. 28, 2021), https://www.reuters.com/world/americas/flow-goods-through-panama-canal-hits-record-2021-10-29.
[7] Greg Miller, *How war, shipping boom, China lockdowns impact Panama Canal,* FREIGHT WAVES (May 2, 2022), https://www.freightwaves.com/news/how-war-shipping-boom-china-lockdowns-impact-panama-canal [https://perma.cc/B4LZ-738E].
[8] Sarah Kennedy, *Maritime shipping causes more greenhouse gases than airlines,* YALE CLIMATE CONNECTIONS (Aug. 2, 2021), https://yaleclimateconnections.org/2021/08/maritime-shipping-causes-more-greenhouse-gases-than-airlines [https://perma.cc/7MBT-KGPM].
[9] BBC, *Panama Canal grapples with climate change threat,* BBC (Aug. 9, 2022), https://www.bbc.com/news/world-latin-america-62407514 [https://perma.cc/N644-ER4V].
[10] *Id.*
[11] *Id.*
[12] *Id.*

The Northwest Passage offers a solution to the problems that the Panama Canal faces.[13] As a consequence of climate change and the global climate crisis posing risks to the entire globe, the ice caps in the Arctic have begun melting thereby opening up the Northwest Passage more than ever before.[14] The accessibility of the Northwest Passage caused by climate change is paradoxically away that emissions could be reduced in the commercial shipping sector.[15] Shorter shipping routes through the Arctic would save fuel and shrink the amount of greenhouse gas being emitted into the atmosphere.[16] While the Northwest Passage does not completely ameliorate these problems, it will improve them.[17]

The Northwest Passage was not always an option as a shipping route.[18] The Northwest Passage was first conquered in 1905 after many failed attempts.[19] The first successful crossing was not economically successful nor created a shipping route.[20] It took three years and used a path that was too shallow for commercial shipping.[21] When the trip was finally completed in

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[13] *See id.*

[14] King, *supra* note 1.

[15] *See id.*; Peter Adams & Maxwell J. Dunbar, *Arctic Archipelago*, THE CANADIAN ENCYCLOPEDIA (Oct. 26, 2015), https://www.thecanadianencyclopedia.ca/en/article/arctic-archipelago [https://perma.cc/99E2-H2PW] (stating that "[t]he Arctic is experiencing climate warming faster and more intensely than lower-latitude parts of the world. Changes have already been noticed in the High Arctic, including reduced sea ice. In addition, the glaciers of the archipelago are already retreating and thinning, some quite rapidly. Annual mean temperatures in the Arctic are predicted to increase by 4– 7°C during this century, with the greatest warming to occur in winter (as much as 12°C according to one emissions scenario).").

[16] King, *supra* note 1.

[17] *Id.*

[18] Amy Tikkanen, *Northwest Passage*, ENCYCLOPAEDIA BRITANNICA (Feb. 2023), www.britannica.com/place/Northwest-Passage-trade-route [https://perma.cc/V35E-H9JG].

[19] *Id.*; King, *supra* note 1 (stating that failed attempts included when "Francisco de Ulloa started searching the Baja California peninsula area for it in 1539. English explorers, including Martin Frobisher, John Davis, and Henry Hudson searched for it from the Atlantic side in the late 1500s and early 1600s. These expeditions were unsuccessful. Explorations continued through the 1600s and 1700s without success. Then in 1849 Robert McClure passed through the Bering Strait with the intent of sailing through to the Atlantic. His ship was trapped in the ice not far from making it to Viscount Melville Sound and probable passage to the Atlantic. Finally, after spending three winters on the ice and some members dying of starvation, McClure and crew were rescued by a sledge party from one of Sir Edward Belcher's ships and transported by sledge to the Sound. McClure and his crew became the first to survive a trip through the Northwest Passage. Norwegian explorer Roald Amundsen and his crew were the first to cross the Northwest Passage entirely by sea in 1906.").

[20] King, *supra* note 1.

[21] *Id.*

one season in 1944, the route taken was also too shallow for commercial shipping.[22] The United State Coast Guard successfully completed a trip across the Northwest Passage that was in waters deep enough for commercial shipping in 1957 over the course of 64 days.[23]

Twelve years later in 1969, the first cargo ship was sent through the Northwest Passage following behind an icebreaker ship.[24] This trip was a test to see whether the Northwest Passage was a viable alternative to the Alaska Pipeline.[25] With the low economic value that the Northwest Passage was perceived to have in 1969, it was determined that it was not a viable option and the Alaska Pipeline was built.[26]

The route was not a widely utilized waterway because the ice in the Arctic made it only travelable during some summers when the climate became warm enough.[27] Over time as temperatures have risen and technology has improved, the Northwest Passage has become a more viable option as an international commercial shipping route.[28] This is mainly due to its location in the Arctic Archipelago.[29] The islands above Canada's mainland are part of the Arctic Archipelago and are all considered part of Canada.[30] The Northwest Passage

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[22] *Id.*

[23] *Id.*

[24] *Id.*; Marine Insight, *What Is an Ice Breaker Ship and How Does It Work?*, MARINE INSIGHT (Aug. 28, 2019), https://www.marineinsight.com/types-of-ships/how-does-an-ice-breaker-ship-works [https://perma.cc/K5EH-4MCV] (defining icebreaker ship as "a special class of ships that are designed to break even thickest of the ice and make some of the most inhospitable paths accessible to the world, navigating through the ice-covered waters, especially in the Polar Regions. The significant features that make the ice-breakers different from other vessels are its strengthened hull to resist ice waters, a specially designed ice-clearing shape to make a path forward and extreme power to navigate through sea ice.").

[25] King, *supra* note 1; Michael Ray, *Trans-Alaska Pipeline*, ENCYCLOPAEDIA BRITANNICA (May 16, 2014), https://www.britannica.com/topic/Trans-Alaska-Pipeline https://perma.cc/WRD9-ZR35] (stating that the "Trans-Alaska Pipeline . . . connects the oil fields of Prudhoe Bay in northern Alaska, U.S., with the harbour at Valdez, 800 miles (1,300 km) to the south.").

[26] King, *supra* note 1.

[27] *See* Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15 (discussing that "[t]he sea ice cover, with an average thickness of about 1.5 to 2 m is complete in winter throughout the [Arctic], with the exception of several recurring polynyas (areas of open water surrounded by sea ice).").

[28] Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15 (saying that "[t]he ice cover has been thinner in recent years, and it is now normal for large areas of the channels to be open in late summer to the point where cruise ships quite commonly sail through the Northwest Passage.").

[29] Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15.

[30] Adams & Dunbar, *supra* note 15 (stating that "[l]ying north of mainland Canada, the Arctic Archipelago consists of 94 major islands (greater than 130 km^2) and

flows through these islands and all the way through the Arctic Circle.[31] While there are many different ways to get through the Arctic Archipelago, the route that can be utilized for shipping is approximately 900 miles long linking the Pacific and Atlantic oceans on either end.[32]

The opportunity provided by the Northwest Passage and the potential economic value continues to increase as global temperatures rise. Nearly half of the Arctic ice that is melting is located north of Canada in the Arctic Archipelago. [33] While the amount of ice that is melting in the Arctic Archipelago is large, the rate at which the ice is melting is also accelerating.[34] As more ice melts, the Northwest Passage will only become easier to access. In summer of 2007, the waterway melted enough for ships to pass through without an ice breaker ahead of them for the first time.[35] While parts of it refroze and the path remains quite treacherous in the wintertime, the summer months offer an opportunity for commercial shipping.[36]

Despite the opportunity, the Northwest Passage is still not widely used.[37] The waterway saw only 27 commercial ships pass through in 2019, compared to the 13,785 commercial ships that passed through the Panama Canal in 2019.[38] This can be attributed to the need for icebreakers in the winter months

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36,469 minor islands covering a total of 1.4 million km^2. Apart from Greenland, which is almost entirely ice covered, the Canadian Arctic Archipelago forms the world's largest High Arctic land area. It contains six of the world's 30 largest islands.").

[31] *Id.* (discussing that "[t]he depths of the channels between the islands range from less than 100 m to about 600 m in eastern Lancaster Sound. The continental shelf varies from over 550 m in depth in the west and north to 200 m in the east. . . . The depth and extent of the channels offer commercial possibilities—for example, as a passageway for submarine tankers."); *Northwest Passage*, HISTORY.COM (Mar. 3, 2021), https://www.history.com/topics/exploration/northwest-passage [https://perma.cc/D9DE-QFQ5].

[32] *Northwest Passage*, *supra* note 31.

[33] Jesse Allen & Robert Simon, *Ice Loss in the Canadian Artic Archipelago*, NASA, https://earthobservatory.nasa.gov/images/50726/ice-loss-in-the-canadian-arctic-archipelago [https://perma.cc/GRE5-QA8F] (last visited Feb. 26, 2024).

[34] *Id.* (proving that "[i]n the six years studied, the Canadian Arctic Archipelago lost an average of approximately 61 gigatons of ice per year. (A gigaton is a billion tons of ice.) The research team also found the rate of ice loss was accelerating. From 2004 to 2006, the average mass loss was roughly 31 gigatons per year; from 2007 to 2009, the loss increased to 92 gigatons per year.").

[35] *Northwest Passage*, *supra* note 31.

[36] *Id.*

[37] *See* Levon Sevunts, *2019 saw Increase in Commercial Shipping Through Northwest Passage*, RADIO CANADA INT'L (Dec. 11, 2019), https://www.rcinet.ca/en/2019/12/11/2019-commercial-shipping-through-northwest-passage.

[38] *Id.*; Martin Placek, *Number of transits in the Panama Canal from 2014 to 2022*, STATISTA (Nov. 28, 2022), https://www.statista.com/statistics/710163/transits-panama-canal.

as well as the fact that the ice is not guaranteed to fully melt each summer solidifying a clear path.[39] The need for ice breakers to lead commercial ships creates additional costs for shipping, but as the Arctic ice continues to melt, the need for ice breakers will decline especially during the summer months.[40]

Utilizing the Northwest Passage is beneficial for economic reasons and climate reasons. The Northwest Passage is 7,000 kilometers shorter when traveling between the east and west coasts of the United States than using the Panama Canal.[41] This will cut costs for shipping companies in numerous ways, but the most notable expenses are fuel and crew costs.[42] Less storage for fuel and supplies on board also allows for more cargo to be transported.[43] Since the Northwest Passage is not manmade, it will be able to accommodate larger ships than the Panama Canal, resulting in further economic and climate benefits.[44] The shorter route resulting in less fuel being used also results in less greenhouse gas emissions being released into the atmosphere.[45]

Costs and climate benefits are not the only positives that can be reaped from the usage of the Northwest Passage. It has been discovered that 25% of the untapped oil on the globe is located in the Arctic region.[46] There are also a

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[39] Jessica Murphy, *Is the Arctic set to Become a main Shipping Route?*, BBC (Oct. 31, 2018), https://www.bbc.com/news/business-45527531 [https://perma.cc/Q5VS-MJUH].

[40] *See* Walt Meier, *Ice Persists in the Northwest Passage*, NASA (August 22, 2021), https://earthobservatory.nasa.gov/images/148802/ice-persists-in-the-northwest-passage https://perma.cc/R28M-DK9S] (discussing that "[t]he . . . route still has ice [b]ut it's possible a channel could open up in the [summer] weeks before freeze-up starts.").

[41] *Northwest and Northeast Passages?*, DISCOVERING THE ARCTIC, https://discoveringthearctic.org.uk/arctic-challenges/troubled-water/northwest-northeast-passages [https://perma.cc/7NKU-M3RH] (last visited Feb. 26, 2024).

[42] *"Historical" North West Passage Voyage Saves $80,000 in Fuel Costs*, SHIP & BUNKER (Sept. 25, 2013), https://shipandbunker.com/news/world/824810-historical-north-west-passage-voyage-saves-80000-in-fuel-costs [https://perma.cc/DKF6-72LE] (discussing that in 2013 ships were estimated to save $80,000 USD on fuel and $80,000 USD on bunker costs); *U.S. All Grades All Formulations Retail Gasoline Prices*, U.S. ENERGY INFO. ADMIN. (Feb. 27, 2023), https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=emm_epm0_pte_nus_dpg&f=m [https://perma.cc/57Z6-J8G4] (in 2013, fuel was approximately $3.49/gallon).

[43] *"Historical" North West Passage Voyage Saves $80,000 in Fuel Costs*, *supra* note 42 (comparing the Northwest Passage to the Panama Canal, "the Arctic journey is shorter and allows the ship to operate at capacity, carrying 25 percent more cargo.").

[44] Tikkanen, *supra* note 18.

[45] Adams, *supra* note 15. It is quite paradoxical that the globe warming contributed to by commercial shipping is allowing for a new shipping route to open which in turn will reduce emissions created by commercial shipping.

[46] Discovering the Arctic, *supra* note 41.

number of other natural resources that are plentiful in the Arctic region.[47] The utilization of the Northwest Passage will make the Arctic region more familiar and accessible to humans and the melting of the ice will make the extraction of these resources easier.[48] Additionally, the transportation of these resources is much simpler if the Northwest Passage runs through the Arctic and can take the resources wherever they need to go.[49] The exploration of Arctic waters and the strategies used to combat them such as advanced ice breaking techniques and Arctic navigation could also benefit other geographical areas in Arctic climates, providing new avenues to harvest other natural resources or opening up new waterways in the Eastern Hemisphere.[50]

The numerous benefits that can be reaped from the utilization of the Northwest Passage demonstrate that it needs to be utilized, and with the current state of the climate in the Arctic there has never been a better time. A lot of the benefits will be gained by private shipping companies and other capitalist entities, however, there are numerous benefits that will be provided to whoever owns the waterway. The opportunities for taxes, tariffs, ports, as well as monitoring and emergency services expenses must be taken on by an owner.

Canada claims ownership of the Northwest Passage since it runs through the Arctic Archipelago, within the Northwest Territories, and Nunavut, all of which they consider part of their territory.[51] A number of other countries, including the United States, actively disagree with Canada's alleged ownership.[52] The United States military has sent vessels through the Northwest Passage without notifying Canadian authorities.[53] The United States claims, with many other countries in agreement, that the Northwest Passage is international waters, not Canadian owned.[54] As the usage of the Northwest Passage becomes more prevalent it is important that the question of who owns the waterway gets answered. If the ambiguity continues, nations could miss out on benefits but more importantly, accountability of maintenance and costly disadvantages to the waterway could cause all those who want to use the Northwest Passage to suffer.

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[47] *Id.* (giving examples such as nickel, iron ore, phosphate, copper, cobalt, uranium, and gold).
[48] *Id.*
[49] *Id.*
[50] Tikkanen, *supra* note 18.
[51] King, *supra* note 1.
[52] *Id.*
[53] *Id.*
[54] *Id.*

II. LAWS GOVERNING INTERNATIONAL SHIPPING WATERWAYS

The implications of deeming a channel or inland waters as international waterways allow a right of passage for international shipping.[55] From a legal standpoint "international waterways are straits, canals, and rivers that connect two areas of the high seas or enable ocean shipping to reach interior ports on international seas, gulfs, or lakes that otherwise would be landlocked. International waterways also may be rivers that serve as international boundaries or traverse successively two or more states. [The] right [of passage] is based on customary international law and treaty agreements."[56] In Jamaica in 1982 at the most recent United Nations Convention, the Law of the Sea (sometimes called the "Constitution for the Oceans") was developed with over 160 countries participating in it to date.[57] The Law of the Sea governs waters off the coasts of countries and allows those countries some enforcement and protection powers.[58]

The Law of the Sea says that countries control their territorial waters beginning at the shoreline and out to 12 miles (called the "12-mile limit").[59] Within those 12 miles, the country who controls the water has their own laws apply.[60] Countries with territorial waters also have their own "Exclusive Economic Zone" (EEZ) which extends 200 miles from the end of the 12-mile limit.[61] Within the EEZ, the country of ownership owns the natural resources

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[55] *International Waterways*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/international-waterways (last visited Feb. 22, 2024) [https://perma.cc/4MAZ-DMAE].

[56] *Id.*

[57] John P. Rafferty, *Are There Laws on the High Seas?*, ENCYCLOPAEDIA BRITANNICA https://www.britannica.com/story/are-there-laws-on-the-high-seas [https://perma.cc/JDF9-R6G4];; Robin R. Churchill, *Law of the Sea*, ENCYCLOPAEDIA BRITANNICA (February 11, 2023), https://www.britannica.com/topic/Law-of-the-Sea [https://perma.cc/8BPG-QRGU].

[58] Churchill, *supra* note 57.

[59] U.N. Convention on the Law of the Sea, art. 3, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994), [hereinafter Law of the Sea].

[60] *Id*.; Raferty, *supra* note 57 (stating that the country can "build, extract natural resources, and either encourage or forbid sea passage through it (or flights over it) just as if it were a parcel of land.").

[61] Law of the Sea, *supra* note 59, art. 57; Rafferty, *supra* note 57 (stating that "[t]he sizes of some EEZs may be limited by the presence of the EEZs of other countries, in which case the overlapping area is often divided equally between the various parties.").

and sea life within the zone.[62] In both the 12-mile limit and the EEZ of the country, they cannot prohibit foreign vessels merely moving through the waters innocently.[63] Passage becomes prejudicial when foreign ships engage in a number of activities including threatening sovereignty, using weapons, loading or unloading commodities, pollution, fishing, research, and other activity "not having a direct bearing on passage."[64]

In areas used "for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone[,]" international ships passing through have the right of transit passage.[65] The Right of Transit Passage is broader than The Right of Innocent Passage. The right of transit allows ships to follow their normal conduct and international regulations pertaining to sea safety procedures but ensures they follow the law of the State of registry for all survey activities and traffic separation schemes.[66]

There are special exceptions from the distance requirements that include archipelagic waters.[67] The archipelagic baselines may be drawn around the perimeter of the outermost points of the outermost islands so long as the ratio of island to water is at most 1:9.[68] The length of the perimeter lines may not exceed 125 miles long, and after three lines that reach 125 miles, the rest may not exceed 100 miles.[69] The country in ownership of the archipelagic waters may block them off if it is for national safety purposes or delineate specific paths for foreign ships.[70] If neither of those options have been taken up by the country of ownership, all foreign ships have the right of innocent passage.[71]

There are waters that are far enough from shorelines that they are not covered by 12-mile limits and EEZs nor considered archipelagic.[72] These are

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[62] Law of the Sea, *supra* note 59, art. 58.
[63] Law of the Sea, *supra* note 59, art.19 (stating that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.").
[64] *Id.*
[65] Law of the Sea, *supra* note 59, art. 37.
[66] *Id.*; V.D. Bordunov, *The Right of Transit Passage Under the 1982 Convention*, 12 MARINE POL'Y 219, 220 (1988), (discussing "[u]nder the Convention, transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or EEZ and another part of the high seas or EEZ (Article 38(2), 1982 Convention). The regime of transit passage originates in the customary norm of free passage through international straits.").
[67] Law of the Sea, *supra* note 59, art. 2.
[68] Law of the Sea, *supra* note 59, art. 47.
[69] *Id.*
[70] Law of the Sea, *supra* note 59, art. 52.
[71] *Id.*
[72] Law of the Sea, *supra* note 59, art 2.

true international waters and there is no singular governing body.[73] In these areas, ships may move freely through the waters and extract natural resources.[74] When crimes are committed on international waters, the law governing the country owning the vessel applies.[75] For international crimes, any entity could claim authority over the crime using universal jurisdiction.[76]

The laws applied within the bounds of waters depend on how many miles offshore a ship is travelling, as well as the purpose of the travel, and the width of the waterway. The Law of the Sea controls those who have signed it and enforces countries' laws up to 212 miles off their shores.[77] A very pressing issue with the Law of the Sea is that not every country has signed it.[78] The United States has not signed the Law of the Sea which presents issues pertaining to the Northwest Passage as they are a dominant country that has used and will use the waterway.[79] The implications are that if the Northwest Passage is deemed to be within the Canadian Archipelago, 12-mile limit, or EEZ, despite the fact that Canada has signed the Law of the Sea, the United States could attempt to argue that the Law of the Sea does not apply to American ships because the United States is not bound.[80]

III. CURRENTLY ESTABLISHED INTERNATIONAL SHIPPING WATERWAYS

The Panama and Suez Canals and the laws that govern them play an important role in the analysis of international waterway law and waterway shipping laws due to their size and frequency of use. Additionally, the Northwest Passage will be taking on a lot of the traffic currently flowing through the Panama Canal. Also important for analysis is the Northeast Passage, sometimes called the "Eurasian equivalent of the . . . Northwest

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[73] Rafferty, *supra* note 57.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Law of the Sea, *supra* note 59, art 2.
[78] *See* Law of the Sea, *supra* note 59.
[79] *See id.; A*nya Wahal, *On International Treaties, the United States Refuses to Playball*, Council on Foreign Relations (Jan. 7, 2022), https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball [https://perma.cc/QG4A-X52W] (explaining that "[t]he United States did not ratify UNCLOS because of fears among conservative Republicans that it would undermine U.S. sovereignty by transferring "ownership" of the high seas to the United Nations. Opponents argued that UNCLOS would also allow global bureaucrats to overrule U.S. naval operations and require U.S. companies to pay royalties to the International Seabed Authority. The Reagan administration also feared being sued for failing to meet environmental standards for the high seas, should the United States accede to UNCLOS.").
[80] *See generally* Law of the Sea, *supra* note 59.

Passage," because it plays a similar role in the Arctic regions of the Eastern Hemisphere.[81] The Northeast Passage connects the Pacific and Atlantic Oceans along the northern coast of Russia.[82]

A. *THE PANAMA CANAL*

The Panama Canal is the waterway that currently dominates shipping traffic between the Atlantic and Pacific Oceans in the Western Hemisphere.[83] A short history of the Panama Canal is necessary to articulate the evolution of the laws and ownership over the canal. New Granada, which in present-day includes Panama and Colombia, began building a canal in 1513, but abandoned the project.[84] In 1881, France and Panama began official construction of the Panama Canal following France's success in building the Suez Canal approximately ten years earlier.[85] The French control of the project had numerous problems including engineering and the death of over 25,000 workers.[86] The United States entered the Hay-Bunau-Varilla Treaty of 1903 and leased the land that the Panama Canal was on and began working on the canal in 1904.[87] This gave the United States "exclusive and permanent possession of the Panama Canal Zone."[88] With much greater success than France, ten years later in 1914, the Panama Canal was complete.[89]

The United States had control of the Panama Canal beginning in 1903 as it was considered American territory via the Hay-Bunau-Varilla Treaty.[90] While the site was leased land and was supposed to be neutral, the Americans had

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[81] Kenneth Pletcher, *Northeast Passage*, ENCYCLOPAEDIA BRITANNICA (June 19, 2013), https://www.britannica.com/topic/Northeast-Passage [https://perma.cc/5T47-MWSY]..
[82] *Id.*
[83] *Who Owns the Panama Canal?*, CONSTITUTIONUS.COM, https://constitutionus.com/economy/who-owns-the-panama-canal https://perma.cc/B29D-TGF8]..
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.; Hay-Bunau-Varilla Treaty*, ENCYCLOPAEDIA BRITANNICA (Nov. 11, 2022), https://www.britannica.com/event/Hay-Bunau-Varilla-Treaty [https://perma.cc/5AGV-AHXL] (explaining that "[the] Hay–Bunau-Varilla Treaty . . . agreement between the United States and Panama granting exclusive canal rights to the United States across the Isthmus of Panama in exchange for financial reimbursement and guarantees of protection to the newly established republic.").
[88] *Panama Canal*, HISTORY.COM (Sept. 6, 2022), https://www.history.com/topics/landmarks/panama-canal [https://perma.cc/BL9H-RX7E]..
[89] *Id.*
[90] *Id.*

significant military control and the right to defend the canal.[91] This created public upset throughout all of Latin America as many were not allowed on the land and were overwhelmed by the American presence.[92] As a newly sovereign nation, Panamanians did not support the "infringement" by the United States.[93]

The most significant benefit for the United States in having control of the Panama Canal was the mere development of it, as 66% of traffic through it is destined for or originates from the United States providing significant commerce benefits.[94] While there was toll revenue that was obtained, the majority of it was used to service the canal.[95] Overtime, the United States saw the Panama Canal as more of a liability than an asset as tensions within Latin America rose.[96] The potential national security threat ultimately drove President Carter and Omar Torrijos, the respective leaders of the United States and Panama at the time, to ratify the Torrijos-Carter Treaties.[97]

The Torrijos-Carter Treaties granted Panama full control of the Panama Canal in December of 1999.[98] This meant that Panama was responsible for defending the canal and would receive all of the profits obtained from the canal.[99] Panama has fully controlled the Panama Canal since 1999, and the tolls make it financially self-sustaining and support the Panamanian economy with

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[91] *Id.*
[92] *Id.*
[93] *Panama Canal*, *supra* note 83.
[94] *Background on Panama Canal Transfer*, U.S. DEP'T STATE (Dec. 7, 1999) https://1997-2001.state.gov/regions/wha/panama/991207_fs_pancanal.html [https://perma.cc/6RYU-5ER8]..
[95] Noel Maurer & Carlos Yu, *What T.R. Took: The Economic Impact of the Panama Canal, 1903-1937*, 68 J. ECON. HIST. 686, 694 (2008); Mary Cooper, *Panama Canal: Does transferring it to Panama threaten U.S. security?*, CQPRESS (Nov. 26, 1999), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1999112600 [https://perma.cc/M6AQ-XVFC]..
[96] Cooper, *supra* note 95.
[97] *Panama Canal*, *supra* note 83; *The Panama Canal and the Torrijos-Carter Treaties*, U.S. DEP'T ST., OFF. HISTORIAN, https://history.state.gov/milestones/1977-1980/panama-canal [https://perma.cc/FKA8-AYTB] (discussing that "[t]he negotiators decided that their best chance for ratification was to submit two treaties to the U.S. Senate. The first, called *The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal*, or the *Neutrality Treaty*, stated that the United States could use its military to defend the Panama Canal against any threat to its neutrality, thus allowing perpetual U.S. usage of the Canal. The second, called The *Panama Canal Treaty*, stated that the Panama Canal Zone would cease to exist on October 1, 1979, and the Canal itself would be turned over to the Panamanians on December 31, 1999. These two treaties [which together were the Torrijos-Carter Treaties] were signed on September 7, 1977.").
[98] *Panama Canal*, *supra* note 83.
[99] *Id.*

the additional revenue.[100] Panama reaps other benefits from its sole control of the Canal outside of financial benefits. These include employment opportunities for thousands across the country, the ecotourism benefits for those who travel to marvel the canal, and the lessening of tensions with the United States.[101] Panama has benefitted from the sole ownership of the Panama Canal that is located in their territory while the United States was relieved of a burden upon the ratification of the Torrijos-Carter Treaty and still receives the benefits from usage of the waterway.

B. *THE SUEZ CANAL*

Spanning 120 miles through Egypt, the Suez Canal is longer than the Panama Canal and receives more traffic as well.[102] The Suez Canal is also a manmade shipping waterway that connects the Atlantic Ocean to the Indian Ocean allowing for a shorter shipping route between Europe and Asia.[103] Egyptian rulers gave France permission to build a canal through their country in the 1850s, and France created the Suez Canal Company to conduct the construction.[104] The company was an Egyptian joint-stock company, with the French owning 52% of the shares.[105] The company had a 99-year lease over the waterway and surrounding area.[106] The Suez Canal opened in November of 1869 and played a key role in the colonization of Africa by European powers.[107]

At the time, both France and Britain had rule over Egypt, but France

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[100] Aditya Giri, *How Much Does Panama Earn From the Panama Canal?*, MARITIME POST (Sept. 10, 2022), https://themaritimepost.com/2022/09/how-much-does-panama-earn-from-the-panama-canal [https://perma.cc/4745-UMFR] (stating that "The Panama Canal Authority regulates the Panama Canal. Its revenue is generated chiefly (roughly 80%) by the transit toll paid by the vessels. Tolls are based on the vessel type, size, and type of cargo. The average transit toll is around $54000. The canal generates about $2 billion a year, and approximately 40% ($800 million) goes to Panama's General Treasury each year. The proceeds contribute to around 3% of Panama's annual GDP.").

[101] *Panama Canal*, *supra* note 83.

[102] *Suez Canal*, HISTORY.COM (March 30, 2021), https://www.history.com/topics/africa/suez-canal [https://perma.cc/32JE-Z8ZR]; *Panama Canal vs. Suez Canal: Global Shipping Insights*, Ascent (last visited Jan. 31, 2024), https://ascentlogistics.com/blog/the-panama-canal-vs-the-suez-canal [https://perma.cc/NRM6-LNG3].

[103] *Id.*

[104] *Id.*

[105] William B. Fisher & Charles G. Smith, *Suez Canal*, ENCYCLOPAEDIA BRITANNICA, INC. (Feb. 13, 2023), https://www.britannica.com/topic/Suez-Canal/The-economy [https://perma.cc/66NX-47TP].

[106] *Suez Canal*, *supra* note 102.

[107] *Id.*

maintained their majority share in the Suez Canal Company.[108] In 1875, financial troubles caused Egypt to sell their share to Britain thereby giving them a controlling stake.[109] By 1888, the British had taken control of the areas surrounding the canal, and the Convention of Constantinople made the Suez Canal a neutral zone open to ships of all nations and provided that it would be protected by the British.[110] The British protected the canal during World War I and later signed the Anglo-Egyptian Treaty of 1936, affirming their control and military powers over the canal.[111] This became crucial in defending the canal during World War II when Germany and Italy both tried to capture it.[112] Following World War II in 1951, Egypt demanded termination of the British military presence at the Suez Canal.[113] In 1956, the British troops left Egypt and sole control of the Suez Canal went to the Egyptian government.[114] The Egyptian government established the Suez Canal Authority in replacement of the Suez Canal Company which is the organization that still governs the Suez Canal today.[115]

The Suez Canal is essential to global trade, especially the oil sector given its proximity to countries that are major players in the oil industry.[116] The Suez Canal charges tolls to utilize it, earning the Egyptian government over $7 billion in 2022, which is enough to sustain the canal and provide Egypt with revenue.[117] Commerce flourishes in areas surrounding the Suez Canal with

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[108] *Id.*

[109] Rob Picheta, *Why the Suez Canal is so important – and why its blockage could be so damaging*, CNN (March 26, 2021), https://www.cnn.com/2021/03/26/africa/suez-canal-importance-explainer-scli-intl/index.html [https://perma.cc/5ZZZ-FJMZ].

[110] *Suez Canal*, *supra* note 102; Fisher & Smith, *supra* note 105.

[111] *Suez Canal*, *supra* note 102; Laura Etheredge, *Anglo-Egyptian Treaty*, ENCYCLOPEDIA BRITANNICA (July 15, 2008), https://www.britannica.com/event/Anglo-Egyptian-Treaty [https://perma.cc/RL6P-S5CB] (discussing that "Anglo-Egyptian Treaty . . . signed in London on August 26, 1936, that officially brought to an end 54 years of British occupation in Egypt; it was ratified in December 1936. Nevertheless, Egyptian sovereignty remained circumscribed by the terms of the treaty, which established a 20-year military alliance that allowed Great Britain to impose martial law and censorship in Egypt in the event of international emergency, provided for the stationing of up to 10,000 British troops and 400 Royal Air Force pilots in the Suez Canal Zone until the Egyptians should be capable of protecting the area, and permitted Great Britain to retain its naval base at Alexandria for a maximum of eight years.").

[112] *Suez Canal*, *supra* note 102.

[113] *Id.*

[114] *Id.*

[115] SUEZ CANAL AUTHORITY, https://www.suezcanal.gov.eg/English/Pages/default.aspx (last visited Feb. 1, 2024) [https://perma.cc/B9JU-MFX5].

[116] Fisher & Smith, *supra* note 105.

[117] Mahmoud Salama & David Goodman, *Egypt's Suez Canal revenue hits $7*

many industrial developments and settlements having been established since the opening of the canal.[118] The early days of the Suez Canal in which many countries held ownership stakes made access to the canal extremely political. The Suez Canal is currently owned by the Egyptian government, allowing it to effectively be governed and protected by the state-operated Suez Canal Authority.[119] This results in Egypt reaping many benefits from the waterway that they control and is located within their borders.

C. *THE NORTHEAST PASSAGE*

Most similar to the Northwest Passage is the Northeast Passage. Running through the Arctic across the Northern end of Russia, the Northeast Passage remains icebound for the majority of the year.[120] The first successful trip across the Northeast Passage in one season was completed in 1934 by a Russian (Soviet at the time) icebreaker.[121] Following that, Russia used the Northeast Passage as a domestic shipping route with icebreakers that allowed for an extension of shipping season.[122] This was critical in bringing ally ships filled with supplies to Russia (the Soviet Union at the time) during World War II.[123]

The Northeast Passage is located within Russia's Exclusive Economic Zone, so it is considered Russian territory.[124] In 1991, the Northeast Passage opened to foreign ships and increased the quality of icebreakers and ports.[125] Similarly to the Northwest Passage, the warming global temperature has been melting the ice in the Eastern Hemisphere as well, making the Northeast Passage increasingly accessible as years pass.[126]

The Northeast Passage also mimics the Northwest Passage in the sense that it wants to compete with the Suez Canal the same way the Northwest Passage wants to compete with the Panama Canal. The Northeast Passage is one-third of the distance of the Suez Canal, making it a very attractive option for

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billion record peak, REUTERS (July 5, 2022), https://www.reuters.com/business/egypts-suez-canal-revenue-hits-7-bln-record-peak-2022-07-04.

[118] Fisher & Smith, *supra* note 105.

[119] *FAQ*, SUEZ CANAL AUTHORITY, https://www.suezcanal.gov.eg/English/Pages/FAQ.aspx [https://perma.cc/8A7U-3LL4] (last visited Feb. 1, 2024); SUEZ CANAL AUTHORITY, *supra* note 115.

[120] Pletcher, *supra* note 81.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Heinter Kubny, *Development of the Northeast Passage Becomes a Problem for Moscow*, Polar J. (June 15, 2022), https://polarjournal.ch/en/2022/06/15/development-of-the-northeast-passage-becomes-a-problem-for-moscow [https://perma.cc/Y6XY-ENUK]..

[125] Pletcher, *supra* note 81.

[126] *Id.*

international shipping due to the money that can be saved.[127] Russia wants to increase the traffic of the Northeast Passage for the economic potential as well as the ability to exploit the natural Arctic resources that will be more easily accessible once their northern lands are more populous.[128]

Just as with the Northwest Passage, the United States argues that Arctic waters cannot be owned and therefore the Northeast Passage does not belong to Russia.[129] This issue has become more prevalent with climate change as the opportunity to use the Northeast Passage is more viable. The political tensions between Russia and the United States make it likely that the issue of the Northwest Passage will be resolved first and could be used as precedent in the situation of the Northeast Passage.[130]

There is currently no precedent explicitly indicating who owns the Arctic waters that could belong to Canada and Russia. What has been demonstrated from established shipping routes such as the Panama Canal and the Suez Canal is that sole control by the country that the waterway is located in provides greater benefit for the waterway and the country in control. It also allows for neutral access permitting use by all foreign vessels, so the sole control does not inhibit any commerce nor disadvantage any countries.

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[127] *Northwest and Northeast Passages?*, *supra* note 41 (stating that "using the Northeast Passage instead of the Suez Canal would save up to $180,000 in fuel costs. There are also much reduced level [sic] of piracy through these northern routes, compared to the risk of piracy for ships in the Indian Ocean that are using the Suez Canal.").

[128] *Id.*

[129] Willy Ostreng, *The Northern Sea Route and Jurisdictional Controversy*, ARCTIS KNOWLEDGE HUB (2010) http://www.arctis-search.com/Northern+Sea+Route+and+Jurisdictional+Controversy [https://perma.cc/N3VJ-L3BY].

[130] Fred Weir, *Russia breaks the (polar) ice on its Northeast Passage aspirations*, CHRISTIAN SCI. MONITOR, (Oct. 13, 2021), https://www.csmonitor.com/World/Europe/2021/1013/Russia-breaks-the-polar-ice-on-its-Northeast-Passage-aspirations [https://perma.cc/J444-HA7Q] (stating that "Russia's competitors in the Arctic worry about the presence of the Russian military in the region, and what it could signal for its future. But that is a result of geographical and climate realities, Russian officials claim, and that the government's goal is to bolster the economic potential of Arctic ports like Murmansk, not its military might in the far north."); Jack Kakasenko, *US-Russia Tensions*, THE WARSAW INST. REV. (Dec. 30, 2022), https://warsawinstitute.review/news-en/us-russia-tensions/ [https://perma.cc/7PGX-HZWG] (discussing that "[t]he United States and Russia have a long and tense relationship. At times relations appear to be improving. Recent acts of aggression in Ukraine have fomented political unrest, as the United States has scrambled to enact sanctions and other restrictions against the Kremlin. The U.S. is at a strategic crossroads with the war in Ukraine.").

IV. THE CURRENT STATE OF THE NORTHWEST PASSAGE

Canada currently claims ownership of the Northwest Passage in the form of "internal waters." Canada's first reason for the Northwest Passage constituting internal waters is due to acquisition of historic title because the waterway has had a long period of isolated usage by Canada.[131] They also claim that it is internal waters because their archipelago surrounds it.[132] When the International Court of Justice decided the *Anglo-Norwegian Fisheries Case,* it allowed "waters within straight baselines drawn around a 'fringe of islands' along the coast" to be considered "internal waters."[133] Canada draws a "line" around all the archipelagos and the entire Northwest Passage runs through them, thus, in Canada's eyes, constituting internal waters.[134] This is what Canada holds, however ownership of the Northwest Passage is still widely debated. The United States along with many other countries disagree with Canada's self-proclaimed ownership of the Northwest Passage and argue that Canada is an international strait thereby triggering the Law of the Sea and subjecting foreign ships to transit passage rights.[135]

The sea to land ratio in the Canadian Archipelago is 0.822:1 and the longest baseline Canada uses to designate the area is forty-four miles.[136] This is consistent with the requirements for Archipelagic areas outlined in the Law of the Sea.[137] This gives Canada the power to either block off the waterway for national security purposes or mark specific paths for foreign vessels to have the right of innocent passage.[138] However, these various powers are only available to Canada and foreign vessels under the Law of the Sea if Canada is deemed an international strait.[139]

For the Northwest Passage to be an international strait as opposed to a Canadian internal water, international law outlined a two-part test that must be fulfilled in the *Corfu Channel Case*.[140] The geographic component outlines that

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[131] Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 Ocean Dev. & Int'l L. 3, 7 (2007).
[132] Brill, A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea, 448 (Helene Ruiz Fabri et al. eds. 2020).
[133] *Anglo-Norwegian Fisheries Case (U.K. v. Norway),* Judgment, 1951 I.J.C. Rep. 116 (Dec. 18); Donat Pharand, Canada's Arctic Waters in International Law 215 (1988); Brill, *supra* note 132.
[134] Brill, *supra* note 132, at 447–48.
[135] *Id.* at 448.
[136] Pharand, *supra* note 131, at 22.
[137] Law of the Sea, *supra* note 59, art. 2.
[138] Law of the Sea, *supra* note 59, art. 52.
[139] Brill, *supra* note 132.
[140] Corfu Channel (U.K. v Albania), Judgement, 1949 I.J.C. Rep. 4 (April 9); Pharand, *supra* note 131, at 216.

the waterway must connect two parts of the high seas, and the functional part outlines that the strait be a "useful route for international maritime traffic."[141] The geographic prong is easily fulfilled by the Northwest Passage, but the functional prong has been a topic of debate for decades. The *Corfu Channel Case* demonstrates that number of ships can fulfill the traffic requirement, however the Northwest Passage likely fails this due to its limited use in history.[142] Even though traffic has grown and will continue to grow, the *Corfu Channel Case* also points to the diversity of nationality of the foreign vessels, which the Northwest Passage likely fails as most of the ships that have been through have been Canadian or American.[143]

This tension over ownership rights between the United States and Canada has existed for decades.[144] For the same reason the United States desperately wanted the Panama Canal, the United States wants the Northwest Passage: to further their capitalistic interests. In 1988, Canada and the United States formed an Agreement on Arctic Cooperation, however uncertainty surrounds what was agreed upon and whether the rights of the United States go beyond Arctic marine research.[145] The agreement still exists today but does little to resolve the dispute between Canada and the countries that oppose Canada's ownership. As the utilization of the Northwest Passage will only grow, it is important that the question of who has the controlling interest is answered.

V. FUTURE OUTLOOK: CANADA AS THE OWNER OF THE NORTHWEST PASSAGE

In evaluating Canada's arguments for ownership, it is likely that the Northwest Passage currently stands as internal waters within Canada. Their argument for ownership due to history can be debated and invalidated by the fact that other countries have had ships go through without Canada's permission.[146] Whether that completely erases Canada's claim over the waterway is a question that does not fall within the scope of this paper nor would be dispositive of Canada's overall ownership claim. Canada's claim of internal waters is very strong given the nature of the Canadian Archipelago and the geography surrounding the Northwest Passage. While the Northwest Passage could technically fall in Canada's 12-mile limit or EEZ, it is undoubtedly part of the Canadian Archipelago because of the Canadian land that surrounds it on either side.

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[141] Pharand, *supra* note 133, at 216, 224; *Corfu Channel*, *supra* note 140.
[142] Pharand, *supra* note 133, at 224; *Corfu Channel*, *supra* note 140.
[143] Pharand, *supra* note 133, at 224; *Corfu Channel*, *supra* note 140.
[144] Brill, *supra* note 132, at 449.
[145] *Id.*; Agreement on Arctic Cooperation, Can.-U.S., Jan. 11, 1988, 1852 U.N.T.S. 60.
[146] Pharand, *supra* note 133, at 224–25.

Using the *Anglo-Norwegian Fisheries Case* as precedent, Canada's drawing of lines around their archipelago to designate their borders is an obvious indicator of internal waters.[147] The internal waters have implications if they are found to comply with the Law of the Sea requirements to be an international strait. These implications include the power to either block off the waterway for national security purposes or mark specific paths for foreign vessels to have the right of innocent passage.[148] Canada can make a very strong argument that the Law of the Sea does not apply to the Northwest Passage because the functional prong of the two-part test is not fulfilled. The lack of number and diversity of ships currently going through the Northwest Passage is likely not sufficient to meet the requirements of an international strait. Thus, the Law of the Sea does not apply to the Northwest Passage as it stands as Canadian internal waters.

Since the Law of the Sea does not apply, Canada does not have to claim a national security threat or result in transit passage for all ships. They could technically close off the waterway and not allow any foreign vessels through. However, much like Russia and the Northeast Passage, it makes a lot of sense economically for both Russia and Canada to open up their northern waterways to foreign vessels and make them international shipping routes that compete with the respective dominant canals on their same hemispheres.

If Canada wants to take advantage of the numerous benefits they can obtain from having the Northwest Passage as a common shipping route, they could allow foreign vessels through their internal waters on their own terms. However, that would involve a large number of foreign vessels passing through from many different origins and to many different destinations. Resultingly, the same conversation about the status of the Northwest Passage as an international strait would be had as the popularity of the waterway grows. At that future time, the countries opposing Canada's sole ownership of the Northwest Passage as internal waters will have a strong argument that it is an international strait. The heightened frequency and diversity of vessels passing through will be enough to satisfy the functional prong and deem the Northwest Passage an international strait.

If the Northwest Passage was classified as an international strait, the Law of the Sea would apply and foreign vessels would have at least the right of innocent passage, but likely the right of transit passage due to the connective nature of the waterway.[149] The location of the waterway in Canada's archipelago would allow Canada to either block off the waterway for national security purposes or designate a route for ships to follow with the right of innocent passage. Due to Canada's interest in improving the climate change

[147] Brill, *supra* note 132, at 448.
[148] Law of the Sea, *supra* note 59, art. 52.
[149] *Id.*

situation,[150] it would be counterintuitive of them to claim national security threats to block a shipping route that drastically reduces pollution without the appearance of actual threat. Additionally, it would get rid of all of the benefits that Canada wants from the waterway. It aligns with Canada's climate initiatives to open the Northwest Passage to foreign vessels and if that is done the country will receive numerous other benefits.

Canada could attempt to designate a route for ships to follow and allow them innocent passage. However, the right of transit passage would likely be held by foreign vessels as the Northwest Passage is used "for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[151] This would allow Canada to control all survey activities and traffic separation schemes; however, foreign vessels are allowed to follow their normal conduct and international regulations pertaining to sea safety procedures.[152] Canada would still maintain *control;* however, the Northwest Passage would be an international waterway. This is similar to the Panama Canal and the Suez Canal in which the country where the waterway is located controls it; however, both canals are considered international waterways.

While Canada's argument claiming that the Northwest Passage is their internal waters holds up today, if they intend to capitalize on the growing ability to use the waterway, then their argument will be destroyed in itself. It is foreseeable that countries sending vessels through the waterway will argue that the Northwest Passage is an international strait and because it connects two parts of the high seas all ships get the right of transit passage. Transit passage rights for foreign vessels is not particularly negative for Canada: there is the potential to receive massive economic value and still control the waterway. Canada should concede to the Northwest Passage being an international strait

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[150] *See generally*, *Environment and Climate Change Canada*, GOV'T CAN. (March 8, 2023), https://www.canada.ca/en/environment-climate-change.html; *see also*, *Climate Change: our Plan*, GOV'T CAN. (Oct. 27, 2023), https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html [https://perma.cc/SB8D-6EGU] (stating Canada's climate plan involving emissions targets, carbon pollution pricing, clean fuel regulations, clean electricity regulations, net- zero emissions by 2050, oil and gas emissions cap, and reducing methane emissions); *see also*, *Canada's Priorities on Climate Change,* GOV'T CAN. (Jan. 27, 2020), https://www.canada.ca/en/environment-climate-change/services/climate-change/canada-priorities.html [https://perma.cc/DEC5-859F] (outlining Canada's international action on climate change which include putting the Paris Agreement into action, clear commitments to keep emissions in check, enhanced action on adaptation, promoting collaborative approaches to climate action, investing toward a low-carbon future for all, promoting transparency and accountability, sharing knowledge and experiences, and sustaining the momentum.).

[151] Law of the Sea, *supra* note 59, art. 37.

[152] Law of the Sea, *supra* note 59, art. 39–41.

and allow foreign vessels the right of transit passage in order to maximize the social and capitalistic benefits the waterway can provide.

VI. IMPLICATIONS OF CANADA'S CONTROL

In 1969, Pierre Trudeau, the Prime Minister of Canada at the time, said that "to close off [the Northwest Passage] . . . and to deny passage to all foreign vessels in the name of Canadian sovereignty . . . would be as senseless as placing barriers across the entrance of Halifax and Vancouver harbours."[153] Following this comment, "the Secretary of State for External Affairs made it clear that it was the policy of the Government 'to make the Northwest Passage a reality for Canadian and foreign shipping, as a Canadian waterway.'"[154] It is clear that Canada recognizes that this is an opportunity it should pursue, however their current efforts are not sufficient.

As demonstrated by the cases of the Panama Canal and the Suez Canal, it makes the most sense when the country in which the waterway is located has control of it. This benefits the country of control the most as well as the other countries utilizing the waterway. Other countries are allowed to use the waterway with the right of transit passage while the country in control manages all costs and problems associated with the operation of the waterway. The country in control is allowed to charge tolls to supplement the cost of operating the waterway.[155]

Canada has significant benefits that they can reap from the control of the Northwest Passage. Obvious economic benefits occur from the supplemental revenue the waterway brings in through tolls, however other potential economic benefits include those in surrounding communities as ports and other infrastructure open, similarly seen in the case of the Suez Canal. It will be difficult to incentivize people to live in the Canadian Arctic due to the climate and the remoteness of it, however, as climate change progresses and the Arctic becomes more inhabitable communities surrounding the Northwest Passage will develop.

Canada will also benefit from the sheer amount of commerce passing through the Northwest Passage thereby making imports cheaper and more abundant. Exporting and distributing oil from the Canadian oil sands in Alberta will be easier and likely more frequent.[156] Additionally, the plethora of

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[153] Pharand, *supra* note 133, at 234.

[154] *Id.* The result of Trudeaus statement in combination with the Secretary of State for External Affairs statement was the "actual enclosure of the Northwest Passage with straight baselines."

[155] Law of the Sea, *supra* note 59, art. 42; *see* Hugh Caminos & Vincent P. Cogliati-Batnz, The legal regime of straits: contemporary challenges and solutions 377–79, 384, 390 (Cambridge University Press, 2014).

[156] *See generally Northwest and Northeast Passages?*, *supra* note 41.

resources located in the Arctic region will be able to be explored and harvested with greater ease as access to the Arctic becomes easier via infrastructure development as the waterway becomes popularized.[157]

Canada has well stated intentions to contribute to solving the global climate crisis.[158] It is an unfortunate paradox that global warming which is caused by greenhouse gasses opens up an avenue to reduce greenhouse gasses in commercial shipping. The Northwest Passage will allow less greenhouse gasses to be emitted into the atmosphere by shortening the trips that ships must take to transport their cargo.[159] This does benefit Canada as it aligns with their climate priorities.

Since the Northwest Passage is located in Canada's Archipelago, Article 234 of the Law of the Sea will allow Canada to impose non-discriminatory pollution regulations on ships entering the waterway.[160] This is allowed because the area is ice-covered and the anti-pollution regulations are meant to be enacted to preserve the ice.[161] While the melting ice is what opens up the Northwest Passage, the Arctic ice will still be there to some extent, allowing Canada to enact regulations.[162] These regulations will further Canada's climate mission by controlling how much individual ships may pollute.[163] This in combination with the shorter shipping route align with Canada's climate priorities.

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[157] *Id.*

[158] *See* Gov't of Canada, *Environment and Climate Change Canada*, *supra* note 150.

[159] Gordon et al., *supra* note 3.

[160] Law of the Sea, *supra* note 59, art. 234 (outlining that "Coastal States have the right to adopt and enforce non- discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice- covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.").

[161] *See id.*

[162] *The fastest way to save melting sea ice: EDF Study*, Env't DEF. FUND (March 14, 2022), https://www.edf.org/article/fastest-way-save-melting-sea-ice-edf-study [https://perma.cc/52FP-MM92]..

[163] *Carbon pollution pricing systems across Canada*, GOV'T CANADA (July 5, 2023), https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html [https://perma.cc/25JE-Y4PL (explaining that Canada currently has carbon pricing in place, "[s]ince 2019, every jurisdiction in Canada has had a price on carbon pollution . . . . The federal pricing system has two parts: a regulatory charge on fossil fuels like gasoline and natural gas, known as the fuel charge, and a performance-based system for industries, known as the Output-Based Pricing System." If they could implement this system in an extent to apply to the Northwest Passage and foreign vessels it would provide them with additional revenue and also incentivize ships to pollute less.).

The United States contests Canada's ownership of the Northwest Passage, however it is clear that the waterway is Canadian. If Canada is to agree to the waterway being an international strait, the United States would be best suited to accept that assertation. The United States should not contest Canada's control of the Northwest Passage; they should look to the problems that were caused by their control of the Panama Canal that led to them ultimately resigning control to Panama as an example of why it makes the most sense for Canada to control the Northwest Passage. The United States would be allowed to send their vessels in with the right of transit passage and use the waterway for their imports and exports. Similarly, to the benefits that the United States receives from the Panama Canal, the United States' capitalistic interests would benefit immensely from the Northwest Passage becoming a common shipping route. The ability to import and export more quickly and cheaply will provide greater economic benefit than the Panama Canal does.

While the United States has not signed the Law of Sea, this proves to be more of an issue when dealing with their own waters than with international straits.[164] United States' vessels must still comply with Panama's regulations when using their Canal,[165] and similarly would have to comply with Canada's regulations while using the Northwest Passage. The United States "may be bound by a norm of customary international law notwithstanding its failure to enter a treaty."[166] As a party who has signed the revised deep seabed mining provision in the Law of the Sea, "the United States has incurred an international legal obligation to not act contrary to the 'object and purpose' of the treaty."[167] Thus, United States vessels undoubtedly must comply with the Law of the Sea when operating in international straits, including the Northwest Passage.

The benefits to global commerce from frequent use of the Northwest Passage would be immense. Being quicker, cheaper, and better for the environment is just the beginning, however these perks come at a cost. The investment that Canada will have to make to develop the initial infrastructure to accommodate this waterway will be significant. The primary capital will be worth it given the benefits Canada will reap from the investment. The continued monitoring and management that come with control of the Northwest Passage will also be costly, however as the Suez and Panama canals have both become self-sustaining through tolls, so too should the Northwest Passage. The investment in the Northwest Passage will provide immense benefit to not only Canada, but also the countries that utilize the waterway.

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[164] James Houck, *The Opportunity Costs of Ignoring the Law of Sea Convention in the Arctic*, HOOVER INST. Feb. 2014, at 1, 18.
[165] *See id.*
[166] *Id* at 18.
[167] *Id.*

CONCLUSION

It is important that the debated ownership status of the Northwest Passage that has grown in the past decades is settled. As the climate continues to warm, the Northwest Passage will provide a viable shipping route resulting in immense benefit to the countries that use it. Determining who has control of the waterway is essential in maintaining not only the waterway, but also political controversy between countries and legal implications of the waterway.

Analyzing other waterways that are used for analogous purposes, it is clear that it is most beneficial when the waterway is controlled by the country in which it is located. Thus, Canada should maintain control over the Northwest Passage. The increased usage of the Northwest Passage as shipping seasons continue will ultimately satisfy the criteria for an international strait. To gain the most benefit and save themselves time and money in rearguing this case in years to come, Canada should agree to deem the Northwest Passage and international strait where they maintain full control. Allowing foreign vessels through with transit passage will give both Canada as well as those in control of the vessels immense economic benefit. The climate benefits and the advantages to global commerce also make the frequent use of the waterway attractive. In order to use the waterway to its fullest extent, it is clear that Canada must concede that the Northwest Passage in an international strait.

THE 2022 FIFA WORLD CUP AS A CATALYST FOR LABOR STANDARDS OF SPORT PROFESSIONALS? A NEW INSTITUTIONAL THEORY PERSPECTIVE

ILIAS BANTEKAS* & MARKO BEGOVIĆ**

ABSTRACT

Following Qatar's successful bid to host the World Cup, it underwent pressure primarily as a result of concerns about the status of migrant workers and their role in developing the required infrastructure for this major international competition. Although Qatar has undertaken major legislative reforms concerning its labor regime, criticisms have not diminished, along with a general debate about the minimum set of standards for a successful mega sporting event. The specific interest of this paper lies in highlighting the status and conditions of expatriate workers employed as sport professionals, especially in the private sector (to the degree that a private sector in fact exists in the country). This paper aims to address how the organization of the World Cup impacted the working conditions of coaches as sport professionals in Qatar. The theoretical foundation of this article is based on so-called new institutionalism, merging normative institutionalism – and focusing on norms and values embodied in sport organization - with historical institutionalism, which reflects intact institutional frameworks and rational choice institutionalism. New institutionalism demonstrates a pattern of particular decision-making processes through otherwise informal practices. It is a pioneering study with a view to understanding the extent of reforms within a particular sports ecosystem. The results indicate a discrepancy between government and private-related sport organizations in terms of the predictability of labor relations and income generation. It further identifies limitations in terms of individual professional and personal development within the private sport sector.

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INTRODUCTION

Qatar's sports ecosystem is structured around two main stakeholders. Nominally, the Ministry of Culture and Sport represents a major state institution for the development of sport, while the Qatar Olympic Committee (QOC) serves as an umbrella sport organization.[1] The responsibility between these two stakeholders is shared, in the sense that the ministry is in charge of sport for all and sport-related infrastructure, while the QOC in conjunction with the National Sport Federations (NSF) and Aspire Academy[2] is responsible for the development of high-performance sport. In addition, an ad hoc and hybrid stakeholder, the Supreme Committee for Delivery and Legacy[3] was established with the purpose of managing the preparation, organization and implementation of activities associated with the 2022 FIFA World Cup and its aftermath and legacy, following which it is in a process of transformation if not outright dissolution. The major political landmark underlying the hosting of the World Cup is based around nation building or transformation/modernization of society,[4] a sectorial approach closely aligned with the Qatar National Vision 2030.[5] This policy document, which is explored more fully further below, is

[1] Zachary Calo, Kim Moloney & Kamilla Swart, *Legal-Administrative Implications of International Sport for Public Administration*, ADMIN. THEORY & PRAXIS, Dec. 7, 2023, at 2-3 (discussing the legal and political framework of sport regulation in Qatar, both before and following the hosting of the 2022 FIFA World Cup).

[2] *About Aspire Academy*, ASPIRE ACADEMY, https://www.aspire.qa/Home [https://perma.cc/A3DR-63B3].

[3] This entity is discussed further below. Although it had absolute control over every aspect of the 2022 FIFA World Cup and is still operational, its website seems to have disappeared. *See Sports Sector Strategy*; 2011-2016 QATAR OLYMPIC COMM. (2d ed., July 2011), https://www.aspire.qa/Document/Sports_sector_strategy_final-English.pdf.

[4] *See* Hiba Khodr, *Exploring the Driving Factors Behind the Event Strategy in Qatar: A Case Study of the 15th Asian Games*, 3 INT'L J. EVENT & FESTIVAL MGMT.T 81, 95 (2012).

[5] *See* Nadine Scharfenot, *Urban Development and Social Change in Qatar: The Qatar National Vision 2030 and the 2022 FIFA World Cup*, 2 J. ARABIAN STUD. 209, 210 (2012) (who explore the place of sports and sports organization in the overall context of the 2030 Qatar National Vision). The FIFA World Cup was part of the Qatari 2011-16 National Development Strategy, which itself was part of the Qatar National Vision. *See Qatar National Development Strategy 2011–2016: Summary of Programmes*, QATAR GEN. SECRETARIAT FOR DEV. PLAN. (Sep. 2011), https://www.psa.gov.qa/en/nds1/Documents/NDS_ENGLISH_SUMMARY.pdf [https://perma.cc/MZ4D-TJV7].

overstretched between sport for development and high-performance sport.[6] In practice, the focus ranges from hosting major international events (for example, FIFA World Cup 2022) and sponsoring sport organizations (for example, FC Barcelona)[7] and purchasing international football clubs (for example, Paris Saint-Germain).[8]

The legal framework in the field of sport is still in development and relies mainly on the Law for Regulating Sport Clubs, adopted in 2011, which regulates the establishment of sport clubs, governance and organizational structures.[9] The law regulates the establishment of private/commercial sport entities – clubs and academies – ultimately dictating that the ministry coordinates with the specific NSF in terms of technical requirements for a given sport.[10] The legal modalities for setting up a sports or other organization in the form of a corporate entity, including shareholding requirements, is discussed below in another section. As this paper aims to address how the organization of the 2022 FIFA World Cup impacted the working position of sport professionals beyond football, the authors employed a mixed-method approach. The first phase includes a document analysis in order to determine a baseline for conducting focus groups as a second phase. The article draws on the different schools of contemporary institutionalism in order to highlight the dynamics and correlations within the sport-related private sector. This article will explain the legal framework concerning sport professionals, namely coaching professionals in Qatar, which in turn reflects a specific dimension of the domestic sport ecosystem. Next, the article will summarize major outputs of labor-related reforms associated with the organization of the 2022 FIFA World Cup. Further, experiences from sport professionals will be presented focusing on labor-related contexts from a variety of focus groups.

The article is organized as follows: Section 2 undertakes a brief analysis of new institutionalism in order to situate Qatar's labor reforms and to further suggest that the labor status of sports coaches is inconsistent with formal law. Section 3 goes on to explore Qatar's legal framework from its status as a British protectorate in the early twentieth century until its successful bid for the World Cup, including the place of sport in its laws. Section 4 examines the position of sports coaches in the legal framework of Qatar, including the *kafala* sponsorship system and the creation of sports corporate entities. Section 5 discusses the legacy of the FIFA World Cup in hastening labor reform in the country, suggesting that the progression was both visible and fast. Section 6 showcases the empirical dimension of this paper, chiefly through a series of interviews with sports professionals which records their personal experiences with private sports operators.

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[6] Scott R. Jedlicka, Spencer Harris & Danyel Reiche, *State Intervention in Sport: A Comparative Analysis of Regime Types*, 12 INT'L J. SPORT POL'Y & POL. 563, 565 (2020).

[7] *Barcelona Agree 150 Million Euros Shirt Sponsor Deal with Qatar Foundation*, THE GUARDIAN (Dec. 10, 2010), https://www.theguardian.com/football/2010/dec/10/barcelona-shirt-sponsor-qatar-foundation [https://perma.cc/3SNQ-S8RF].

[8] Qatar Sports Investment (QSI), which is a subsidiary of Qatar Investment Authority (QIA) purchased in 2011 approximately 70 per cent of Paris St Germain's shares. *See* Mauricio Alensar, *Who Owns Paris St Germain Now? How Much did Qatar Sports Investments Pay Colony Capital in 2011?* CITY AM (Dec. 2, 2023), https://www.cityam.com/who-owns-paris-saint-germain-now-how-much-did-qatar-sports-investments-pay-colony-capital-in-2011/ [https://perma.cc/PGJ9-U3L9].

[9] Law No 11 on Regulating Sports Clubs (2011), https://www.almeezan.qa/LawPage.aspx?id=2476&language=en#.

[10] *Id*. at Art. 53.

I. THE CONTRIBUTION OF NEW INSTITUTIONALISM TO THE 'ACTUAL' NORMS UNDERPINNING THE LABOR STATUS OF SPORTS COACHES

The empirical contribution of new institutionalism will dissect institutional dynamics, particularly in locating the status of sport professionals within the private sector. The school of new institutionalism represents a theoretical framework for this paper, primarily due to its nature and scope. Within this framework, researchers are able to understand drivers and actors within institutions as they shape structures and policies.[11] Besides the three schools of new institutionalism, namely historical, rational choice and sociological –particular attention is given to normative institutionalism as it focuses on norms and values within institutions. In order to understand how the organization of the World Cup impacted the working status or conditions for sport professionals beyond football, norms and values represent and determine components equal to institutionalization and organizational structures. Therefore, as a process institutionalization represents a product of rules.[12] The power structure between relations and influence are key drivers for institutionalization, practiced through a normative framework with a view to developing, maintaining, or disrupting institutional, arrangements.[13] As a product, institutions are diverse and fluid both in a non-formal or a rigid form and depend on political environments.[14]

In the context of the 2022 FIFA World Cup, the reform undertaken presupposes significant legislative changes that affected not only institutional development and its dynamics, but also different stakeholders.[15] In practice, the processes of organization, cooperation, coordination or subordination create both formal and informal rules.[16] Having in mind the definition of institutions as a product of human and social interactions, new institutionalism aims to grasp informal rules and structures and their interplay with formal ones.[17] The latter presupposes the development of an institutional relationship within regulatory regimes.[18] That said, the interplay between institutional development and its correlation with normative beliefs, it facilitates the shaping of institutions and influence decision-making processes as part of a larger socio-political landscape.

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[11] RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION, 54 (Simon Bulmer, Peter Humphreys & Mick Moran eds., 2003).

[12] Ota Weinberger, Inštitucionalizmus. Nová Teória Konania Práva a Demokracie [INSTITUTIONALISM: A NEW THEORY OF ACTION, LAW AND DEMOCRACY] 50 *Normative Institutionalism* 89-105 (Eva Bolfikova & Jana Frenova, eds., 1995).

[13] Thomas B. Lawrence, Monika I. Winn & P. Devereaux Jennings, *The Temporal Dynamics of Institutionalization*, 26 ACADEMY MGMT. REV. 624, 628 (2001).

[14] Kenneth A Shepsle & Barry A. Weingast, *Institutionalizing Majority Rule: A Social Choice Theory with Policy Implications*, 78 AM. ECON. REV. 357-72 (1982).

[15] Frank Schimmelfennig, *The Normative Origins of Democracy in the European Union: Toward a Transformationalist Theory of Democratization*, 2 EUR. POL. SCI. REV. 211, 233 (2010).

[16] Eva Bolfíková, Daniela Hrehová & Jana Frenová, *Normative Institutionalism, Institutional Basis of Organizing*, 50 SOCIOLOGIJA I PROSOR 89,91 (2012).

[17] Marko Begović, Mariann Bardocz-Bencsik, Carole A. Oglesby & Tamás Dóczi, *The Impact of Political Pressures on Sport and Athletes in Montenegro*, 24 SPORT IN SOCIETY 1200, 1203 (2021).

[18] Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Institutional Fields*, 48 AM. SOCIO. REV. 147, 160 (1983).

The landscape is of particular importance, as it often gives rise to dispute between the law-on-the-books, clear regulatory frameworks, with law-in action influenced and interpreted among others by political actors. Of course, this discussion is not new per se, however, it is still relevant and contributes to legal realism.[19] Despite the notion that legal systems are operating within tangible or formal structures, the gap between adoption and practice (implementation) in action is filled by the conceptual framework of institutionalism.[20] The latter is often operationalized through the interaction of formal institutions endowed with the ability to exercise beyond formal, employing informal norms and practices. This interdisciplinary view is based on the view that legislative regimes are incorporated as socially constructive frameworks within broader institutional environments. This constellation represents a potential fertile soil for exploitation and manipulation of the underlying regulatory frameworks by dominant societal actors through informal processes. Therefore, this complex inter-relationship between formal legal frameworks and informal regulatory regimes reflects the impact upon constructed and societally shaped institutional ecosystems.[21] Here public, non-governmental, quasi-governmental, and informal actors jointly constitute, influence and direct institutional relationships that create law or quasi-judicial outcomes. Bureaucratization, as in the light Weberian model, presupposes monopoly of legal regimes so long as influential actors exist on the ground and which possess the capacity and institutions to induce isomorphic processes.

Contributing or maintaining institutional stability is enabled often through transformation of informal practices into formal legal regimes. Thus, the institutional practice often overrides and bypasses regulatory frameworks to maintain institutional stability and to facilitate potential reform processes that could lead institutional change. Therefore, institutional stability is conditioned by the relationship between organizational structure and cultural patterns and does not necessarily exclude potential institutional contradictions. It is of particular importance to highlight that the way institutional contradictions do occur, unfold, evolve and are ultimately resolved depends on socio-political or cultural settings. This is very important for Qatar as it is a country comprised of more than 90 per cent expatriate population living and working within an institutional environment with flexible boundaries between public and private sectors in the field of sports. Historical institutionalism suggests that over time, informal practices are institutionalized under the political engagement providing both legality and legitimacy of operations. This process is conditioned by organizational structures and institutional capacities through which key stakeholders exercise these transitions under the rational-choice institutionalism doctrine.[22] It further suggests that informal practices often override formal capacity in rearranging or repositioning institutional relationships. Therefore, it would be premature to observe these changes from the traditional view that

[19] Roscoe Pound, *Law in Books and Law in Action* 44 AM. L. REV. 12 (1910) in Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45 (2011).
[20] Rikki Abzug, Stephen J. Mezias, *The Fragmented State and Due Process Protections in Organizations: The Case of Comparable Worth*, 4 ORG. SCI. 433, 435 (1993); *see also* Begović, et al., *supra* note 17, at 1208.
[21] Rogers M. Smith, *Political Jurisprudence: The "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 91 (1988).
[22] JAN OLSSON, SUBVERSION IN INSTITUTIONAL CHANGE AND STABILITY: A NEGLECTED MECHANISM, 85 (2016).

formal legal regimes play a central role, primarily as it is enforced in very heterogenous and contested areas and shaped by cultural patterns.[23] Moreover, questions of jurisdiction and shared/transferred competencies reflect the existence of institutional maturity and administrative capacity in both coherent and unstructured institutional environments.[24] Consequently, in order to analyze and understand the relevant repercussions at macro level, it is necessary to observe organizational structures, institutional relationships and their individual actions.

As societally driven institutions, sport organizations are subject to particular legislative frameworks and accept to adhere to rules that do not relate to sports, reflected.[25] Within the sport ecosystem that includes public, non-profit and for-profit entities, the development of institutional arrangements affects their stakeholders diversely.[26] Often, stakeholders are subject to varying types of pressures. The political/public/state monopoly over the use of power refers to a variety of coercive pressures; the normative refers to norms broadly accepted within society, while mimetic pressures are related to imitation in order to comply with the socio-political realm.[27] As the position of sport professionals outside of football constitutes the chief concern of this article, it is important to address: (i) the evolution of sport-related institutions, (ii) their normative framework, and (iii) the role of stakeholders in changing, maintaining or disrupting institutions. The interplay between these processes is reflected through institutional logic, in a sense that a sport ecosystem is (re)constructed in the context of Qatar around the 2022 FIFA World Cup, with a major focus on football in terms of allocation of resources and organizational efforts. Moreover, in order to draw upon the dynamics of institutional change or evaluation, it is important to reflect upon the concept of institutional memory – human resources, policies and procedures along with the archive – which entails an understanding of current affairs within a sport organization.[28] The institutional memory represents a crucial orientation in following institutional dynamics both constructive and disruptive, as both of these processes are not exclusive by their nature.[29] The frequent changes or rotation of employees or procedures, as well as organizational changes are key factors contributing to the loss of institutional memory.[30]

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[23] OTA WEINBERGER, *Law, Institution and Legal Politics*: *Fundamental Problems of Legal Theory and Social Philosophy*, 14 LAW & PHIL. LIBR. 1, 111–32 (1991) (discussing how new institutionalism operates in the context of law and politics).

[24] Austin Sarat, *The Maturation of Political Jurisprudence*, 36 W. POL. Q. 551, 556 (1983).

[25] Marko Begović, *Corruption in Sports: Lessons from Montenegro*, 58 INT'L REV. SOCIO. SPORT. 126, 127, 141–42 (2023).

[26] Wenkai He, Paths Toward the Modern Fiscal State: England (1642-1752), Japan (1868-1895) and China (1850-1911) (Sept. 6, 2007) (Ph.D. thesis, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology Library).

[27] DiMaggio & Powell, *supra* note 18, at 160.

[28] *See* Christopher Pollitt, *New Labour's Re-disorganization: Hyper-modernism and the Costs of Reform – Cautionary Tale*, 9 PUB. MGMT REV. 529, 543 (2007); *see also* Begović et al., *supra* note 17, at 1216.

[29] Alfons van Marrewijk, Sierk Ybema, Karen Smits, Stewart Clegg & Tyrone Clegg, *Clash of Titans: Temporal Organizing and Collaborative Dynamics in the Panama Canal Megaproject*, 37 ORG. STUD. 1745, 1769 (2016).

[30] CHRISTOPHER POLLITT, TIME, POLICY, MANAGEMENT: GOVERNING WITH THE PAST 161 (2008).

II. THE LEGAL FRAMEWORK OF QATAR AND THE CONSTITUTIONAL ROLE OF SPORT

Qatar has a relatively vibrant constitutional history, even if brief compared to other nations. The *Pax Britannica* in this region was established through a series of maritime defense treaties, collectively known as the Maritime Truce, which Britain signed with the rulers of the Trucial States in 1835, Bahrain in 1861, Kuwait in 1899 (de facto), and Qatar in 1916.[31] The rulers of Gulf kingdoms were compelled to enter into these agreements with the British Crown as a means of disengaging from Ottoman oppression and with an assumption that at some future point they would be achieve viable self-governance.[32] Gulf rulers signed other treaties with the British Governments of Bombay and India, the most important of which were the Exclusive Agreements, binding them into exclusive treaty relations with, and ceding control of their external affairs to, the British Crown. These were signed by the Ruler of Bahrain in 1880 and 1892, the rulers of the Trucial States in 1888 and 1892, the Ruler of Kuwait in 1899, the Saudi Ruler of Najd and Hasa in 1915 (annulled in 1927), [33] and finally the Ruler of Qatar in 1916.[34] In 1916, the ruler of Qatar, Sheikh Abdullah bin Jassim Al Thani, signed a protection treaty with Britain that included eleven clauses. However, in order to safeguard the sovereignty of the state, Sheikh Abdullah rejected three clauses put forward by the British, namely: a) the seventh clause that allowed British nationals to compete with the local population in the pearl trade; b) the eighth clause that provided for the appointment of a British resident Commissioner in Qatar; c) and finally, the ninth clause that allowed Britain to establish a post and telegraph office in the country. Sheikh Abdulla considered these clauses to threaten the sovereignty of the country, and so only eight of the original eleven clauses remained. This agreement remained steadfast for nearly twenty years, until in 1935 it was renewed with the addition of several new clauses. By the early 1950s, the Qatari public, aided by the Arab nationalist ideals espoused by Gamal Abdel Nasser, demanded the end of colonial rule and the advent of constitutionalism in the country.[35] Just like other Gulf states at the

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[31] *See* Stephen J. Ramos, *An Historical Examination of Territory and Infrastructure in the Trucial States*, in GATEWAYS TO THE WORLD: PORT CITIES IN THE PERSIAN GULF 93 (Mehran Kamrava, ed. 2016); Robert Landen, *The Arab Gulf in the Arab World 1800–1918*, 1 ARAB AFF. 57, 59 (1986).

[32] *See* James Onley, *The Politics of Protection in the Gulf: The Arab Rulers and the British Resident in the Nineteenth Century*, 6 NEW ARABIAN STUD. 30, 52 (2004) (referring to tribute relations and subsequent tribute payments by some sheikhdoms, particularly Bahrain during the eighteenth and nineteenth centuries).

[33] David Roberts, *The Consequences of the Exclusive Treaties: A British View*, THE ARAB GULF AND THE WEST (B.R. Pridham ed., 1985); Husain Al-Baharna, THE LEGAL STATUS OF THE ARABIAN GULF STATES: A STUDY OF THEIR TREATY RELATIONS AND THEIR INTERNATIONAL PROBLEMS 1–36 (1968). On January 15, 1902, Ibn Saud too Riyadh from the Rashid tribe. In 1913, his forces captured the province of Al-Hasa from the Ottoman Turks. In 1922, he completed his conquest of the Nejd, and in 1925, he conquered the Hijaz. In 1932, the Kingdom of Saudi Arabia was proclaimed with Ibn Saud as king.

[34] *See* James Onley, *Britain and the Gulf Shaikhdoms 1820–1971: The Politics of Protection*, Center for International and Regional Studies (2009). Consequently, the British authorities established two parallel systems of justice. Colonial/civil courts administered English and colonial laws, whereas local courts were entrusted with the administration of Islamic law. Nizar Hamzeh, *Qatar: The Duality of the Legal System*, 30 MIDDLE E. STUD. 79 (1994).

[35] ADEED DAWISHA, ARAB NATIONALISM IN THE TWENTIETH CENTURY: FROM TRIUMPH TO DESPAIR 312 (2003); ELIE PODEH, THE QUEST FOR HEGEMONY IN THE ARAB WORLD: THE STRUGGLE OVER THE BAGHDAD PACT (1995).

time, Qataris established a variety of cultural and sports societies with the underlying aim of independence and possibly Pan-Arab unification.

Qatar became independent from British rule in 1971 and quickly set out to draft its own constitution, which was issued in 1972. It is instructive that this instrument sets out important guiding principles that echo the ideals of the Arab nationalist movement. The desire for a unified Arab nation-state is outlined in Part 2, article 5 (b), which states that:

> The State believes that the union of Arab countries in the region is a fateful need dictated by the common higher Arab interests in the region in special, and in the grand Arab homeland in general. The State shall devote all possible efforts to support such union and work to achieve it in the most appropriate image gathering between it and those sister countries which has strongest ties, most powerful and most originality with them.[36]

A similar clear expression of support for the Arab nationalist cause is in the following paragraph, which asserts that:

> The State believes in the brotherhood of all Arabs and works on strengthening solidarity with its sister Arab countries. The State seeks to strengthen the unity of the Arab nation and supports the joint effort to serve and support the Arab issues and interests. The State fully supports the Arab League and the higher goals which its charter aims to achieve them.[37]

From 1972 onwards, Qatar sought to find its place in the Gulf region, the Arab sphere, and the world at large. This process coincided with its newly found wealth in natural gas.[38] Since the early to mid-1990s, Qatar set itself on an ambitious path to establish world class institutions with a view to diversifying its dependence on natural resources and as a means of becoming a knowledge-based society. Despite its short history, Qatar boasts is among the top investors globally in education,[39] with entities such as Qatar Foundation,[40] one of the largest media networks comparable to those in Europe and the USA, namely the Al Jazeera Media Corporation,[41] and a series of state-owned companies with

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[36] Qatari Amended Provisional Constitution of 1972, Preamble.
[37] *Id.*
[38] *Looking Back to How Exploration Started in Qatar*, GULF TIMES, (Dec. 28, 2016), https://www.gulf-times.com/story/526227/looking-back-to-how-oil-exploration-started-in-qatar [https://perma.cc/8R52-KPZM] (Oil was first discovered in 1939).
[39] In 2021, Qatar allocated an estimated $4.89 billion to education and continues to invest in the ever-expanding education sector, currently estimated at $2.5 billion and projected to grow to $2.8 billion in the next two years. It is significant to note in order to put the numbers into perspective that the Qatari indigenous population is roughly 300,000. *See* US International Trade Administration, 'Qatar, Education and Training Equipment' (Nov. 23, 2022), https://www.trade.gov/country-commercial-guides/qatar-education-training-and-equipment#:~:text=In%202021%2C%20Qatar%20allocated%20an,in%20the%20next%20two%20years [https://perma.cc/LC7C-MMK2].
[40] Qatar Foundation, https://www.qf.org.qa (last visited Apr. 16, 2024).
[41] Al Jazeera Media Network, https://network.aljazeera.net/en [https://perma.cc/H3XH-SZQB] (last visited Apr. 16, 2024).

operations and investments throughout the globe.[42] Qatar has established a special economic zone, namely the Qatar Financial Centre (QFC)[43] and is the key mediator not only in the Gulf but across the globe.[44] It mediated the US-Taliban agreement of 2020,[45] and more recently the Hamas-Israel ceasefire agreement of November 2023.[46] Just like its Gulf neighbors, Qatar's regional and global ambitions are reflected in a policy instrument known as 'Vision'. Visions set out mega-targets spanning a ten- or fifteen-year period. Although Visions seem to reflect mere policy objectives, they are treated by Gulf nations as constitutional frameworks, and it is clearly understood that all branches of government must work towards fulfilling them. This naturally has an impact on institutional bylaws as well as how laws in general are construed and implemented.[47] One of the key building blocks of Qatar's 2030 Vision is the hosting of mega-sporting events and general investment of sports among its three key priorities.[48] Besides the FIFA 2022 World Cup, Qatar hosts an event in the Association Tennis Professionals (ATP) tournament,[49] Formula 1,[50] and was recently awarded the 2027 FIBA World Cup in basketball.[51]

It is important to understand the role of Qatar's Vision in domestic law reform. It is generally thought that countries lacking Western democratic credentials shy away from the spotlight for fear of being constantly branded as

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[42] For Qatar its investment vehicle is the Qatar Investment Authority (QIA). Although financial data is missing from its website, its estimated assets are 300 billion USD, which ranks it 11th among all sovereign wealth funds according to the Qatar Investment Authority (QIA), *QIA: Sovereign Wealth Fund in Qatar, Middle East*, https://www.swfinstitute.org/profile/598cdaa60124e9fd2d05bc5a [https://perma.cc/RJQ4-L6NC](last visited Apr. 16, 2024).

[43] QFC, https://www.qfc.qa/en [https://perma.cc/H7DU-GHGX]. *See* Zain Al Abdin Sharar & M Al Khulaifi, *The Courts in Qatar Financial Center and Dubai International Financial Center: A Comparative Analysis*, 46 H.K. L.J. 529, 529 (2016).

[44] In fact "[m]ediating disputes between conflicting parties to achieve peaceful resolutions" is a stated priority in Qatar's official foreign policy, State of Qatar Government Communications Office, Foreign Policy, https://www.gco.gov.qa/en/focus/foreign-policy-en/; *See also Trump Praises Qatar's Efforts on Terrorist Financing*, BBC, (Apr. 11, 2018), https://www.bbc.com/news/world-middle-east-43724576 [https://perma.cc/KM3T-DM8W] (this is an important state because Gulf states were routinely accused in the West for filtering financial resources to terror groups).

[45] Agreement For Bringing Peace to Afghanistan, https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf [https://perma.cc/9BP2-3XUR].

[46] *Palestinian Joy as Israel Agrees Gaza Truce*, AL JAZEERA, (Aug. 27, 2014), https://www.aljazeera.com/news/2014/8/27/palestinian-joy-as-israel-agrees-gaza-truce [https://perma.cc/R33Q-HJNK]; *Statement by President Biden on the Ceasefire in Gaza*, WHITE HOUSE (Aug. 7, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/07/statement-by-president-biden-on-the-ceasefire-in-gaza/ [https://perma.cc/9YH3-QCQS].

[47] It is fair to include alongside Qatar's National Vision of 2030, also its the Bid Book, the Qatar National Development Strategy, the Qatar 2022 Strategic Plan, and the Legacy Framework of the Supreme Committee for the Delivery of Legacy. *See* Ilias Bantekas, *Legislating through Policy Statements: The Authority of National Visions in the Arabian Gulf* 44 STATUTE L. REV. 1, 3 (2023).

[48] Paul Michael Brannagan & Richard Giulianotti, *Soft Power and Soft Disempowerment: Qatar, Global Sport and Football's 2022 World Cup Final*s 34 LEISURE STUD. 703, 705 (2014).

[49] Qatar Exxon Mobil ATP Tour, https://www.atptour.com/en/tournaments/doha/451/overview [https://perma.cc/9XGV-QW2F]; *See* Deutscher Tennis Bund v. ATP Tour Inc., 610 F.3d 820, 824 (3d Cir. 2010), *cert. denied*, 562 U.S. 1064, 131, (confirming that the ATP can re-organize professional tournaments and relegate one or another to a lower tier without breaching anti-trust rules (in this case the Hamburg and Qatar tournaments)).

[50] Formula 1 World Championship Limited, *Qatar Airways Qatar Grand Prix 2023*, https://www.formula1.com/en/racing/2023/Qatar/Circuit.html [https://perma.cc/F4YB-PSC8] (last visited Apr. 17, 2024).

[51] FIBA, *Qatar Announced as Host of the FIBA Basketball World Cup 2027*, https://www.fiba.basketball/news/qatar-announced-as-host-of-the-fiba-basketball-world-cup-2027 [https://perma.cc/NSN7-4V9Q].

authoritarian or have their human rights record paraded throughout the globe by governments and NGOs. Hence, where a country adopts a constitutional instrument that effectively imposes on itself global exposure through bidding for events such as the FIFA World Cup, or an international mediator role, it is inevitable that its human rights record will become a cause for greater global concern. As a result, it is clear to the Qatari leadership that in order to avoid criticism it will have to undertake extensive civil liberties and labor rights reforms.[52] It should not be thought, however, that the assimilation of labor norms into a new state is an automatic process, even if its laws reflect international standards. This is very much a gradual process that cannot be achieved solely by legal transplants.[53]

III. THE LEGAL FRAMEWORK OF ALIEN SPORTS COACHES

In this context, the profession of coaching cannot easily be lumped together with the other professions in the Qatari and GCC labor market.[54] Throughout the GCC there is high demand for coaches by teams and clubs, as well as by individuals in the form of personal fitness or specialized training. Indeed, the latter represents a significant part of the overall fitness market in the West and is typically served by a combination of self-employed instructors, as well as part-time instructors that are employed full time elsewhere. The peculiarities of the GCC and Qatari market are explored further in the ensuing discussion of this section.

In Qatar, the growth of the private sports market has been mostly unregulated. There are several reasons for this, all of which affect the labor rights of professional coaches. The first reason is that associations other than corporate entities are prohibited, as already explained.[55] Secondly, there is no specific qualification framework or mandatory licensing regulations for coaches and sport professionals. This is particularly evident in respect of individual sports and other organized physical activities, such as fitness instruction.[56] Although there does not exist a physical education department in any Qatari university (at the time of writing), there are several courses on sports management run by state

[52] For an analysis of the human rights potential of National Visions, *see* Eleni Polymenopoulou, *Human Rights in the Six States of the Gulf Cooperation Council (GCC): from Vision to Reality* 3 CARDOZO INT'L COMP., POL'Y & ETHICAL L. REV. 929, 969 (2020).

[53] The literature on legal transplants is significant and rather consistent. While wholesale legal transplants without contextualization and serious nurturing have failed, structured transplants that are fed into the host system with a dedicated machinery have fared extremely well. *See* Ilias Bantekas, *Transplanting English Law in Asian Special Economic Zones: Law as Commodity*, 17 ASIAN J. COMPAR. L. 305, 306 (2022).

[54] The literature does not generally distinguish between the general labor force and sports professionals, let alone coaches. *See* Dantam Le, *Leveraging the ILO for Human Rights and Workers' Rights in International Sporting Events*, 42 HASTINGS COMMC'N & ENT L.J. 171, 174 (2020).

[55] Self-employment is not regulated as such because only sponsored employment is permitted for expatriate workers, in accordance with Arts 18ff of Law No 4 of 2009. *See* Ryszard Cholewinski, Understanding the Kafala Migrant Labor System in Qatar and the Middle East at Large, GEO. J. INT'L AFF. (ONLINE) (Feb. 1, 2023), https://gjia.georgetown.edu/2023/02/01/the-kafala-system-a-conversation-with-ryszard-cholewinski/ [https://perma.cc/RPA3-DD8A].

[56] Qatar Skills is the official authority for professional certifications. There are no sports-related coaching or other programs on its roster. *Training Plan*, QATAR SKILLS, https://qatarskills.com.qa/training-plan/ [https://perma.cc/LU39-8N4S].

entities,[57] thus demonstrating that sport managers are valued far higher than professional sports educators and coaches. Thus, non-profit organizations, whether for sport, culture, or other purposes, do not exist and if a sports academy or club were to be set up, it would have to assume a for-profit corporate form, in which case the non-profit aim would be lost (save if set up by the State itself).[58] An alien can only work in Qatar after accepting an offer of employment and where the employer has agreed to sponsor the alien with the consent of the Ministry of Labor.[59] It is highly unlikely in practice for a sports professional to be made a partner to a sports company. It would be expected that this would only occur where the alien makes a large financial contribution to the investment company. Nonetheless, even if this were to occur, such a business entity would be subject to several requirements under Qatari corporate law, chiefly that a Qatari partner hold 51 per cent of shares and be identified from the outset.[60] Exceptionally, these stringent capital requirements are missing in the Qatar Financial Center (a special economic zone),[61] and in some other exceptional circumstances,[62] but the authors are not aware that sports organizations can be set up there.

Secondly, Qatari labor law sets strict criteria even in the private sector concerning the salary ranges of employees from different countries. As a rule, and in order to avoid fraud and abuse of the labor system, only nationals from a select number of developing countries are eligible for manual labor work.[63] Europeans and workers from North and South America are typically employed

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[57] Courses are run by the Qatar Olympic Academy, https://www.qatarolympicacademy.org/diploma-courses/48; Josoor Institute, *Diploma Programme in Sports Management*, https://www.josoorinstitute.qa/education-development/courses/professional-diploma-programme/diploma-programme-sports-management [https://perma.cc/8UEC-BKN2] (last visited Apr. 16, 2024); Hamad bin Khalifa University College of Science & Engineering, *Master of Science in Sport and Entertainment Management*, https://www.hbku.edu.qa/en/cse/ms-sport-entertainment-management [https://perma.cc/78B2-2CBJ] (last visited Apr. 16, 2024).

[58] Fitness First, *Ongoing Educational Courses*, https://qatar.fitnessfirstme.com/education/ongoing-education [https://perma.cc/76C4-29BY] (last visited Apr. 16, 2024); IFPA, *Elevate Your Fitness Journey: Empowerment Through Education*, https://www.ifpa-fitness.com [https://perma.cc/K7W9-HTTN] (last visited Apr. 16, 2024). One of the few entities offering certified courses for sports professionals in a private capacity is Fitness First. This is a commercial enterprise, as is also the IFPA.

[59] Law no. 4 of 2009 Regarding Regulation of the Expatriates Entry, Departure, Residence and Sponsorship, Art. 18, https://www4.aucegypt.edu/CMRS/Files/Law_4_2009_2611.pdf [https://perma.cc/VME5-EDJF].

[60] This is a public policy requirement, as per the Qatari Court of Cassation Judgment 11/2015. This means that the parties cannot validly choose to waive it in favor of non-Qatari partners. Equally, By virtue of a Ministerial Decision no. 396 of 2017, foreign entities are permitted to set up wholly foreign owned representative trade offices (RTOs) in Qatar.

[61] *Companies Regulation 2005*, QATAR FINANCIAL CENTRE 8 (Aug. 7, 2023) (article 2 makes it clear that shareholding requirements applicable elsewhere in the country do not apply there), https://qfcra-en.thomsonreuters.com/rulebook/companies-regulations-2005 [https://perma.cc/FXJ2-KZ76].

[62] Qatar Foreign Investment Law, Law No. 1/2019 allows for up to 100% foreign ownership in certain business sectors which are considered to be a priority for the Qatari Government.

[63] As part of its commitment to FIFA and worker demands, the government introduced in March of 2021 a non-discriminatory minimum monthly wage of 1.000 QAR, which amounts to around 275 USD, which also includes an obligation by the employer to provide free accommodation and food (or a minimum of 500 QAR for accommodation and 300 QAR for food). These regulations are reinforced with the appointment of a Minimum Wage Committee which is tasked with period assessment of wages based on inflation and living standards. Moreover, Law No 17 of 2018 set up the Workers' Support and Insurance Fund with the aim of raising sufficient funds in the event that a contractor was unable to pay wages, or where the business became insolvent. This adds another layer of protection to wage safety that was not available in the past. *Qatar's New Minimum Wage Enters into Force*, INT'L LABOUR ORG., (Mar. 19, 2021), https://www.ilo.org/beirut/countries/qatar/WCMS_775981/lang--en/index.htm [https://perma.cc/G6BN-7CF5].

based on tertiary-level qualifications and their salaries are significantly higher. Depending on one's salary, the person may be eligible to bring its dependents to Qatar[64] and one's salary range further determines more trivial issues, such as the permissible quota of alcoholic purchases.[65] Official Qatari sports clubs participating in local leagues, as well as public sector sports entities (that is, federations) typically employ coaches and attendant health professionals (for example, physiotherapists) with tertiary level education and their salary ranges reflect their status. On the other hand, private clubs tend to hire coaches lacking tertiary level education who nonetheless possess basic coaching (diploma level) qualifications attained in their country of origin and although their salaries are higher than the minimum wage, it is still significantly lower as compared to white collar workers. The vast majority of professional coaches hired at this level do not as a general rule earn enough to support their families in Qatar,[66] save if their employer is willing to alter the salary range in the contract, on paper at least, in order to allow a coach to bring their family. This is rare, however, and employers are very cautious about false statements.

Despite the existence of excellent sporting facilities in Qatar, these are all in the possession of government entities or owned by large hotel chains (for example, tennis courts). In turn, they are made available for the needs of national sporting federations, which generally tend to exclude non-Qataris, although it is becoming more common for such local clubs to attract expatriate talent. Private sports clubs as a rule do not have the resources to purchase land to construct their own facilities and hence lease training spaces from public entities that own them at a fee. This general un-availability of sporting facilities not only raises the cost of training in private clubs, but further reduces the prospect of high-performance sports for the non-Qatari expatriate population. This is a serious concern, because the expatriate population of Qatar represents a staggering 85 percent of the overall population,[67] but high demand is not matched with serious provision and availability of high-performance sportsmanship. Qatar and GCC countries more generally have failed to appreciate the growth and size of the expatriate sports market, nor the prospect of high-level sports training by foreign athletes during Qatar's winter and spring season.

In line with the aforementioned discussion, there is no (official) private coaching in Qatar other than through registered sports companies. A sports coach can only be present in Qatar if sponsored (*kafala*) by an employer or its spouse.[68] Low-paid coaches sponsored by an employer effectively supplement their income by coaching privately after working hours, at risk of violating their

[64] Currently, the minimum salary (official requirement) for a Family Residence Visa in Qatar is QAR 10,000 per month for private-sector employees. This is far above the average laborer monthly wage. Applications are available on the government portal, Hukoomi, https://hukoomi.gov.qa/en/service/family-applications-service [https://perma.cc/8J27-BMVS].
[65] Qatar Foreign Investment Law, *supra* note 62.
[66] *Id.*
[67] An accurate source, according to this author, offers significant statistics, that are crucial from a policy perspective. It justifies a desire to decrease dependency on expatriate workers and so-called 'Qatarisation' of the public sector. *See* "Qatar Population 2021," *World Population Review*, https://worldpopulationreview.com/countries/qatar-population [https://perma.cc/U8RH-VE6R] (last visited 15 Jan. 2024).
[68] *See* Ray Jureidini & Said F Hassan, *The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform*, 2 MIGRATION & ISLAMIC ETHICS 92, 92 (2020).

employment contracts and Qatari law more generally.[69] Even so, the practice is rife, and expatriates rely on this informal coaching in order to support their high-performance dependents who are unable to find sufficient training and playing time in registered clubs. A big part of this private coaching takes place in public spaces (for example, public parks), as well as in residential compounds, many of which have some excellent sports facilities that are only available to residents. This underground and unregulated coaching pattern is problematic but is clearly the result of very high demand.

It is not easy to counter this trend of unofficial private coaching as well as the un-availability of high-performance training for expatriates. One solution might be to set up a register of qualified coaches under the sponsorship of the Ministry of Sports and Culture and who may work as independent coaches[70] under condition that they report a particular and verified amount of coaching hours per month and subject to tax liability. In equal measure, private sports entities may be granted access to both facilities and credit through which to construct new training grounds.[71] In turn this would generate the hiring of more foreign coaches and eliminate the need for extensive unofficial coaching. Such a state of affairs would strengthen Qatar's 2030 Vision, of which sports is a key component.[72]

IV. THE LABOR REFORM LEGACY OF THE 2022 FIFA WORLD CUP

One cannot divorce sports coaching from general labor reforms in Qatar, because as already stated no coach is an independent contractor and all are susceptible to contracts with clubs or other corporate entities or the public sector. Hence, despite the fact that the Western perception of Qatari labor rights concerns construction workers, in fact the same legal regime applies to all employee's *mutatis mutandis*. Once must thus understand the labor status of sports coaches within this particular framework and not through a separate lens. It is instructive to briefly set out this labor framework. The plight of labor rights in Qatar received international attention chiefly through two private initiatives. The first was an investigative report by the Guardian newspaper in 2013 which signaled and condemned the large number of labor-related deaths in construction projects,[73] whereas the second was a 2014 report by the US-based NGO

[69] Advertisements are rife in local sites, as "Qatar Living," but in the opinion of the authors word-to-mouth, especially from existing corporate clients is more common. https://www.qatarliving.com [https://perma.cc/Q344-7XER], but in the opinion of the authors word-to-mouth, especially from existing corporate clients, is more common.

[70] *See* 'Qatar Olympic Academy, Ministry of Culture and Sports Sign MoU' (Dec. 11, 2019), https://www.olympic.qa/media-center/qatar-olympic-academy-ministry-culture-and-sports-sign-mou [https://perma.cc/M3VW-L7F7]. The MoU apparently was meant to "enhance the concept of training, qualification and professional development of national cadres in sports clubs and organizations." It is not clear to the authors that this encompasses actual sports coaching.

[71] It is instructive that on the basis of Law No 13 of 2008 "On the Contribution by Certain Companies towards Social and Sports Activities," all listed companies in the Qatari stock exchange are obliged to offer 2.5 per cent of their profits (so-called sports levy) to sporting and cultural activities. A special fund has been established to distribute and manage these assets.

[72] *Qatar National Vision 2030*, STATE OF QATAR GOV'T COMMC'N OFFICE, https://www.gco.gov.qa/en/about-qatar/national-vision2030/.

[73] Pete Pattison, *Revealed: Qatar's Work Cup Slave*s, GUARDIAN (Sept. 25, 2013), https://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves.

Amnesty International, which while equally focusing on appalling living conditions and the then growing death toll, noted that Qatar's labor system facilitated practices akin to trafficking and forced labor and that laborers' were forced to pay exorbitant recruitment fees and employers often confiscated their passport. It also stressed that Qatar's sponsorship system (the *kafala*) unnecessarily tied workers to a single employer, thus requiring them to get exit visas from their sponsor to leave the country or work elsewhere. This system represents deregulation of responsibility and labor control to individual's workers by their sponsors. This, it was rightly held, breeds a culture of exploitation.[74] Sport is not exempted from this practice, as demonstrated by the Belounis case. After his contract was abruptly terminated, Belounis was prevented from leaving Qatar without his employer's consent, in line with the kafala system. When Belounis engaged in legal proceedings to protect his rights against unpaid salaries, he was refused an exit permit, thus confirming the dominant position of employers/sponsors. Contracts for sport professionals are often obscure and their key provisions unclear, which in turn enables sponsors to terminate employment at any time, whereas employees are placed in an exploitative circle that favors compliance beyond the ordinary terms of a sports contract.

These were serious criticisms that would have to be addressed not only for the smooth operation of the FIFA World Cup, but also in order for Qatar to successfully bid for any future mega-sporting event. In 2017 the Qatari government adopted legislation whereby any fees paid by blue collar workers to agents or manpower companies would have to be immediately reimbursed under pain of severe sanctions.[75] The government further ensured that this practice does not become entrenched by monitoring manpower companies by issuing fines or dissolving companies found to have demanded fees.[76] Following the successful Qatari bid for the FIFA World Cup, the government invited the International Labor Organization (ILO) to set up a regional headquarter in Doha and effectively consult Qatar in its deep labor reforms. Despite the ILO's initial reluctance, this experiment seems to have worked well for both sides.[77] Qatar's Supreme Committee for the Delivery of Legacy,[78] which was not only the organizer of the FIFA World Cup, but the entity in charge of its legacy (both tangible and intangible) addressed early on the deficiencies of the Qatari labor

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[74] *Qatar*, HUMAN RIGHTS WATCH: WORLD REPORT 2014 596–600 (2014), https://www.hrw.org/sites/default/files/media_2023/01/HRW%20World%20Report%202014.pdf [https://perma.cc/G5FL-CYQT].

[75] In 2017, the Supreme Committee introduced the Universal Reimbursement Scheme, requiring a contractor either to prove that workers did not pay any fees or to reimburse the worker. *See Qatar/FIFA: Reimburse Migrant Workers' Recruitment Fees*, HUM. RTS. WATCH (Oct. 20, 2022), https://www.hrw.org/news/2022/10/20/qatar/fifa-reimburse-migrant-workers-recruitment-fees [https://perma.cc/4X57-6U47].

[76] *See Ministry of Labor Closes and Revokes Licenses of 23 Labor Recruitment Offices*, PENINSULA, (March 1, 2023), https://thepeninsulaqatar.com/article/01/03/2023/ministry-of-labour-closes-and-revokes-licenses-of-23-labour-recruitment-offices [https://perma.cc/BUH7-LJLT]; *See Qatar/FIFA: Reimburse Migrant Workers' Recruitment Fees*, HUM. RTS. WATCH, (Oct. 20, 2022), https://www.hrw.org/news/2022/10/20/qatar/fifa-reimburse-migrant-workers-recruitment-fees [https://perma.cc/8FAJ-JFE5].

[77] Its current presence in Qatar is a springboard for strengthening labor rights in the GCC and the Arab world more broadly. *See The ILO in Qatar*, INT'L LABOUR ORG., https://www.ilo.org/beirut/countries/qatar/lang--en/index.htm [https://perma.cc/WCQ6-6MMA].

[78] *See* Moza Al-Thani, *Channeling Soft Power: The Qatar 2022 World Cup, Migrant Workers, and International Image*, 38 INT'L J. HIST. SPORT 1729, 1737 (2021).

system. This was an arduous task because the *kafala* system had worked well and the complication was that the bulk of the country's blue-collar workforce was employed by private contractors. As a result, it was clear that the government needed to set up a massive labor monitoring mechanism with a view to preventing and avoiding labor abuses in the private sector.

As a first step, the Supreme Committee set out a Workers' Welfare Charter in 2013, supplementing it in 2014 with a much more comprehensive Worker's Welfare Standards (WWS).[79] It also set out a comprehensive law on domestic servants,[80] which is broad enough to encompass personal trainers, but the authors are not aware if this status has been requested, or indeed rejected, by a household in Qatar. The WWS is now mandatory on all companies and makes serious inroads on recruitment, employment and living conditions and in theory it also applies to sports academies and their coaches. Bulletin 1 to the 2016 version of the WWS set up the institution of Workers' Welfare Officers (WWO) and Project Workers' Welfare Officers (PWWO). These entities are meant to ensure that the living and working standards of blue-collar workers are in line with ILO standards and those mandated by the government of Qatar. This has given rise to a compliance audit,[81] but it is not abundantly clear to the authors if this applies in practice across all industries not under the supervision of the Supreme Committee. This is particularly relevant to the discussion at hand because the audit system requires of quarterly self-audits, as well as independent audits commissioned by the Supreme Committee and the Ministry of Labor.[82] A clarification by the Ministry of Labor and the Ministry of Culture and Sport on the applicability of these audits to publicly and privately funded sports clubs would be useful.

An average compliance score of 78.3 per cent across the entire construction sector was recorded in 2021.[83] By the end of 2021, almost 86 per cent of the workforce employed for the benefit of works commissioned by the Supreme Committee had moved to far improved accommodation with better amenities and medical facilities.[84] There is no available data for sports professionals in the country, particularly since the effort of the government was to protect the most vulnerable among its workforce.[85] It is clear that the aforementioned labor reforms eyed construction and other manual labor work and makes no neat distinctions. Sports professionals, however, constitute a distinct labor community with its own labor demands and characteristics and

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[79] Supreme Committee for Delivery and Legacy, *FIFA World Cup Qatar 2022: Amazing Delivered*, 'Workers' Welfare Standards' (2d ed.), 80 (2022), www.sc.qa/workerswelfare [https://perma.cc/XKN7-6FW9].

[80] Law No. (15) of 2017 on Domestic Workers (United Arab Emirates), Aug. 22, 2017, https://www.mol.gov.qa/admin/LawsDocuments/Law%20No.%20(15)%20of%202017%20on%20Domestic%20Workers.pdf [https://perma.cc/XW39-242J].

[81] Workers' Welfare Standards, Bulletin 1 to Edition 2 (2018), section 19.1, https://www.qatar2022.qa/sites/default/files/docs/Workers-Welfare-Standards-Qatar-2022-v2.pdf.

[82] *Id.* § 19.2.

[83] Qatar Supreme Committee on Legacy, 'Seventh Annual Workers' Welfare Report: Progress Report 2021', at 19, https://www.workerswelfare.qa/sites/default/files/documents/WW_Progress_Report_2021_EN.pdf [https://perma.cc/29KX-GRT8].

[84] *Id.* § 19.

[85] The ILO, an otherwise harsh critic, has praised Qatar for deep reforms and significant progress it has made in its labor reforms. *See* ILO, *Labor Reforms in Qatar: Coming Together around a Shared Vision* (2022), https://www.ilo.org/beirut/countries/qatar/WCMS_859843/lang--en/index.htm [https://perma.cc/GEM8-AP3M].

there is a need to adopt specialized legislation to deal with these. The *Belounis* case certainly highlights why such specialized legislation is needed, despite the best efforts of the Qatari government and its Ministry of Sports and Culture to embed and enforce labor laws and reforms in the sport sector.

The ILO, but particularly international trade union organizations have consistently called on Qatar to recognize trade unions and collective bargaining, particularly to the country's blue-collar labor force.[86] Collective bargaining is clearly at odds with the kafala system, which is individualistic in nature, and it is difficult to reconcile the two without effectively abolishing one in favor of the other. Hence, a compromise solution was the only way to resolve this conundrum. The Supreme Committee ultimately devised a grievance system entailing that workers would not be targeted or discriminated and that they would not become the subject of reprisals.[87] This is an excellent reform compared to the previous state of affairs which lacked a grievance mechanism altogether, but still falls short of the protection offered by employment tribunals or labor arbitration. In order to allow labor complaints to be lodged, the WWS set up a three-tier grievance mechanism that include worker interviews, Workers' Welfare Forums (WWF) and a 24-hour grievance hotline.[88] Complaints need not be lodged by workers in an individual and personal capacity only, but also through the medium of an institution known as elected workers' representatives (WRs).[89] Even though WRs are provided training in order to execute their mandate, this is no substitute to access to the courts. With the introduction of Law No 236 of 2018, Qatar set up Dispute Settlement Committees, which are meant to facilitate workers' access to an effective dispute resolution mechanism. Disputes are to be resolved within three weeks from submission of the complaint,[90] but it is not clear if this mechanism has been viewed as successful among migrant workers. It is not surprising that under government pressure and effective monitoring that instructive that non-World Cup construction companies volunteered to provide the WWF scheme to their employees under the supervision and assistance (although not always) by the ILO itself.[91] The introduction, even if limited, of a culture of elected workers' representatives[92] is a significant milestone for workers' rights. A similar system was set in motion to the non-World Cup workforce through the passing of the Ministry of Labor's Decision No 21 of 2019, which sets out the conditions for the election of worker representatives in so-called Joint Committees. Companies with thirty or more employees are obliged to allow their workers to elect representatives whose role is to engage with management over work-related issues.[93] Smaller sports academies will be unable to benefit from this scheme,

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[86] *See Qatar Must Move Forward on Labor Rights*, INT'L TRADE UNION CONFEDERATION (MAR. 17, 2023), https://www.ituc-csi.org/qatar-statement-march-2023 [https://perma.cc/B9TB-S639].

[87] FIFA, Grievance and Remedy Mechanisms for Workers, https://publications.fifa.com/en/final-sustainability-report/human-pillar/access-to-effective-remedy/grievance-and-remedy-mechanisms-for-workers/ [https://perma.cc/2D79-3R55] (last visited Apr. 17, 2024).

[88] *Id.*

[89] Welfare Report 2021, *supra* note 83, at 24.

[90] Art. 2, Law No. 236 of 2018.

[91] Welfare Report 2021, *supra* note 83, at 24.

[92] *Decree Paves Way for Election of Worker Representatives in Enterprises*, INT'L LABOUR ORG. (May 1, 2019), https://www.ilo.org/beirut/countries/qatar/WCMS_696935/lang--en/index.htm [https://perma.cc/Z6KD-JXVA].

[93] *Decision No. 21 of 2019 by the Minister of Administrative Development, Labor, and Social Affairs Regulating the conditions and procedures of the election of workers' representatives to joint committees*,

but sports clubs funded by the Ministry of Culture and Sport should be encompassed therein not as distinct clubs as such, but as employees of the Ministry.

It should be noted that the Dispute Settlement Committees mandate that disputes are resolved within three weeks from submission of the complaint, but it is not clear if this mechanism has been viewed as successful among migrant workers. This system has not been made available to sports professionals, despite the fact that several sports entities satisfy the above number, especially professional clubs in the more popular sports such as football, handball, and basketball. Furthermore, there is no indication that such collective rights will be conferred upon sports professionals as an extension of the same right offered to other 'workers.' Moreover, these reforms are rather general, and do not provide sufficient standards to protect sport professionals from the existing disadvantageous position within the sponsorship system, despite Qatar's ratification of the relevant ILO Conventions.[94] This is especially evident in the process of changing employer, whereby sponsors may use their dominant power and refuse to provide a non-objection certificate (NOC) that is required by law in order to work for a new employee. Moreover, missed or late payment of wages in the private sector is not uncommon, while access to justice may be not only slow but also ineffective.[95]

V. EXPERIENCES OF SPORTS PROFESSIONALS

The data we have gathered shows no significant differences in the experience of sport professionals in individual sports on the one hand and team sports on the other. The interdependence of Qatar's sport ecosystem direct stakeholders, along with royal family members engaged as decision-makers in prominent roles helped to shift significant human and financial resources towards the 2022 FIFA World Cup. That said, the commercial sector or service providers continued to operate in a largely unregulated or inconsistent legal environment. The organization of focus groups was aimed at understanding the practical implications of the wider labor reforms on the sport ecosystem. For this purpose, there were two focus groups comprised of sport professionals, namely coaches. Initially, invitations were addressed to forty sport professionals, from which fourteen responded positively and ultimately participated in the study. Prior to their participation, sport professionals signed consent forms and the moderator explained the procedures. The significance of this approach and the underlying rationale was to uncover unheard stories and learn from the participants' experiences. The participants were identified by pseudonyms. Focus groups were conducted between June and September 2022, lasting on average 120 minutes each.

INT'L LABOUR ORG. (Apr. 21, 2019), https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=108501 [https://perma.cc/G7BG-L6V6].

[94] Qatar has not ratified the ILO's Freedom of Association and Protection of the Right to Organize Convention of 1948, nor the ILO's Right to Organize and Collective Bargaining Convention of 1949. *See* ITUC, *Qatar Must Move Forward on Labor Rights*, *supra* note 86.

[95] *See* Tirana Hassan, *Qatar: Events of 2022*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2023/country-chapters/qatar [https://perma.cc/6C2J-S86V].

In structuring the interviews, data has been clustered as per the prevalent themes:

- Participation in policymaking
- Involvement in governing structures and decision-making processes
- Economic status
- Health insurance

Salah stressed that after five months working for a company, and just before the end of his six-month probation period he was given the choice, to either sign a new contract excluding a yearly return ticket and paid leave or agree to terminate his current contract. Most of the participants in both focus groups claimed that their contracts had been changed with similar amendments, with a view to weakening their status within their corporate structure. "These constellations forced many to seek alternative solutions, including resigning, changing sponsorship, and leaving the country," according to Joel. Salah said, "[t]he fact that some members of NSFs are at the same time owners of sport-related companies, discourages us from challenging this practice primarily due to the nature of the relationship among stakeholders." This practice of having closed groups of royal family members and connected persons as decision-makers within sport-related organizations quintessentially reflects a deeply entrenched patrimonial system. Consequently, it has led to the establishment of informal and clientelist networks aimed at bridging public and private interests, while shaping and directing institutional dynamics within the sport ecosystem. This does not necessarily mean that such practices are endorsed or promoted by the government or the Emir. According to John, public funds are often distributed without clear criteria to and within sport-related organization, particularly since internal regulations and procedures for fund allocation are either non-specific or not in place. As in some other countries, the homogeneous forces evident in these arbitrary processes have gone on to produce resilient structures with a firm grip over sport-related dynamics and relations that are very much unchallenged.[96] These entrenched power dynamics contribute to a patrimonial system, where processes are influenced, shaped, and directed by undisputed political power politics. The commercial dimension of sport in Qatar, a is subjected to influence from individuals associated with the dominant structure, as indicated by Tiba.

The structural challenges for expatriate sports professionals continue to persist in the aftermath of 2022. Sponsorship remains an exclusive power bestowed on employers in their relationship with employees and is not limited to manual and construction workers. Several commentators point to the case of Zahir Belounis in order to illustrate that the labor system does not favor sport professionals. The footballer's contract was apparently terminated without payment for two years and he was unable to leave Qatar without his club's consent.[97] The dispute with Belounis' football club, Al-Jaish occurred in 2013 and does not in any way represent the reality on the ground in 2024; it being

[96] Marko Begović, *Sports Law in Montenegro: Origins and Contemporary Development*, 19 ENT. & SPORTS L. J. 1, 1 (2021).
[97] Gomes, Leandro, *The Abuse of Migrant Workers by World Cup 2022 Hosts, Qatar: A Case to Be Made for Alternative Dispute Resolution*, CJCR Blog Post 15 (2021), https://larc.cardozo.yu.edu/cjcr-blog/15 [https://perma.cc/AC3S-YYJD].

clearly an isolated incident which Qatar categorically does not want to see again. This is particularly true since there is no publicity on any similar case since, CAS arbitration is now common for such disputes in Qatar, and the fact that the Belounis case was highly publicized in Qatar at the time.[98] However, the fact that this is a relatively old incident perhaps also serves as testimony that it is isolated and that while labor reforms were not specifically adapted to sports professionals, incidents of such severity have been eliminated.

The participants were also asked about their involvement in policy making, including in the development of action plans or long-term strategies. The overwhelming majority indicated that they were not sure of their existence. John stressed that: "our position is simple—we are a manual labor force, with the difference that we do not work in construction. We are coaches working with kids." Others seem to corroborate this statement. Adam complemented John's position by highlighting that in his fifteen-year long career in Qatar, he was never really asked about planning of activities. Rather, "our supervisor or manager simply gives us a schedule of activities without further explanation. Besides sport-related tasks, I [Tiba] was given responsibility in the HR sector as well." Tiba further indicated that no specific employment policy has been in place and the hiring procedure (at least during my short experience), was limited to General Manager without any consultation with HR or individuals that manage sport programs to fire or hire sport professionals. Mohamad continued by not only confirming Tiba's claims, but also highlighted the cases of sport professionals who are formally employed within a company. However, without any known sport-related engagements, "[u]sually, those are either sport managers, head coaches or supervising positions." Kim concluded that it "was not realistic to expect that any of us would even have an opportunity to be involved in planning, as they only expect from us to deliver on and off the court and whenever is needed." The kafala system still prevails, and without the NOC, the employee cannot change jobs.[99] Moreover, the sponsor may decide to cancel the employee's visa, and little can be done.

As Kim concluded, "our contract and residence would be terminated immediately without any explanation." According to all participants, unilateral alterations to contracts are frequent and can substantially vary from the original agreement, including working in a completely different industry. "For a period of six months, I [Adam] was forced to work as a driver for nurses or my contract and residence would be terminated." Further, Kim continued "many of my colleagues are either leaving the country or starting freelance engagement, as they cannot sustain the pressure associated with this instability." Such unilateral variations to contracts are not only prohibited under Qatari contract law, but render these contracts void or voidable, depending on whether the variation was the result of coercion.[100] Although the Ministry of Culture and Sport and the courts would entertain such contractual claims by sports professionals, the latter do not generally escalate such claims. The system is therefore perpetuated by

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[98] *See* Peter Kovesay, *French Footballer Zahir Belounis Secures Exit Permit*, DOHA NEWS (Nov. 27, 2013), https://dohanews.co/french-footballer-zahir-belounis-secures-exit-permit/ [https://perma.cc/84LR-EPDG].

[99] Mustafa El-Mumin, *The GCC Human Rights Declaration: An Instrument of Rhetoric?*, 34 ARAB L. Q. 86, 94 (2020).

[100] *Art. 137*, Qatari Civil Code; equally *Art. 140* of the Civil Code regarding contracts voided as a result of exploitation.

the absence of judicial action. The establishment of a sports-related arbitral chamber in Qatar with jurisdiction over all disputes arising between sports professionals and their employer would go a long way to changing abusive behaviors.

The focus group moderators initiated this part by asking to what degree participants were familiar with the sport-related regulatory framework. The majority indicated that they did not have any knowledge, nor had they been informed or discussed about regulatory frameworks in the field of sport. Moreover, save for sport-related rules, all participants were unsure if there were any internal regulations. Sandy indicated that coaches in the private sector "are just money-making machines . . . we are objects and we do not have a stake in our companies." There is a consensus that within the mid-level management, changes of staff are very frequent, and Kim pointed out that "it is hard to adjust every 4-6 months to the new manager or supervisor." The role of supervisors is particularly interesting. Sam stressed the following, "I believe that I am talking for all of us here; they are usually reluctant to communicate with us or to engage in any segment of sport-related operations." Joshua said, "[t]he biggest challenge for us is that we don't know what is expected from us, as goals are not clear, or they are subject to frequent changes." The participants noted that although they had heard or seen owner(s) or senior management, they had never been in a position to talk with them. "There is a wall between them and us," said John.

Most participants were former athletes, and the discussion echoed the fact that the instability of their sporting careers had endured in their post-playing professional/coaching life. One participant stated that, "I [Joshua] strongly believe that competencies are not the most important for determining salary scheme nor to enable advancement in your career—everything is decided ad hoc and if there is an opportunity to lower your salary or to replace you with someone less skilled but cheaper, my manager will not hesitate to take action." Another noted, "I [Andrew] have my friends working for NSF, and for basically the same working hours and less demanding work he is receiving double my salary because it is a state job." Salah shared that in his previous company, "[t]he salary was basically the same for all of us, despite the different educational levels, working experience or performance. We were all the same, below average income in Qatar."

Tiba specified that she had been with the same company for more than a decade. "I [Tiba] saw many coaches coming and leaving, I have a master's degree, but I had never an opportunity to receive an upgrade of my salary or overall working conditions." Sam provided us with a sobering account on challenges faced when his son was born. "Since I am an expat, I wanted to go to Europe to visit my parents and celebrate with my family, but my company didn't want to issue me a salary certificate to apply for a visa. Then I found a travel agency that could apply in my name, but they needed a letter from my company about my experience; yet, once again my company declined to issue it without any explanation." The same participant observed that "[t]his is just the tip of an iceberg. As per the terms of my contract, I was entitled to transportation allowance and yearly round-trip ticket to my home country. When I purchased my own car, the company stopped paying the transportation allowance. Soon after they amended my existing contract, which now said that I am entitled to an annual round trip ticket every two years. Since I came here, my rights have slowly been degraded and if I decided to leave the company and as a result, I am

sure that I will not get an NOC." Some of the participants confirmed similar experiences.

Kim mentioned an issue with the accommodation as per the contract and it appears that most of the participants who were working or still working for companies are experiencing the same problem. The quality of accommodation is below any decent level, especially in terms of sanitation. Tiba said, "[i]f you request change or an equivalent allowance, you will be mostly like fired, as happened to my colleague." "During summer, and you know how hot and humid this can be in Qatar, the air conditioning didn't work in the apartment. I [Andrew] asked for maintenance as this is a company-owned property. Not only was I declined, but next month I received my salary with 30 per cent deduction without any written notice. I didn't complain, as I do not believe that anything can be changed here." "In the last five years our status has been significantly downgraded, and that is why most of my [Joshua] colleagues left the country." Regarding accommodation, the majority of participants confirmed that sports companies always provide shared apartments where many of the workers share toilets, the kitchen, and even bedrooms.

Similar to the economic status, the quality of health insurance is unpredictable for sport professionals. All of the participants highlighted that although their contracts generally addressed health insurance "as per Qatari Labor Law," in reality, except for covering expenses for medical examination fees related to getting a work visa, the company did not provide the type of insurance associated with the specificity of sport-related jobs. One participant noted that "[t]he fact is that when I was injured, I couldn't afford to go to the hospital, and I couldn't work. That month I didn't get my full salary and for me it was clear that I needed to seek for alternative, rather freelance jobs." Nick confirmed this by noting that "after I had a rupture of my hamstrings and received emergency care, I was not entitled to proper professional recovery (rehabilitation). I was expected to come back and work, although, I was not able to move without crutches. Luckily, my colleagues covered for me, but still, I received a deduction from my salary." Most of the participants confirmed that they did not have a medical card that would cover risks associated with their occupation.

CONCLUSION

The commercial sector in Qatar seems to follow a pyramidal and exclusive organizational structure, with little or no opportunity for expatriate sport professionals to be engaged in decision-making bodies or processes. In this

patrimonial system, the process of institutionalization of sport is shaped by strong political influence. The findings indicate a need for in-depth research on governance and power relations in Qatar's sports ecosystem after the 2022 FIFA World Cup. Further, the findings suggest that there is a lack of formal path for procedures for career development.

Especially in the last five years, the overwhelming focus was dedicated to football, organization of the World Cup and to prove the organizational capacity and image of Qatar. This is not to say, of course, that the country has not achieved significant progress in labor standards and human rights more generally. This has occurred chiefly in the construction sector and in fields of employment directly controlled by the government and the public sector. The 'private' sector on the other hand, particularly sports entities set up under the patronage of the state or by influential figures, have failed to implement many of the labor reforms undertaken in other areas. Institutionalism, in its constructionist nature, suggests that major actors in the sport ecosystem in Qatar operate through informal regulatory regimes reflecting both normative and rational aspects of societal dynamics with ability to exist within broader institutional environments. While the status of labor rights in Qatar has increased manifold, there are certain sectors where improvement is not obvious and in fact is lagging behind other sectors. Complaints in these fields by employees, especially in the context of sports academies in the private sector may lead to retaliation by the employer/sponsor.

The interrelated nature of these actions is secured through concerted effort from different stakeholders aimed at maintaining institutional relationships shaped by informal regulatory regimes while at the same time sustaining the legitimacy of formal legal frameworks.[101] This is important as the interdisciplinary approach employed in this paper observed a greater context that includes nature legal institutions and organizational structures. This particular case confirms the complexity of existing institutional settings shaped by cultural patterns from both Qataris and expatriates that enfolds into calculated decisions from the latter to conform or to coerce to decisions from the former, as compliance is part of informal practices. The implementation of the sponsorship system prevails (while positive in many respects) against sport professionals in a manner that is generally arbitrary and the wider labor reforms have not improved labor standards for sport professionals despite the Qatari government's (and the Emir personally) sincere efforts to better regulate the 'private' sector. Many participants confirmed that the labor system in place still significantly limits or denies freedom of movement, especially where sponsors arbitrarily refuse to issue NOCs, which allow an employee to find other employment under a new sponsorship. Consequently, the reaction from participants enables and facilitates institutional isomorphism. The challenge is reflected in a conservative understanding of formal legal regimes affecting institutions, given that the latter tend to subdue its actors through institutional isomorphism within broader, socio-political (including cultural) frameworks. The loopholes and lack of oversight are part of institutional ambiguity and reflect the relationship between public and non-public actors with strong taken-for-

[101] Susan Burgess, *Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy*, 25 POLITY 445-59 (1993).

granted norms in place, thus making regulations irrelevant to the non-governmental, private sport sector.

Therefore, it is obvious, as indicated by the participants themselves, that decisions are often not a product or based on efficiency; rather they represent a sort of a natural reflex. Moreover, these decisions display a formal structure that operates in a rather *pro forma* regime as part of a larger ceremonial or symbolic institutional setting that a country such as Qatar with strong values stands for.[102] With the present ambiguities inherent in the institutional relationship between public and private sport providers, pressures in place more often than not culminate in a selective application of existing legal regimes. This suggests that that cultural setting has led to a concerted effort toward aligning regulatory frameworks with institutional dynamics. This conjures a number of impacts at the macro level with new regimes being articulated, formulated, and institutionalized. The operationalization of the latter is exercised through mimetic, coercive or normative impetus, or a combination of all of these. It further leads to collective compliance from sport professionals as it is practiced more as a cultural pattern. Moreover, sport professionals are often engaged in enforcing this behavior within the relevant organizational structures keeping these practices institutionalized and surrounding pressures less transparent.[103] This state of affairs is laid against the backdrop of leadership by strong individuals (sponsors) with high level of societal autonomy within a particular sector.

It was noted by the participant in respect of the issue of exit visas, that all actors from all levels played their role in aggravating access to justice or toward predictable rule of law situations, by adapting their interpretation of the existing regulatory regime in accordance with the sponsor's interest. This may well be seen as a sort of institutional contradiction, as its underlying rationale is not often related to market demands or maximization of institutional potentials where isomorphism dominates and shapes institutional environment. There is no doubt that the human rights and labor legacy of the 2022 FIFA World Cup will have a dramatic impact on changes in the sports arena, especially if Qatar continues with the same vigor its outlook on mega sports events and invests in the sporting capacity of its expatriate workforce. This of course will take time, as there is a need for adopted legislative framework to be incorporated and effectively enforced despite conflictual cultural patterns embedded in institutional ecosystem. That said, the transformative potential of new legal regime will require perhaps new institutional actors. The authors suggest that the establishment by law of a specialist arbitral chamber with compulsory jurisdiction over sport labor-related disputes would go a long way to alleviating many of the problems identified in this article.[104]

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[102] The cultural setting is embedded into institutional ecosystem. *See* Barry Levitt, *Political Culture and the Science of Politics*, 40 Latin Am. Rsch. Rev. 365, 368 (2005) (book review); JAN-ERIK LANE & SVANTE ERSSON, CULTURE AND POLITICS: A COMPARATIVE APPROACH (2002).

[103] It is not a new phenomenon that the behavior from decision-makers being translated into rules or even structures. *See generally*, MARCH, JAMES G. &JOHAN P. OLSEN, ELABORATING THE "NEW INSTITUTIONALISM (2011).

[104] *See* Ilias Bantekas & Michael A Stein, *Why Arbitration in Business and Human Rights Disputes Enhances Labor Rights*, CAMBRIDGE UNIVERSITY PRESS: FIFTEEN EIGHTY-FOUR (Sept. 8, 2021), http://www.cambridgeblog.org/2021/09/why-arbitration-in-business-and-human-rights-disputes-enhances-labor-rights/ [https://perma.cc/2WB4-KECF].

In 2019 the Qatar Sports Arbitration Foundation (QSAF) was established, in the form of an independent organisation with the primary purpose of resolving sport-related disputes within Qatar through arbitration and mediation. It was made possible through the cooperation of Qatar Olympic Committee, the Qatar Football Association, the Qatar Stars League, and the Qatar Players Association.[105] For this purpose, the QSAF has set up the Qatar Sports Arbitration Tribunal (QSAT). The QSAT recently adopted an award that is relevant to the relationship between sports professionals and their clubs. It held that contracts between players and their clubs are governed by labor law and specialist regulations.[106] Its impact is yet unknown, and one hopes that similar disputes between coaches and clubs will be encompassed in the ambit of the QSAT.

[105] Qatar Supreme Committee for Delivery & Legacy, Overview, https://www.qsaf.qa/en/overview/ [https://perma.cc/VET8-XM2D].

[106] QSAT Award No 3/2019, https://www.qsaf.qa/wp-content/uploads/2020/09/-حكم-2019-003-القضية-التحكيم_Redacted.pdf [https://perma.cc/4TJB-HKEM].

GLOBAL CIVIL JUSTICE

CESARE CAVALLINI*

ABSTRACT

The growing interest of law schools in various International, Transnational, or even Global Law programs underscores the close relationship between research and teaching. This connection holds even when focusing on fields traditionally viewed as domestic and primarily associated with national legal frameworks, such as civil procedure. Civil procedure is one of the most pivotal areas in this regard. One proposal worth considering is to rebrand this field as "International, Transnational, or Global Civil Procedure" or "International Dispute Resolution", although the latter may not be entirely appropriate. However, changing the course title does not resolve the underlying issues, such as course content and its relevance to students' education.

This essay aims to delve deeper into this matter. First and foremost, it seeks to provide a more accurate interpretation of the usual term "international civil procedure" by appending the words "global civil justice". It is not merely a matter of terminology but a fundamental and primary objective of what international civil procedure should aim to achieve. This addition enables us to identify the core principles that should guide the litigation rules, transcending the specifics of each country's legal traditions. Since the goal is not to prepare students exclusively for domestic bar exams, which inherently reflect national patterns, but rather to equip them with the foundational knowledge of civil procedures and the judiciary across various legal systems; teaching activities must be rooted in rigorous research in comparative civil justice.

Consequently, a well-considered cross-comparison becomes essential. Above all, it necessitates a deep appreciation of the fundamental domestic rules and general principles. This transformation from "procedure" to "justice" advocates for a novel approach to studying and researching civil procedure as a primary field for social sciences.

In essence, the focus should not solely be on the international or transnational aspects of the technical rules but on genuine global justice that identifies differences within a shared foundation of principles and objectives. The outcome of this approach is precise and groundbreaking. It heralds a new era for civil procedure (and justice) among scholars worldwide, with teaching naturally evolving due to this innovative research. Comparing the legal systems of the two families prepares students to navigate various jurisdictions, emphasizing commonalities over differences. Simultaneously, it encourages scholars to establish universal principles in addition to specific rules, aiding domestic policymakers in redefining the vision and scope of civil justice judiciously.

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INTRODUCTION

This essay explores the existence and relevance of the "global civil justice" concept. It questions whether this phrase reflects a growing trend in some law schools worldwide or if it remains a mere expression of novelty. Indeed, the essay may acquire greater depth if one assumes a positive response to this provocative initial question.[1]

It is widely acknowledged in the global discourse that "civil procedure" primarily operates within domestic realms, both in terms of scholarly examination and practical implications.[2] The essence of this assertion is readily understandable, as it accurately portrays the country-specific models and regulations that underlie various civil procedural codes or acts. Additionally, owing to historical traditions separating civil law from common law systems, the local framework in this domain persists, despite efforts to cultivate a broader perspective that transcends strict boundaries of localized and parochial legal norms.[3]

The rationale behind this classical and predominantly domestic approach to learning, studying, and teaching civil procedure is apparent and pragmatic to a certain extent. One of the most crucial issues that emerges at the start of an international lawsuit primarily concerns the choice of applicable law, as opposed to the jurisdiction under which the selected law is utilized to resolve the case. When jurisdiction becomes a pertinent factor, it is determined by the country's laws where the case is initially filed. This implies that the case will be subject to the jurisdiction of one specific country, which is inherently domestic. Prospective lawyers, typically students in classical law degree programs, study "Civ. Pro." by the specific legal framework of the country

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[1] I must premise that this topic aims to respond to a growing need, primarily in the Continental educational pattern. Still, this essay should not be considered merely a follow-up of a prior study on the value of teaching U.S. civil procedure in Europe, *see* Cesare Cavallini & Marcello Gaboardi, *Should We Teach (A Bit Of) U.S. Civil Procedure in the European Law Schools?*, 2 COURTS & JUST. L.J. 1 (2020). The primary distinction between the present essay and the initial one arises from the intended audience of the educational program in which these subjects may be taught. To clarify, discussing global civil justice and procedure topics does not inherently require prospective students to be practicing lawyers. Therefore, the program can be designed to accommodate a diverse range of students, including those pursuing a general bachelor's degree, along with other social science disciplines, or even those enrolled in an LL.M. program in Global Dispute Resolution and Arbitration. In the latter case, it is an introductory course (to international litigation or arbitration) for individuals originating from various legal systems. Nonetheless, this topic soon reveals a fascinating outcome in terms of research: somewhat beyond comparative law, but relatively that civil procedure must be afforded everywhere.

[2] *See* Cesare Cavallini & Emanuele Ariano, *Issue Preclusion Out of the U.S. (?) The Evolution of the Italian Doctrine of Res Judicata in Comparative Context*, 31 IND. INT'L & COMPAR. L. REV. 1, 5 (2021) (writing that civil procedure as a field has been usually considered as a "a *hortus conclusus*, an enclosed garden virtually impermeable, for cultural and institutional reasons, to foreign legal solutions, models, and styles[]"), also *quoted in* Helen Hershkoff, *The Americanization of the Italian Civil Proceedings?*, 57 N.Y.U. J. INT'L L. & POL. (forthcoming 2024).

[3] *See* Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524. *See also* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMPAR. L. 545 (1995) (more focused on the research pattern); Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008).

where the law school offers the program. In other words, despite the growing transnational boundaries of civil disputes, the process is always set within a domestic framework.[4]

Nonetheless, when considering the significance of studying and subsequently teaching "Civ. Pro." as an international field, it is important to note that prospective students may not necessarily aspire to become lawyers. Conversely, some may already hold legal qualifications but are interested in exploring various civil justice systems. I aim to discuss a distinct degree program that caters to the unique goals of these students, highlighting the need to approach "Civ. Pro." not solely as a purely domestic field.

Given this premise, it becomes evident that an alternative approach to "Civil Procedure" (Civ. Pro.) is necessary. Moreover, transitioning from a domestic civil procedure to a civil procedure that addresses the diverse academic achievements of geographically dispersed students implies that the degree program primarily aims to establish a global educational foundation rather than a purely domestic one. Consequently, discussing the potential interpretation of "Civ. Pro." on a global scale may seem incorrect or, at the very least, prone to misunderstanding. Suppose this interpretation aims to align with the previously defined scope. In that case, it should not be classified under the terms "international" or "transnational" civil procedure, nor be rapidly seen in the traditional and well-known light as "comparative" civil procedure.

This essay aims to explore the role of "Civil Procedure" within the broader context of "civil justice" and how "Civil Procedure" should adapt to different scenarios, whether in terms of students' needs or the program's scope. This approach to change requires that research and, more importantly, teaching establish a cohesive thread that can illustrate how various legal systems worldwide can identify shared values and general principles. Furthermore, it should elucidate how these principles can be implemented in the context of prospective civil justice reforms and contribute to a less technically oriented but robust education, one that can be aptly referred to as "global civil justice".

Therefore, "global civil justice" must be distinguished from "global civil procedure" for various reasons and distinct purposes. As highlighted in a recent article, "global civil procedure" originates from a different context, serves a different purpose, and can be viewed as a continuation of the initial framework within the context of global civil justice. [5] It addresses unique needs and approaches distinct challenges, tailored explicitly for educational programs and job markets catering primarily to lawyers and judges. Yet, while "[g]lobal civil procedure includes the procedural rules, practices, and social understandings that govern transnational litigation and arbitration[,] [a] global civil procedure norm is a norm adopted across courts or arbitration

[4] *See* Clermont, *supra* note 3, at 528 (writing, "[t]ransnationalism does not appear expressly in that statement of the course's goals. Nevertheless, some integration of transnational perspectives could help reach those goals, while helping also to satisfy the presumed need to increase the overall coverage of transnationalism.").
[5] Alyssa S. King, *Global Civil Procedure*, 62 HARV. INT'L L.J. 223 (2021).

providers to make that jurisdiction or provider more competitive in attracting transnational litigation or arbitration."[6] The framework of global civil justice involves recognizing in advance how a global procedural norm can be established. This recognition is based on a proper understanding of the defining attributes of a procedural norm. These attributes include the country-specific origin, tradition, and social context within which rules must operate. It is essential to emphasize that this understanding is not limited solely to American law, as procedural norms encompass diverse legal traditions worldwide, primarily in the Anglo-Saxon and European context.[7]

In framing the global civil justice pattern, Part I endeavors to comprehend the role and constraints of recent soft-law regulation in this area, namely, the European Law Institute (ELI) and its collaborative effort with the International Institute for the Unification of Private Law (UNIDROIT) in formulating the Model European Rules of Civil Procedure.[8] This section seeks to ascertain whether this finalized project holds the potential to elevate the concept of "global civil justice" or whether it simply serves as a condensed summary of diverse country-specific regulations governing domestic civil procedures. Part II aims to identify the critical foundational elements of civil proceedings, whether specific to the civil law system or common law traditions. The objective is to identify shared characteristics and distinctions, thereby contributing to the argument that advocating for a global civil justice system requires a comprehensive analysis of the structure of each legal tradition while acknowledging their diverse origins and regulatory scopes.

I. THE ROLE AND THE LIMITS OF THE SOFT LAW

As previously mentioned, the ELI/UNIROIT Model European Rules of Civil Procedure is a significant endeavor led by private organizations and scholars to establish a unified set of procedural rules across the European region. This model offers a potential solution for establishing a common framework of rules and principles and a standardized technical language to harmonize the diverse aspects of civil procedure law that vary across countries. While the European context is distinct from a global one, it is worth noting that this model, developed in part by U.S. scholars serving on various committees, should be considered seriously in the context and content of this essay's purpose.

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[6] *Id.* at 224.

[7] The previously outlined differentiation between global civil procedure and global civil justice also elucidates the varied contexts in which they could be taught. The latter is primarily tailored for bachelor students who may not aspire to become lawyers or judges but intend to pursue degrees in diverse social sciences.

[8] *See Modern European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT)*, EUR. L. INST., www.europeanlawinstitute.eu/projects-publications/completed-projects/completed-projects-sync/civil-procedure/. *See also* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE (OXFORD UNIV. PRESS. 2021).

First and foremost, the project methodology aimed to mirror its underlying objective: the establishment of uniform regulations for civil procedure model rules across European member states. Specifically, the methodology provided a set of rules "in fields where a move towards harmoni[z]ation and approximation was likely to be met with a sufficient degree of acceptance to motivate European and national legislature to take the proposed rules as a basis for an innovative harmoni[z]ing legislation."[9]

Unlike model codes, which require a uniform and constant level of detailed regulation, model rules offer flexibility in terms of detail across various sections. This flexibility considers the current level of alignment and the potential for future regulation in specific areas. The ELI/UNIDROIT Model European Rules of Civil Procedure (Model Rules) aims to balance by focusing on essential aspects of civil procedure while incorporating differing degrees of regulation in different sections when deemed appropriate. This implied the need to address specific crucial issues, primarily related to ensuring consistency in terminology. This was imperative because the ultimate goal of the Model Rules is to furnish guidance for future adaptation and reforms at the national level.

Although this essay is not intended to criticize projects of this nature, it is essential to acknowledge that when discussing global civil justice, its content, scope, and whether it is used for research or primarily teaching purposes, we must recognize it as a potential examination subject. Upon reviewing the introductory remarks regarding the scope of this essay and the concept of a possible "global civil justice", one could initially perceive this project as an attempt to identify shared elements among diverse legal systems. However, this effort aims to preserve individual countries' unique traditions while harmonizing regulations across various facets of civil proceedings and judicial administration. However, given that the ultimate objective of this project is to provide guidance (and potentially even require in the context of a prospective EU Directive) for member states to align their domestic codes with European standards as closely as possible, it is worth noting that this endeavor does not align well with the primary focus of this essay.

Firstly, it is essential to acknowledge that every European regulation, especially in the case of a potential directive, ultimately has implications at the domestic level. Therefore, our current objective is to maintain country-specific civil procedure codes rather than harmonize them, possibly in simplified model rules. Secondly, our current objective is undoubtedly not to individuate a common core of civil procedural rules, maybe less technical than usual Codes Rules, nor to rewrite domestic rules even harmonized. Conversely, the "global civil justice" concept aims to introduce a novel type of course. Rather than being a mere comparative procedural course, it begins with a comparative perspective to educate students about the fundamental principles of various legal systems.

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[9] *See* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE, *supra* note 8, at 6 (citations omitted).

Furthermore, the course seeks to equip students with the skills needed to navigate across different jurisdictions since they may be called upon to work within a global context, fulfilling roles such as lawyers, regulators, and public administrators. Another critical point is that offering a course of this nature entails a fresh examination of comparative procedural law. This, in turn, could pave the way for a more deliberate process of internationalizing a traditionally domestic field. Ultimately, such an endeavor could also prove highly beneficial for policymakers and legislators seeking to reform existing litigation rules, even if it is not a primary task.

II. "FOUNDATION STONES": A COMPARATIVE ANALYSIS OF CIVIL PROCEEDINGS FOR A GLOBAL CIVIL JUSTICE

In this chapter, titled "Foundation Stones", I aim to meticulously dissect the foundational elements of civil proceedings arising from two distinct legal traditions. Through a step-by-step examination, my objective is to establish a shared framework of principles while also highlighting and appreciating the unique differences and specificities inherent in each legal family. In doing so, the objective is to only comprehensively address some aspects typically governed by civil procedural codes, particularly from a European perspective. The aim is to highlight certain pivotal moments within civil proceedings that predictably emphasize the fundamental principles applicable to regulations in any given country despite structural and historical differences. This analysis begins with a broad overview of the civil justice system's constitutional foundations.

A. *DUE PROCESS OF LAW*

First and foremost, I believe that the initial step in shaping civil justice is addressing what is commonly called the "due process of law". This leads us to question of whether this concept can be universally embraced, albeit with variations in interpretation and implementation across different regions. Hence, discussing the idea of due process on a global scale ultimately involves formulating a universal constitutional framework within which each country's legislature can oversee the administration of civil justice.

This task is indeed challenging, as the term "due process of law" initially had its roots in the Anglo-Saxon legal tradition and has only more recently found its place in the civil law realm, as exemplified by Article 111 of Italy's constitution, which was recently revised to incorporate this concept, at least in the title of the article.[10] Hence, we should initially understand the

[10] *See* art. 111 COSTITUZIONE [CONST.] (It.) ("Jurisdiction shall be implemented through due process regulated by law."), https://www.senato.it/sites/default/files/media-documents/COST_INGLESE.pdf [https://perma.cc/W94S-NZRZ]. It is essential to highlight that the Italian constitution is unique in including its inclusion of the translation of "due process of law" within its constitutional framework. However, this particular concept is further elaborated

fundamental essence of the Anglo-Saxon idea of due process, primarily as it pertains to U.S. law.[11]

Contrary to what one might expect, due process has no precise definition. Also, U.S. literature does not provide much assistance in constructing a comprehensive theoretical framework for due process, mainly when it is related to civil procedure and justice.[12] The legal principle known as "due process of law" is established by the Fifth and Fourteenth Amendments of the U.S. Constitution.[13] Essentially, it mandates that substantive and procedural laws must be guided by fairness and efficiency when safeguarding citizens' life, liberty, and property. The evolution of the due process clause, particularly about procedural law, has closely paralleled the gradual separation of substantive law from procedural elements. This division has functioned as a noteworthy hallmark in tracing the development of common law within the U.S. legal system from its inception. It symbolizes the gradual liberation of substantive law "that was finally able to stand on its own[.]"[14]

While this essay does not delve deeply into the extensive interpretations of due process by the U.S. Supreme Court over more than a century,[15] its primary objective is to offer a concise overview. This overview aims to facilitate an evaluation of the significance of this legal concept on a global scale. This entails exploring potentially analogous principles in other constitutions. Ultimately, the central focus is to distill the essence of the (procedural) due process clause, striking a balance between the fairness, reasonableness, and efficiency of civil proceedings, all while preventing the unjustifiable infringement of citizens' fundamental rights, such as life, liberty, and property.

In more practical terms, although the due process clause is a flexible concept, its core principle revolves around the right to have a fair opportunity to be heard before a final decision is made concerning the

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upon by other originally established constitutional provisions. Specifically, we can observe this in Article 24 of the Italian Constitution, and the overarching principle articulated in Article 3, as I will deeply specify in this paragraph.

[11] The U.K. justice system must know a specific due process of law provision. However, the origin is generally attributed to Clause 39 of the Magna Carta, in which John of England promised,"[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived or deprived of his standing in another way, nor we will proceed with force against him, or send other to do so, except by the lawful judgment of his equals or by the law of the land." MAGNA CARTA (G.R.C. Davis ed., British Library 1995) (1215), *The Text of the Magna Carta*, FORDHAM UNIV., INTERNET HISTORY SOURCEBOOKS PROJECT, https://origin-rh.web.fordham.edu/halsall/source/magnacarta.asp [https://perma.cc/GWQ2-ZUKM]. Despite this general provision, the term "due process of law" does not pertain to the English Law, which law, that is merely and indirectly informed to the natural justice principles, as it is well explained by Geoffrey Marshall in his essay *Due Process In England*. Geoffrey Marshall, *Due Process In England*, 18 NOMOS 69 (1977).

[12] *See* Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155 (2017).

[13] *See* U.S CONST. amend. V; *see also* U.S. CONST. amend. XIV.

[14] Grossi, *supra* note 12, at 158 (explaining the separation process, which is described as the decline of the original writs and forms of actions (quoting THEODORE F. T. PLUCHNETT, A CONCISE HISTORY OF THE COMMON LAW 381–82 (5th ed. 1956))).

[15] *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

aforementioned fundamental rights;[16] accordingly, due process also means the fair and "accurate determination of decisional facts, and informed unbiased exercises of official discretion[,]"[17] that require—as a further core principle of the due process in civil cases—the neutrality of the decision-maker.[18]

One recent criticism against the jurisprudential concept of procedural due process, which deals with the delicate balance between fairness and efficiency when assessing the competing interests of parties, is that it appears overly broad.[19] Precisely, the grounds for critiques of the *function* of the due process, are traditionally viewed as unfavorable. It means that a "due process analysis would factor in the past, but would not lead the past control the present, a result that would clearly be inconsistent not only with due process but with the very essence of the common law system, a system designed to be flexible, in service of the people, evolving with the people."[20]

On the contrary, the function of due process should be *positive*, which means that it must inspire legislative reforms and mainly impose "an obligation on the states to provide a judicial system that is fair, efficient and just."[21]

While the broader implications of this viewpoint undeniably pertain primarily to the United States, given their logical connection to a thorough examination of the existing civil procedure rules, doctrines, and jurisprudence,[22] it is noteworthy that, within the scope of this essay, the suggested interpretation of U.S. due process could potentially serve as a robust foundational element for a global vision of justice. Yet, a firmly established set of principles to steer reforms, regulations, and legal decisions is apparent in various continental legal systems, especially in those endowed with a written constitution, such as France, Spain, Germany, and Italy. Frankly, these foundational principles, which can bestow constitutional legitimacy to legal sources and jurisprudence, have steadily evolved within these systems after World War II. In Italy, they have been further bolstered in recent decades through constitutional reform and numerous decisions rendered by the Italian Constitutional Court.[23]

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[16] *See* Davis v. Scherer, 468 U.S. 183, 202 (1984) (Brennan, J., concurring) (stating that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner[]'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).
[17] Grossi, *supra* note 12, at 169 (quoting O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 797 (1980)).
[18] *See, e.g.*, Marshall v. Jerico Inc., 446 U.S. 238, 242–43 (1980) (emphasizing that the Court has "jealously guarded" the due process requirement of a neutral decision-maker by applying this requirement "in a variety of settings," including warrants issued by justices of the peace, state optometry board disciplinary hearings, and parole revocation proceedings).
[19] Grossi, *supra* note 12, at 177.
[20] *Id.* at 178.
[21] *Id.* at 180.
[22] *Id.* at 184–202.
[23] *See* Corte cost., 22 marzo 1971, n. 55, (It.), *in* RIV. GIUR COST. I, 824 (A compelling demonstration of the widespread pertinency of the core principles of due process raised in a pivotal early pronouncement by the Italian Constitutional Court concerning the right to be heard, the primary cornerstone of due process. This concept is linked to the subjective limitation of res judicata to the original parties, as third parties lacked the opportunity to participate in the proceedings and be heard prior to the judge's decision.).

In summary, regardless of one's viewpoint regarding fairness and efficiency as the fundamental principles of American due process of law, continental legal systems include these criteria in their sources of law. However, the level of detail may vary. This approach guarantees that these systems contribute to a due process guarantee that avoids criticism for being excessively vague and general. Additionally, these systems naturally guide every legal provision concerning due process, often directly through the *rationale* of case decisions.

Regardless of how due process is defined (or also formally not, as in France), it can be asserted that the core principle is universally recognized, albeit with variations in its application due to the distinct legal frameworks and sources of law established by each legal system. This disparity highlights a fundamental difference between the Anglo-Saxon legal tradition and the civil law context of regulation. In this regard, it is noteworthy that due process in civil proceedings is generally acknowledged within the civil law tradition through various legal sources. These sources include constitutions, the codes of civil procedure, and fundamental provisions established by the European Convention on Human Rights.[24]

Therefore, it is evident, beyond a strict comparison, that certain general principles underpin the foundation of due process in civil proceedings within civil law. These principles are articulated differently in each country's specific legal sources and regulations. Still, they are more detailed than the U.S. ones, even if they share the same common core. I can summarize, at minimum, them as follows:

> 1. *Right to be Heard*: Parties must have an opportunity to be heard and present their side of the case before a neutral and impartial tribunal. This principle includes the right to present evidence, cross-examine witnesses, and make legal arguments.
> 2. *Impartial Judge or Jury*: Civil cases are typically heard by judges or juries, and these decision-makers must be unbiased and impartial. Parties have the right to

[24] *See* Eur. Consult. Ass., *European Convention on Human Rights*, art. 6 (1948), *amended by* Protocols No. 11, 14–15, *supplemented by* Protocols No. 1, 4, 6–7, 12–13, 16, https://www.echr.coe.int/documents/d/echr/Convention_ENG [https://perma.cc/7WAM-2RMW], (signed by Italy, Germany, France, and Spain, for instance), which states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This article safeguards the right to a fair and impartial trial, a fundamental aspect of European human rights protection. It ensures that individuals have access to justice and can hear their cases before a competent, independent, and impartial tribunal.

challenge judges or jurors if they believe there is a potential for bias.

3. *Access to the Court*: Individuals can access the court system to seek redress for their grievances. This principle includes accessing the necessary legal procedures, forms, and assistance.

4. *Fair and Timely Proceedings*: Due process requires that civil cases are conducted fairly, efficiently, and without unnecessary delay. Parties should not be subjected to undue procedural burdens or delays.

5. *Equal Protection*: Due process also incorporates the principle of equal protection under the law, ensuring that all individuals are treated equally regardless of race, gender, religion, or other protected characteristics.

6. *Enforceability of Judgments*: Parties can enforce court judgments, including collecting damages or enforcing court orders.

Given that, anyone can note that these principles represent the natural common grounds for civil justice globally, as the reflection of a democratic judicial system. Hence, while the French, Spanish, and German constitutions do not use the term "due process of law" explicitly, they establish fundamental rights and principles that protect individuals' rights in civil proceedings.[25]

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[25] More specifically, in *France*, the concept of "procedural due process of law" is known as "le droit au procès équitable". It is a fundamental principle enshrined in the French legal system, which ensures that individuals involved in civil disputes are afforded certain rights and protections to provide a fair and just resolution of their cases. A key provision of the French Constitution, 1958 CONST. (Fr.), https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 [https://perma.cc/9SKQ-6WC2], are worth underlining:

> Article 1 of the French Constitution states, "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion." *Id.* art. 1. This principle underscores the importance of equal treatment under the law, a fundamental aspect of due process.

The *German* legal system places a strong emphasis on protecting the rights of individuals involved in civil cases, starting with some key provisions of the Constitution, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/SW99-Y2J2], as follows:

> Article 2 guarantees the right to personal freedom, including a fair hearing: "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law." *Id.* art. 2.
>
> Article 3 ensures equal treatment: "All persons shall be equal before the law." *Id.* art. 3.
>
> Article 103 protects the right to a fair trial, including court access and the right to be heard. "In the courts every person shall be entitled to a hearing in accordance with law." *Id.* art. 103.

The *Spanish* legal system places a strong emphasis on protecting the rights of individuals involved in civil cases, specifically through a couple of constitutional provisions, C.E., B.O.E., Dec. 27, 1978 (Spain), https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf [https://perma.cc/4TFE-9KEK]:

The Italian constitution incorporates a comprehensive framework that explicitly encompasses the concept of due process of law, also terminologically.[26] This framework embraces a series of principles that collectively govern the due process of law, including the "statement of reasons" and the accessibility of the Court of Cassation as an ordinary instrument for judicial review regarding matters of law, thereby reinforcing constitutional guarantees that uphold the concept and substance of due process.

Hence, it becomes evident that the initial step in shaping and ultimately educating on global civil justice involves recognizing that various democratic systems, despite their distinct structures, hold shared principles for governing civil proceedings. These principles can serve as a foundation for upholding the due process of law, transcending its terminological and substantive origins across different jurisdictions. However, the globally

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Article 24 guarantees the right to a fair trial in civil (and criminal) matters, including access to courts, the right to be heard, and the right to legal representation:

> 1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.
> 2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defen[s]e and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defen[s]e; not make self-incriminating statements; not declare themselves guilty; and to be presumed innocent.

Id. art. 24.

Article 117 establishes the independence of the judiciary and its role in ensuring due process: "1. Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable, and liable and subject only to the rule of law." *Id.* art. 117.

The more detailed civil justice system in terms of procedural due process is undoubtedly the *Italian* system.

[26] *See* art. 111 COSTITUZIONE [CONST.] (It.), *supra* note 10, stating that for civil proceedings:

> Jurisdiction shall be implemented through due process regulated by law. All court trials shall be conducted with adversary proceedings, and parties shall be entitled to equal conditions before a third-party and impartial judge. The law shall provide for a reasonable duration of trials. . . .
> All judicial decisions shall include a statement of reasons.
> Appeals to the Court of Cassation in cases of violations of the law shall always be allowed against sentences and measures affecting personal freedom pronounced by ordinary and special courts.

These set of principles are usually integrated by Article 24, which generally states that:

> Anyone may bring cases before a court of law to protect their rights under civil and administrative law.
> Defense is an inviolable right at every stage and instance of legal proceedings.
> The poor are entitled by law to proper means of action or defense in all courts.
> The law shall determine the conditions and forms regulating damages in case of judicial errors.

Id. art. 24.

shared principles that guide due process in civil cases are not exclusive to the adversarial system, which is well-known in the Anglo-Saxon region, particularly in U.S. procedural law.[27] As demonstrated, these principles naturally transcend various civil justice systems, whether adversarial or inquisitorial, challenging the classical dichotomy that has traditionally, but to some extent mistakenly,[28] been presented.

Looking at it from another perspective, this research endeavor can adopt this commonly held viewpoint to scrutinize country-specific technical regulations. Within a comparative framework, it can delve into how these regulations have addressed and adhered to the principles of due process. In doing so, it contributes to the evolution of comparative law in its contemporary and essential role in shaping policies and guidelines for reforming domestic laws of civil procedure to pursue the evolving needs of society and economy.

B. *RIGHTS VS. REMEDIES?*

Traditionally, the distinction between rights and remedies underpins the traditional understanding of civil law and common law, emerging from the role of law in safeguarding rights and yielding remedies. Civil law systems protect individual rights as delineated by legislative frameworks. In contrast, common law systems empower courts to use their judgments to adjust existing legal norms in response to profound societal shifts. Civil law courts are characterized as declarative, with remedies seen as legislative solutions to specific issues. In contrast, common law courts are *perceived* as inventive in their remedies, providing a judicial response to evolving circumstances of society and economy.[29]

However, the foundational cornerstone of global civil justice might be aptly characterized as the progressively diminishing gap between "rights and remedies", a traditional distinction between the legal traditions of common law and civil law. It is a widely acknowledged view among comparative legal scholars that a significant distinction between common law and civil law, although sometimes overstated, is that common law systems are often perceived as evolving through judicial decision-making. In contrast, European civil law systems are entirely constructed around the legal provision of individual rights.[30]

This overarching assumption needs more complete accuracy. Instead, it necessitates a redefined framework for the conventional dichotomy.

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[27] *See* Kuckes, *supra* note 15, at 11–12.
[28] *See* discussion *infra* Section II.D.
[29] *See* Joseph Dainow, *The Civil Law, and the Common Law: Some Points of Comparison*, 15 AM. J. COMPAR. L. 419, 427 (1967) ("[W]hile the common law starts with a case-law basis it also includes legislative encroachments, and while the civil law starts with a legislative basis, it incorporates developments of case-law."). For a recent critical approach to this specific topic, *see* Cesare Cavallini & Marcello Gaboardi, *Rights vs. Remedies: Towards a Global Model*, 28 U.C. DAVIS J. INT'L L. & POL'Y 171 (2022) [hereinafter *Rights vs. Remedies*].
[30] *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 23 (1991). *See* Dainow, *supra* note 29, at 423–24.

To begin with, it is crucial to start with the European civil law context, which a presumed clear distinction between the rights system and remedies system has distinctly influenced.[31] It is a common assumption in civil law that *remedies hinge upon rights*. This assumption implies that an individual holding a right is entitled to seek judicial relief;[32] and it is based on the preliminary categorization of the civil law system as a framework that arranges rights according to established legal provisions delivered by the legislature, government, or administrative agencies.[33] In other terms, "[r]ights – or better yet, their legal consecrations – logically and chronologically precede remedies."[34] While the assumption that remedies depend on rights has a historical reason, due to the classical *codification* of the civil law systems[35] as a complete set of written legal provisions that can be brought before a court,[36] in the civil law context, remedies directly enforce the rights that are considered worthy of being protected by those codes. The judicial remedy concretely conceives what abstractly is provided by the law as individual rights.

Hence, also the function of the claim and the inherent civil proceeding structure is according to that assumption: legislative bodies have the authority to define individual rights and establish their legal frameworks, while courts are responsible for ascertaining whether a particular right, as outlined by the law, exists or is absent in a specific case.[37] Nevertheless, a widely held view asserts that the court's role is more inclined toward conservatism than innovation within the civil law framework. This perception stems from the court's obligation to interpret and uphold rights by the legislature's abstract and pre-established framework. The court's conservative function becomes evident when adjudicating factual and legal matters pertinent to a lawsuit. This arises from the court's primary focus on preserving the current legal system rather than introducing radical changes.[38]

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[31] *See* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1985).
[32] *See generally* Matthias Ruffert, *Rights and Remedies in European Community Law: A Comparative View*, 34 COMMON MKT. L. REV. 307 (1997).
[33] *See* MARTIN VRANKEN, WESTERN LEGAL TRADITIONS: A COMPARISON OF CIVIL AND COMMON LAW 16, 21 (1st ed. 2015).
[34] Cavallini & Gaboardi, *Rights vs. Remedies*, *supra* note 29, at 176–77 (citing JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007) and Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983)).
[35] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 34, at 27.
[36] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 456 (2000). *See also* Gewirtz, *supra* note 34, at 588(who elucidates that civil law systems exhibit a closely knit structure defined by the interplay between written codified laws and legislative mandates).
[37] *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies-And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).
[38] *See generally* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241 (1985); *see also* Dainow, *supra* note 29, at 425. It is worth noting that the civil law courts' role of merely applying legal rules was the direct consequence of the Montesquieu doctrine called "mouthpieces of law", *see* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Thomas Nugent trans., Hafner Publ'g Co. ed. 1949) (1748). *See also* Abram Chayes, *How Does the Constitution Establish Justice*, 101 HARV. L. REV. 1026, 1027 (1988) ("The judge was the mouthpiece of the law, nothing more**,** confined to the mechanical task of announcing consequences in particular *cases*." (emphasis added)).

However, even though the formal role of courts within the civil law framework expanded under the declaratory judgment doctrine, commonly regarded as the "mouthpieces of the law", in practice, the frequent adjudication inevitably entailed a substantial and discretionary interpretative function concerning the current legal provisions.[39] This interpretation must address every legal issue presented to the court, often not solved by the specific legal provisions since legal provisions seem inconsistent with other rules or, vice versa, the single case needs the concrete evaluation of general clauses, such as unfairness or good faith, in determining the meaning of the law as generally laid down by the legislature.[40]

Given the unexpectedly rapid pace of social changes, courts have expanded their role in addressing unprecedented legal issues and compensating for the legislature's slower adaptation. Courts predominantly utilize constitutional principles as the primary tool for interpreting the law in similar cases,[41] since the case cannot be decided under the existing legal provisions, and it needs to be approached differently but according to the general concepts provided by the applicable constitution. Definitively, whenever legal rules cannot resolve a new legal issue, or the legal issue exists. Still, it is controversial and unprecedented; the court's decision is driven by implementing constitutional principles: the so-called "'*constitutionally oriented interpretation*' of the existing statutory law."[42] made by the inferior courts on their own, permitted by the same constitutional court.[43]

The approach to deciding cases arising from social changes, driven by the judiciary's imperative to address evolving circumstances, not only extends to the safeguarding of citizens' expectations beyond the individual rights outlined in statutory law but is influenced, to a certain degree, by practical considerations. This shift has gradually steered civil law courts towards redefining the traditional dichotomy between rights and remedies. The judicial protection appears no longer a chronological outcome of a judicial declaration of existing rights: remedies, on the contrary, stem from the "appropriate judicial reaction to overwhelming social changes."[44]

While scrutinizing the continental law of precedent alongside the common law doctrine of stare decisis may aid in bridging the gap within this dichotomy, as explained in the following paragraph, it is crucial to emphasize that the reduction of this gap extends to common law systems as well, particularly in the context of the U.S. legal framework. While the issue

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[39] *See generally* Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 CATHOLIC U. L. REV. 1 (1985); *see also* Cass R. Sunstein, *There Is Nothing That Interpretation Is*, 30 CONST. COMMENT. 193 (2015).
[40] *See* Frederick Schauer, *Constructing Interpretation,* 101 B.U. L. REV. 103, 115–16 (2021); Chris Willett, *General Clauses, and the Competing Ethics of European Consumer Law in the UK*, 71 CAMBRIDGE L.J. 412, 412 (2012).
[41] *See* Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 749 (1995).
[42] Cavallini & Gaboardi, *Rights vs. Remedies*, *supra* note 29, at 189 (quoting Corte. cost., 27 luglio 1989, n. 456, Foro it. 1990, I, 18 (It.)) (emphasis added), including footnotes, especially nn. 135–44, regarding a concrete illustration of how this methodology is applied in making decisions in cases that fall outside the direct protection of statutory law.
[43] Regarding the Italian system, *see* Corte cost., 27 luglio 1989, n. 456, Foro it. 1990, 1, 18 (It.).
[44] *See* Cavallini & Gaboardi, *supra* note 29, at 194.

might be one of proportion, it is undeniable that precedents continue to bear substantial influence on legal frameworks despite the inevitable expansion of statutory law in the U.S. due to societal complexity. Consequently, both statutory law and precedents, albeit in different proportions, tend to align towards a global model of remedial law, emerging as the preferred approach to address new cases arising from the evolving societal demands for protection.

C. *THE ROLE OF THE FIRST HEARING*

The role of the first hearing, one of the critical aspects defining the enduring impact of the dichotomy between common law and civil law systems, is unquestionably linked to the framework of civil proceedings and the pivotal role played by the first hearing before the judge. It reflects the divergent structure of the civil proceeding, also known as *adversarial* in the Anglo-Saxon legal tradition and *inquisitorial* in the civil law context. The contrast between the adversarial and inquisitorial models of civil justice is widely recognized in comparative discussions.[45] However, there is a need to revisit and clarify what this dichotomy truly signifies and implies within the broader context of global civil justice.

Generally speaking, the contrast between the two systems is traditionally rooted in the judge's function during the legal process and in resolving the case. The adversary system is conventionally viewed as an adjudication system where the involved parties govern procedural actions and the adjudicator plays a primarily passive role.[46] On the contrary, an inquisitorial system emphasizes the significant role of the judge in overseeing and directing the trial proceedings.[47] This dichotomy has reflected the differences, more than the commonalities, between the Anglo-Saxon legal systems and the Continental ones, and the most relevant difference has been marked by the interpretation of the purported *principle of concentration*, particularly among Anglo-Saxon scholars.[48]

It is essential to highlight the distinct perspectives from which the principle of concentration, extending beyond the literal interpretation of the

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[45] *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3–6 (1986) [hereinafter THE FACES OF JUSTICE]; Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMPAR. L. REV. 1 (2011); Linda S. Mullenix*, Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4 (2001).

[46] *See* DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 74; *see also* Franklin Strier, *What Can the American Adversary System Learn from an Inquisitional System of Justice*, 76 JUDICATURE 109 (1992); *see also*, recently, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2d ed. 2019).

[47] *See, e.g.*, Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); Benjamin Kaplan et al., *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443 (1958).

[48] *See, e.g.*, OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 5 (2d ed. 2017) (noting that "[t]he concentration, orality, and immediacy of procedure, especially at the proof taking stage, are certainly related to the presence of the jury, as well as a passive role for the judge and the markedly adversarial nature of the proceeding."); *see also* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 524, 529–30 (2012); Benjamin Kaplan*, Civil Procedure-Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 419 (1960).

idiom, has been interpreted by both legal traditions.[49] Despite these varying interpretations, the principle maintains consistent significance under the consideration of U.S. scholars. It plays a similar role within the framework of the common law civil proceedings, and ultimately only in the U.S.

Contrary to this perception, the global perspective, which encompasses Continental rules and traditions, presents a different reality. It becomes evident that, since the Codification Era, the emphasis on ensuring concentration, immediacy, and orality has been vital to secure the most precise case decisions. This emphasis has been reinforced by the structure of civil proceedings, even in the absence of jurors, and in the formal separation between pretrial and trial phases.[50] Furthermore, the initial hearing, or the preliminary conference (akin to U.S. terminology), has increasingly become a distinguishing feature in modernizing the civil procedural model within the Continental context.[51] Simultaneously, the U.S. provision addressing this pivotal issue (Rule 16 of the Federal Rules of Civil Procedure)[52] has demonstrated a growing significance of the pretrial conference or even multiple such conferences as needed. These conferences are crucial for judges to efficiently manage claims and the evidence gathered during the discovery phase. They offer opportunities to resolve lawsuits through alternative means beyond jury trials, such as summary judgment and judicially-led settlements.[53] Hence, anyone might affirm that the principle of

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[49] Traditionally, Anglo-Saxon scholars have regarded the principle of concentration as a unique characteristic of common law systems, attributing its emergence to the pivotal role of jurors in England's courts of equity. Consequently, this historical principle, which initially implied that jurors made decisions based on a single hearing of evidence, evolved into a distinctive feature of civil proceedings structured by both the pretrial phase and trial by jury. Notably, it remains a fundamental aspect of the U.S. civil process framework. *See* Langbein, *supra* note 48, at 529; *see also* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMPAR. L. 277, 293 (2002):

> A concentrated trial is virtually mandatory when a group of lay people is required to take time out of their work lives to hear and help decide a dispute, but is hardly necessary when the facts will be heard by a professional judge who will be at the court daily.

[50] More specifically, *see* Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: towards a Global Semi-Adversarial Model*, 34 FLA. J. INT'L L., (forthcoming 2023–24):

> More specifically, the principle of concentration indicates that a case should be treated in a single hearing[,] or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded. . . . [T]he principle of immediacy refers to a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof. Finally, the principle of orality means an efficient, swift, and simple method of procedure, based essentially on an oral trial in which the adjudicating body is in direct contact with the parties (not only with their counsel) and the witnesses.

according to GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE [FOUNDATIONS OF CIVIL PROCEDURAL] 371–72 (1934).

[51] *See* Cesare Cavallini & Stefania Cirillo, *The Americanization of the Italian Civil Proceedings?*, 57 N.Y.U. J. INT'L L. & POL. (forthcoming 2024), on the reform of the 2022 Italian civil justice, and the full-renewed framework of the first hearing, in so resembling the U.S. model. *See also infra* pp. 20–22.

[52] *See* FED. R. CIV. P. 16.

[53] *See* Langbein, *supra* note 48, at 542.

concentration today represents the primary tool to guarantee the "day-in-court,"[54] equivalent to the trial by jury phase. On the contrary, it is widely recognized that this principle shapes the course of the pretrial phase, by delegating managerial authority to the judge to delineate the lawsuit's parameters and guide it towards a swift and efficient resolution.

The 2022 Italian reform on civil justice serves as tangible evidence of the redefined significance of the principle of concentration, now recognized as a universal foundation within civil justice systems, transcending the unique procedural frameworks of specific countries. The reform introduces a novel element to the Italian legal system by assigning a distinct role to the initial hearing, which deviates from the conventional Continental model. Before the reform, Italian legal proceedings lacked a clear distinction between pretrial and trial phases. Parties were permitted to introduce facts and evidence right from the outset of the proceedings, subject to specific time constraints stipulated by the Code of Civil Procedure, which expired as the proceedings unfolded. The process commenced with introductory pleadings, followed by the inaugural hearing, during which parties typically sought permission to submit up to three pleadings, a request usually granted by the presiding judge.[55]

Since the first hearing was void, the 2022 reform alters the function of the first hearing, aiming to elevate it as the primary forum for discussing the claims. The first hearing signifies the point at which the judge formally enters the proceedings to address the dispute and explore potential solutions.[56] These solutions may encompass traditional adjudication and alternative approaches such as judicially guided settlements or expedited resolution methods.

Therefore, under the reform, the first hearing takes place, and the judge steps into the scenario, acknowledging the lawsuit's parameters, but only after the parties have submitted their pleadings. During this hearing, the judge is presented with various options, which are justifiable given the comprehensive understanding of the claim at this stage. One option is to arrange one or more hearings to examine witnesses and engage with the parties, following a review of the admissibility and relevance of the parties' oral evidence requests. Alternatively, the judge may facilitate a judicial settlement between the parties.[57] In another scenario, the judge can opt for

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[54] DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 51.

[55] The parties could outline or revise their claims and defenses in the initial pleadings, which had to be filed within 30 days of the judge's order. In the subsequent round of pleadings, due within 30 days after the expiration of the first set, the parties could respond to the initial pleadings and introduce requests for evidence. In the third round of pleadings, to be submitted within 20 days following the expiration of the second set, the parties could request counterevidence to contest the evidence presented by the opposing party in the second set of pleadings. These successive pleadings delineated the scope of the dispute regarding factual matters, documentary evidence, and requests for non-documentary evidence. *See* CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], § 183, ¶¶ 1–3 (It.), *in* SIMONA GROSSI & CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 203 (2010).

[56] Specifically, the 2022 reform mandates that, during the initial hearing, the parties must establish the final set of facts to be proved and claims, a task that the first hearing can fulfill because it also necessitates that the parties define the parameters of the facts, evidence, and claims before the hearing begins.

[57] *See infra* Section II.G.

summary adjudication[58] or, if the case is prepared for a decision, initiate the conventional adjudication phase, which involves a final exchange of written submissions between the parties.

Hence, the essence of the new structure hinges on the comprehensive and definitive resolution of the factual aspects of the dispute and the corresponding requests for relief before the first hearing. While it may not appear groundbreaking or novel compared to the traditional U.S. pretrial phase guided by the Federal Rules of Civil Procedure and its provision for a preliminary conference, it does mark a distinct shift from the perspective of the Italian judge.

However, the pivotal aspect is the expanded significance assigned to the first hearing under the reform, and it is this alteration that draws parallels with the outcomes of the U.S. pretrial phase. Without a doubt, in both systems, the most influential tool in this transformation has been the broadened scope of the preliminary conference—the first hearing, and the expanded role and authority of the judge during and following this crucial event. This shift emphasizes the growing importance of managerial judging and the associated authority granted to the pretrial judge to succinctly encapsulate pertinent facts, evidence, and legal arguments.[59]

Therefore, it is inaccurate to label the U.S. pretrial phase as purely adversarial, given that the judge's active involvement in discovery control and the pivotal role of the preliminary conference extends beyond merely preparing for the trial phase. In most cases, this phase is where disputes are resolved without resorting to conventional adjudication and formal trials.[60]

Moreover, this expanded focus on the central role of the first hearing is further substantiated by the German model of the first hearing and the ELI/UNIDROIT Model European Rules of Civil Procedure. [61] Both models, with the first representing established rules and the second embodying an unofficial legal framework, establish a civil litigation structure emphasizing a *two-phase system*. This system involves a first hearing of substantial density, with a primary focus on the pivotal role of the judge in devising swifter methods for resolving the dispute.

Yet, German law provides that the civil proceeding structure is dominated by a well-prepared "*main* hearing" (*Haupttermin*),[62] by which the

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[58] *See infra* Section II.F.

[59] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985).

[60] *See* Cavallini & Cirillo, *The Americanization of the Italian Civil Proceedings?*, *supra* note 51. We tried to demonstrate that today even the U.S. model of civil proceeding (as defined by the 1938 Federal Rules of Civil Procedure) is switching to a quite different *semi-adversarial* model, in so converging towards a spontaneous but global outreach of the new predominant trend of the civil justice model.

[61] *See infra* Section II. It is important to highlight that when it comes to more intricate matters, specifically within the context of the judge's responsibilities in managing legal proceedings, the framework proposed by the ELI uniform rules, while categorized as a form of soft law, could indicate a growing trend towards a more comprehensive global civil justice model.

[62] *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 272, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0999 [https://perma.cc/7XHU-GRYQ] (Ger.):

judge, after hearing the parties, can take some different determinations to put the dispute in the decision's pipeline. Similarly, the uniform civil proceeding model embraced by the ELI is founded on a two-phase system, albeit with a greater emphasis on flexibility, contingent upon the complexity of the specific case.[63] Nonetheless, this standardized model places its primary focus on a "final hearing", effectively supplanting the German "main hearing" model, and is designed to guide the resolution of disputes through various procedures established by the judge's case management. [64]

Conclusively, one can say that a more universally acknowledged element of the global civil justice framework shall be symbolized by the growing significance of the first hearing, which, although named differently in each country's specific civil procedure laws, plays a vital role in shaping the trajectory of the proceedings and the end-types dispute resolution, balancing effectiveness with efficiency and following the due process duties, but seriously looking at a quick dispute resolution.

D. *FACT-FINDING AND DISCOVERY*

As the civil litigation framework gradually adopts a more globally semi-adversarial approach, variations persist in the fact-finding and discovery phase across different legal systems. This particular aspect presents the most significant challenge to comprehensively understanding the fundamental principles of global civil justice despite some persistent differences in technicalities and traditions. Although the traditional contrast between the adversary and inquisitorial models in civil proceedings can be linked to a shared sense of values and policies, reconciling these differences remains complex, especially in fact-finding and discovery.

This chapter assesses whether the existing divergence in procedural frameworks for discovering and taking evidence, as we can observe between the adversarial justice model and non-adversarial approaches (representative of the contrast between the Anglo-Saxon and Continental systems), should be redefined and partially aligned. This evaluation also takes into account the 2022 Italian reform of civil justice.

1. *Adversarial vs. Inquisitorial Model?*

(1) As a general rule, the legal dispute must be dealt with and terminated in a hearing for oral argument that has been comprehensively prepared for (main hearing).
(2) The presiding judge shall either make arrangements for an advance first hearing at which oral argument is to be heard (section 275) or shall have preliminary proceedings conducted in writing (section 276).
(3) The conciliation hearing and the oral argument should be arranged as early as possible.
(4) Matters entailing the vacation of premises are to have priority and shall be conducted on an expedited basis.

[63] *See also* Remo Caponi, *Le regole modello europee Eli-Unidroit sullo sfondo della riforma italiana del processo civile*, 76 RIV. TRIM. DIR. PROC. CIV. 717, 751–53 (2022).
[64] *See* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE Rules 61–64, *supra* note 8, at 8.

Firstly, it is necessary to establish the distinct fundamental structures usually employed in both legal systems to shape the so-called *discovery phase*, as they are essentially shaped above the dichotomy between the adversarial model and the inquisitorial one. The first is the legal realm of the lawyers, since it conventionally stems from an adjudicative framework, wherein the involved parties wield control over procedural actions. At the same time, the adjudicator typically assumes a passive role.[65] Furthermore, the adversarial system is characterized by distinct phases: the pretrial and the trial. During the trial phase, the jury holds the responsibility for decision-making. The jury stands as a distinctive feature of "adversarial legalism."[66]

In terms of discovery and evidence collection, this system places exclusive responsibility on the litigants and their attorneys to pursue evidentiary material, ready it for trial, and present it in court without direct involvement from the judge.[67]

On the contrary, an inquisitorial system highlights the judge's significant involvement in overseeing and managing the trial process. There exists no difference between pretrial and trial phases: a claim denotes a singular event, the trial, which is organized across multiple hearings, even if the recent 2022 Italian civil justice reform moves differently, assigning to the first hearing a crucial and, in some cases, exclusive role.[68] In Continental Europe, the concept of a jury trial is absent; the sole decision-maker in this context is a judge.[69] Regarding the initial stage of a legal case and the process of gathering evidence in an inquisitorial system, the decision-makers assume a more comprehensive role collecting and evaluating evidence.

However, this classical division is noteworthy and deserves further clarification. The primary distinction arises from the structural differences in civil proceedings, with the civil law framework appearing to be more pertinent in comprehending the intricacies of the matter in question. Indeed, it is essential to recognize that within every Continental system, rooted in the civil law tradition, there exists multiple significant stages for disclosing and discovering information. Hence, a close link exists between the initial and subsequent stages, primarily involving pleading and responses. Here, despite certain country-specific variations and the absence of a clear demarcation between pretrial and trial stages, parties can introduce new facts and corresponding evidence to bolster their claims.[70] The judge has been

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[65] *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 74 (1997); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 4–8 (2d ed. 1977); Robert W. Millar, *The Formative Principles of Civil Procedure*, 18 ILL. L. REV. 1, 9–24 (1923); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109, 109 (1992); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2d ed. 2019).
[66] *See* KAGAN, *supra* note 65, at 127.
[67] *See* DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 74. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381 (1982) (explaining the historical pattern of the limits placed on the judges by the adversarial model).
[68] *See infra* Section II.D.
[69] *See* Strier, *supra* note 65, at 109–11.
[70] *Id.* For further technical details, mainly on the German and Italian Code of Civil Procedure, *see* Cesare *Cavallini* & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, 34 FLA. INT'L L.J. 6–9 (forthcoming (2023–24)). Even after the

involved since the beginning of the process, and it justifies the role taken by the judge in selecting the non-documentary evidence and counterevidence requested by the parties during the previous phases. The judge's active role in collecting admissible and relevant evidence, and their task in evidence-taking, need some subsequent hearings; this task is deeply rooted in the Continental systems, different from the Anglo-Saxon adversarial model.

Therefore, it is crucial to emphasize the existing disparities between these two systems, regarding, for example, taking evidence from a witness presented by the parties: in the U.S. system, for instance, the lawyer has the power to prepare a witness (and expert), and can scrutinize them directly through cross-examination.[71] Conversely, under Continental regulations, the judge directly gathers evidence from witnesses and experts, occasionally allowing certain lawyer activities in cross-examination, always with prior permission from the judge.[72]

Ultimately, is this difference in the fact-finding process, regardless of the civil proceeding structure, substantial enough to hinder the establishment of a global pattern across legal systems?

2. *The Fact-Finding Semi-Adversarial Model as a Global Tendency*

The response to the preceding question is sophisticatedly pessimistic. The essence of this statement extends beyond simply comparing the two legal systems and their traditional dichotomy between adversarial and inquisitorial systems. The argument would have been approached differently if it were solely about this comparison.

The traditional dichotomy needs to be revised; it has merely served as a characterization of both systems, and frequently, has represented an oversimplified, irreducible contrast that hampers a more comprehensive vision and understanding of the subject matter. However, discussing an adversarial proceeding essentially involves delineating the distinction between pretrial and trial-by-jury systems, regardless of whether civil or criminal cases are at hand. In simpler terms, it signifies that the increased involvement of the parties (primarily the lawyers) stemmed from the framework of civil proceedings. The resulting decreased participation of the judge is a direct outcome of this structure. Jurors were instituted to hear all factual issues and evidence orally during the proceedings. They were held responsible for adjudication during a particular stage of the process—the trial phase—following the "dialectical paradigm of truth-seeking"[73] to the fullest extent. In this phase, parties and lawyers could influence the course

2022 Italian civil justice reform, the dual-stage process of presenting facts and evidence persists, despite alterations to the civil procedural framework and the enhanced significance of the initial hearing. *See infra* Section II.D.

[71] *See* FED. R. CIV. P. 26, 27, 30.

[72] *See* CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], art. 262 (It.); DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 105–08.

[73] KAGAN, *supra* note 65, at 127.

of the proceedings and even waive procedural rules through mutual agreement.[74]

Initially, the U.S. system operated as described. However, significant changes swiftly ensued. These changes encompassed the crisis of the so-called notice-pleading, the rise of managerial judging during the pretrial phase, exerting control over the discovery phase to prevent abuse and high costs for the involved parties,[75] and a noticeable decline in the party's (and lawyers') interest in relying on jurors for adjudication.[76]

These relevant changes in the conceptualization and practice of the civil justice system in the U.S., together with the UK Lord Wolff civil justice reform in the late '90s [77] have unavoidably broken the traditional dichotomy between adversarial and inquisitorial systems as the main prerogative of the fundamental gap between the two legal families.[78]

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[74] *Id.*

[75] *See* Cesare Cavallini, *Determination of the U.S. Pleading from the Civil Law Perspective*, 21 WASH. U. GLOB. STUD. L. REV. 155 (2022).

[76] *See* Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 559 (2017); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 27 (2017); Langbein, *supra* note 48; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

In the U.S., less than 1% of the filed civil cases are resolved through a trial at the federal level. *See U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2018*, DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf [https://perma.cc/RF6Z-544W] (in 2018–19, just 0.9% of federal civil filings reached trial); *U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12s-Month Period Ending September 30, 2021*, www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2021.pdf [https://perma.cc/Z87Z-3T2N] (in 2020–21 just 0.5% of federal civil filings reached trial).

See Herskhoff, *supra* note 2, (manuscript at 6) (mainly considering how, in reality, "many have argued that US procedure "is much the worse . . . in normative terms" because of its exceptionalism, underscoring the expense of US litigation and the litigiousness of American legal culture.").

[77] *See* John A. Jolowicz, *The Woolf Report and the Adversary System*, 15 CIV. JUST. Q. 198 (1996); more recently, *see also* JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS 107 (2014).

Jolowicz's work likely explores the implications of the Woolf Report, a significant review of the civil justice system in England and Wales conducted by Lord Woolf. This report led to substantial reforms in the late 1990s to enhance access to justice, efficiency, and fairness within the civil justice system. Jolowicz might discuss how these reforms affected the traditional adversary system, a cornerstone of the English legal system, and whether they altered the balance between adversarial and inquisitorial elements.

Sorabji's book likely provides an updated analysis, focusing on the impact of the Woolf reforms (initiated by Lord Woolf) and subsequent reforms led by Lord Jackson. The book may delve into the changes in civil justice procedures, case management, costs, and access to justice resulting from these reforms. Specifically, it might explore how these reforms have affected the traditional adversary system and whether they have introduced elements more aligned with an inquisitorial approach, given the overarching aim of making the system more efficient and user-friendly.

Both Jolowicz's article and Sorabji's book are likely valuable resources for understanding the evolution of the English civil justice system, how it has responded to the need for reforms, and the impact of those reforms on the *traditional notions of adversarial proceedings*. They may also shed light on whether these changes have bridged the gap between the adversarial and inquisitorial approaches in pursuing better justice administration.

[78] It is worth summarizing that the adversarial system, primarily employed in common law countries like the United States, emphasizes the role of opposing parties that present their cases before an impartial judge or jury. This system relies heavily on the parties gathering evidence, examining witnesses, and advocating for their positions.

On the other hand, the inquisitorial system, more commonly found in civil law jurisdictions like many European countries, features judges taking a more active role in investigating and

However, with evolving legal reforms and changing practices, many legal systems have adopted elements from both systems to create a more flexible and efficient approach. For instance:

> *a. Managing Judge and Case Management Reforms:* The U.S and UK have implemented the managing judge and case management reforms aimed at streamlining procedures, encouraging pre-trial settlements, and ensuring cases move through the system more efficiently. These reforms often involve active judge involvement in case management, particularly in the discovery phase.[79]
> *b. Evidence Gathering Procedures:* While adversarial systems historically placed the burden of evidence gathering on the parties, modern reforms have seen judges play a more active role in managing evidence and fact-finding procedures. Many jurisdictions have introduced changes in procedural rules to encourage cooperation

determining the facts of a case. The judge plays a more proactive role in examining evidence and questioning witnesses.

[79] The idiom and the idea of a managing judge in the U.S. has grown in the early '80s, principally from the iconic article written by Judith Resnik, *see* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982), even partially criticizing the phenomenon, already at stake in those years. The U.S. legal system has evolved from its purely adversarial nature to reflect aspects of the Continental civil law model. This shift is evident during different stages of the pretrial phase, where judges are increasingly involved in managing the discovery process. This increased judicial participation aims to address criticisms of lawyers engaging in what is referred to as a "fishing expedition", which had led to excessive costs over time. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994). It is worth noting, also, that the so-called "abuse of discovery" has been one of the essential reasons raised by the U.S. Supreme Court in transforming the pleading's determination. *See* Cavallini, *supra* note 75, at 166.

In conclusion, U.S. judicial activism has yet to focus primarily on penalizing excessive discovery. Instead, it has influenced the way legal claims are presented. This influence resembles the Continental judicial practice of identifying claims and reshaping U.S. pleading content. As a result, it establishes a significant boundary on party discovery within the U.S. legal framework. The amendments introduced in 2006 and 2015 that pertain to various elements within the discovery process, alongside the overarching framework of Rule 26(f) that highlights the importance of pretrial discovery plans, collectively complement Rule 16 as managerial instruments. These tools aim to streamline case proceedings, fostering an environment conducive to rendering decisions based on the intrinsic merits of the case. *See also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

Moreover, the importance of judicial management within the reformed English legal system, particularly in cases of substantial value and complexity, underscores the pivotal role of the judge in guiding the process right from its inception. Consequently, the English legal process now bears a resemblance, in broad terms, to the initial crucial involvement of judges seen in many Continental systems. Similar to the United States, the downsizing of the traditionally adversarial-based Anglo-Saxon legal system undeniably reflects a gradual convergence with aspects of the Continental legal tradition. *See, e.g.*, ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES AND PRACTICE 277 (4th ed. 2021).

> between parties [80] and early disclosure of evidence,[81] borrowing aspects from adversarial and inquisitorial systems.

As a result of these reforms and changes, the strict dichotomy between adversarial and inquisitorial systems has become less pronounced. Legal systems now often incorporate elements from both approaches to better serve the goals of justice, efficiency, and fairness. The traditional divide between these systems is increasingly seen as a spectrum rather than a rigid binary classification.

Therefore, if we consider the so-called inquisitorial model, one might only perceive the Continental judge's responsibility as choosing the non-documentary evidence collected by the involved parties; [82] we can recognize that this way of proceeding is in contrast with the Anglo-Saxon system, which permits lawyers to prepare witnesses and examine them through cross-examination.[83]

Instead in the so-called adversarial model, the evidence may be deemed inadmissible if it is considered irrelevant or if it aligns with the criteria outlined in the "exclusionary rules."[84] Specifically, evidence connected to a fact relevant to proving the case is considered pertinent.[85] Apart from adhering to strict exclusionary rules, judges possess discretionary authority to exclude evidence based on regulations to prevent the admission of evidence that could undermine the fairness of the proceedings.[86]

Considering the considerations above regarding the primary role of the initial hearing on a global scale, it is crucial to note Stephan Subrin's assertions in his thought-provoking article: "Active case management in the

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[80] *See*, in the U.K., the Allocation Questionnaire and the Subsequent Allocation Hearing outlined in CIVIL PROCEDURE RULES [CPR], 26–29 (UK). These mechanisms emphasize collaboration between legal representatives and the judge, shifting away from the conventional adversarial model. Instead, they underscore the judge's managerial role in ascertaining the appropriate trajectory for the lawsuit through cooperative engagement among all parties involved. The potential triple allocation of lawsuits into small-track, fast-track, and multi-track hinges on the proactive involvement of the judge. This role supports the adversarial role the parties' lawyers assumed, particularly concerning pre-action disclosure. The Civil Procedure Rules (CPR) entail crucial responsibilities for the judge, including issuing orders, providing directions, and overseeing case management, all aimed at guiding the lawsuit toward the most efficient resolution possible.

[81] In the United States, early disclosure of evidence refers to the procedure wherein parties engaged in a legal matter are either mandated or opt to share pertinent information and evidence at the outset of legal proceedings, sometimes even before formally initiating a lawsuit. This practice is intended to foster openness, ease dispute resolution, and streamline legal proceedings by enabling each party to access relevant information promptly. Early disclosure typically includes exchanging documents, witness statements, expert reports, or other materials crucial to the case. Its purpose is to encourage fair negotiations founded on comprehensive information, potentially leading to settlements and minimizing prolonged litigation. The specific protocols and guidelines governing early disclosure of evidence may differ among jurisdictions and might be governed by court regulations, local practices, or agreements among the involved parties.

[82] For instance, the Italian judge needs to assess whether the facts that the witness is required to testify about are crucial for resolving the case and hold legal relevance (for example, the witness is unable to testify about contracts exceeding a value of 2.58 Euros) CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], art. 244 (It.); CODICE CIVILE [C.c.] [CIVIL CODE], art. 2721 (It.).

[83] *See* FED. R. CIV. P. 26, 27, 30.

[84] DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 125.

[85] IAN DENNIS, THE LAW OF EVIDENCE 5 (4th ed. 2010).

[86] *Id.* For further considerations, *see* Cavallini & Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, *supra* note 70, at 9–11.

United States, including early control of discovery in some courts, *begins to resemble the judicial control exerted in civil law countries*."[87]

Furthermore, considering that Subrin's pertinent viewpoint was expressed before the recent Supreme Court pronouncements on pleading determination and the gradual departure from the initial concept and purpose of notice pleading,[88] it is evident that the increasing limitations on liberal discovery were initially associated with notice pleading. And "the difficulty of obtaining a dismissal for failure to state a claim,"[89] aligns with the corresponding SCOTUS amendments[90] in the revised concept of plausible pleading and the streamlined procedures for motions to dismiss and summary judgments.

The traditional dichotomy between adversarial and inquisitorial systems is reshaped, specifically regarding the fact-finding and discovery phase. Indeed, the ongoing discussion among U.S. scholars regarding the existing dichotomy eloquently shows that the issue encompasses the judge's managerial function in litigation, the credibility of the implausible pleading doctrine, the interpretation of the concentration principle, and, lastly, the significance of pretrial efficiency and efficacy as the best output of a litigation within the adversarial context. Our pivotal findings on these matters reaffirm that judicious utilization of a judge's managerial authority does not contradict a process that allows parties to engage in advocacy. It is crucial to rectify the distortions within this adversarial framework.

As I have outlined in the chapter on the global sense of the first hearing, due also to the recent civil justice reform in Italy (a typical continental and inquisitorial system, from the Anglo-Saxon viewpoint), the early stage of a lawsuit, involving the collection of evidence and a broad obligation of disclosure, does not inherently create a distinct separation between pretrial and trial phases. Stated differently, the practical function of a thorough initial phase we outlined can be carried out as an ongoing process. Additionally, we demonstrated that a preliminary phase predominantly managed by the involved parties does not contradict a system where the judge assumes a significant role in overseeing the lawsuit, particularly regarding methods of evidence collection.

Indeed, while there has been a move towards moderating adversary frameworks by incorporating a more active role for judges in the United States, this evolution has not forsaken the traditional adversarial nature inherent in the Anglo-American legal procedure, which primarily revolves around the lawyers' contest, albeit under judicial supervision.

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[87] Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 306 (2002) (emphasis added). The author reruns some common law countries' specific rules of fact gathering and evidence, and underlines how, in most cases, the court allows judicial permission or control of documents, discovery, and non-parties' depositions (Canada and Japan, for instance). *See also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMPAR. L. 153, 185 (1999); Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMPAR. L. 125 (1999).

[88] *See infra* p. 26 and note 76.

[89] Subrin, s*upra* note 87, at 311.

[90] *See infra* note 122–23.

Conversely, the emerging autonomy of attorneys in managing the preliminary phase before the judge's direct intervention reflects a characteristic of the Continental non-adversarial system. Nevertheless, this novel approach has yet to consider the judge's involvement in overseeing the lawsuit. Instead, it has shifted the judge's participation to a subsequent stage, his crucial role in the first hearing differently than in the past.

A novel system, termed "semi-adversarial", has surfaced, affirming the compatibility of these two distinct structures.

A global new semi-adversarial system is now at stake.

E. *JUDICIALLY-LED SETTLEMENT*

The increasing alignment of the judge's role in both legal systems, while some distinctions persist in the structure of civil proceedings, is particularly marked when we observe the rising prevalence of in-court settlements as a common way to resolve disputes.[91] What sets in-court settlements apart from other mechanisms that encourage agreements instead of formal adjudication, such as mediation, is the ongoing involvement of the judge in steering the resolution of the dispute. In this scenario, the judge assumes a dual role as a facilitator of the settlement and the ultimate decision-maker.

A global trend for in-court settlements stems from the recent Italian civil justice reform. While this reform implements the opportunity to reconsider the convergence of systems, putting into action the revised role of the initial hearing or preliminary conference,[92] the renewed Italian system has strengthened the judge's ability to facilitate settlements by instituting a procedure after defining the dispute's boundaries, similar to the practice in the U.S.[93]

Specifically, a provision titled "the conciliation attempt" provides that the judge, upon request of the parties, must schedule a hearing to discuss the possibility of settlement.[94] Moreover, under the provision titled "judge's conciliation proposal", the judge, during the first hearing or until the taking of evidence ends, may outline a settlement proposal and invite the parties to consider it, based on the nature and the value of the dispute, and only if the subject of the lawsuit allows easy and prompt legal solutions.[95] The Italian reform bolstered in-court settlements through two fundamental changes.

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[91] *See*, recently, Cesare Cavallini & Stefania Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, 2023 J. DISP. RESOL. 52 (2023).
[92] *See infra* Section II.D.
[93] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459, 459 (2004); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEG. STUD. 949 (2004); ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); Langbein, *supra* note 48, at 529; John H. Langbein, *The Demise of Trial in American Civil Procedure: How it Happened, is it Convergence with European Civil Procedure*, *in* CORNELIS H. VAN RHEE & ALAN UZELAC, TRUTH AND EFFICIENCY IN CIVIL LITIGATION 119 (2012).
[94] CODICE DI PROCEDURA CIVILE [C.p.c.] [CIVIL PROCEDURAL CODE], § 185 (It.).
[95] CODICE DI PROCEDURA CIVILE [C.p.c.] [CIVIL PROCEDURAL CODE], § 185 *bis* (It.).

Initially, it mandates the personal presence of the parties during the first hearing, enabling the judge to initiate conciliation attempts. The judge can discretionally consider nonattendance by a party as a further element of evidence on the facts brought before the court by the opposite party. This amendment effectively makes the judge's conciliation attempt mandatory under Italian law.

Secondly, the reform extends the judge's authority beyond the initial hearing, allowing them to propose settlements even during the final stages of litigation, such as when referring the case to decision.[96] Comparably to the U.S. system, the distinctive aspect of in-court settlements, divergent from other methods such as mediation that encourage agreement over adjudication, lies in the continued involvement of the judge. In this process, the judge serves dual roles as both a facilitator in settling and the ultimate decision-maker for resolving the dispute.

Becoming a global outreach, the judicially-led settlement must face several issues and concerns, primarily due to the unchecked managerial role it assigns to judges. In the United States, for instance, extensive literature criticizes the advocacy for in-court settlements due to the inherent dangers and drawbacks of judges' uncontrolled managerial responsibilities. The primary reservation of the "against settlement"[97] approach revolves around the potential for coercion, wherein parties and their attorneys might feel pressured into settling due to the judge's directive powers. This influence could impede the parties' freedom to choose whether to settle, as there might be apprehension that refusal to conciliate could unfavorably impact the final decision. Another concern relates to the disparity in resources between the parties.

Since parties often possess unequal bargaining power, encouraging settlements might force the weaker party to accept an unjust deal.[98] More importantly, there needs to be more concern about how involvement in settlement activities could affect a judge's independence. This potential influence raises worries about the judge's ability to maintain impartiality and neutrality regarding the case.[99]

In this regard, it is important to highlight that, unlike the U.S. system, Italian law mandates a distinct and compulsory settlement hearing conducted in the presence of the involved parties. This hearing occurs within the trial proceedings, which inherently focus on adjudication.[100] The evolution towards a "structured" in-court conciliation signifies a mandatory aspect within civil law countries' legal processes. This conciliation is now governed by the civil procedure code, ensuring a regulated and mandatory

[96] For an in-depth analysis of these two aspects of the Italian reform, *see* Antonio Carratta & Cesare Cavallini, *Judicial settlement e modelli di tutela a confronto*, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 427 (2022).
[97] *See*, expressly, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 108 (1986).
[98] *See* Resnik, *supra* note 67, at 426–31.
[99] *See id.*
[100] *See id.*

presence in these proceedings; exploring the dialectical and competitive interplay between adjudication and in-court settlement involves analyzing their dynamic relationship within legal proceedings.[101]

Furthermore, a distinct and precise regulation that effectively oversees in-court settlement and encompasses the aforementioned aspects can solve the questions about the impartiality of the judge (the trial judge, in both systems). Indeed, if the judge is required to document the negotiation proceedings, along with the evident and persistent intent of the parties to resolve the dispute, the same judge's equidistance is assured, as the Italian law, for instance, provides a specific and autonomous rule.[102]

Apart from the recent Italian legislative reform, the backing for judicially-led settlement initiatives is expanding internationally, which seek to advocate for this type of dispute resolution on a broader spectrum. This pattern is demonstrated by the laws in Germany and France, where the trilateral negotiation of disputes before the court is widely considered suitable and shared.

The German legal system thus provides in Section 278 of the German ZPO (Code of Civil Procedure) that the judge can seek an agreeable resolution of the dispute: "In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue."[103] This occurs at the beginning of the first hearing, during which the judge reconstructs the facts alleged by the parties, considers the legal arguments of each party, and then asks both parties if they are willing to enter into a settlement agreement. At the conciliation hearing, the judge endeavors to achieve an agreeable resolution of the legal dispute, provided that efforts have yet to be made to reach an agreement out of court, or decides that conciliation holds no prospect of success. The judge discusses the circumstances, facts, and dispute status up to that point with the parties, assessing all cases without any constraints and posing questions where necessary. The appearing parties must be personally heard on these aspects.

If this initial attempt is unsuccessful, a second phase begins in which German judges reintroduce the attempt at a conciliatory solution after witness testimony has been taken. Even after a first-instance judgment has been issued and the losing party appeals, the German appellate court will again attempt to encourage the parties to reach a conciliatory agreement.

Despite all these advantages and options for resolving the dispute through conciliation, there is no obligation for the parties to reach an amicable solution. Instead, incentives are provided to reduce legal costs if

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[101] *See* Michele Taruffo, *I modi alternativi di risoluzione delle controversie*, *in* LUIGI P. COMOGLIO ET AL., LEZIONI SUL PROCESSO CIVILE 152 (1998). *See also* Cavallini & Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, *supra* note 91, at 81.

[102] CODICE CIVILE [C.c.] [CIVIL CODE], § 185 *bis* (It.).

[103] ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 278 (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1032 [https://perma.cc/6GJR-9HBV]. *See also* Rolf Stürner, *Mediation in Germany and the European Directive 2008/52/EC*, *in* LA MEDIAZIONE CIVILE ALLA LUCE DELLA DIRETTIVA 2008/52/CE 45 (Nicolò Trocker & Alessandra De Lucaeds eds., 2011).

the parties agree to the conciliation proposal. Hence, in the German legal system, mediation only partially stands as an alternative to proceedings before state judges. It thus becomes an internal or near-court mediation, merging with the same process within the civil proceeding and the judge's activities. The judge either directly assumes the role of a *facilitator* or suggests that the parties engage in a mediation process before another judge acts as a mediator. In essence, it is not a dispute resolution method used solely to address excessive delays in legal proceedings, but rather a method to achieve a more balanced and fair solution in disputes that possess characteristics, making their resolution through legal processes unsatisfactory for the involved parties.

Equally noteworthy from this perspective is the *French legal system*. Yet, among the tasks generally assigned to the judge is also reconciling the parties (Article 21 of the French Civil Procedure Code).[104] The French legal system, however, seems even more encouraging than judicially-led settlement, explicitly focusing on the so-called *mediation judiciarie*. Article 131-1 thus states, "[a] judge seized of litigation may, after [obtaining] the consent of the parties, appoint a third person who will hear them and confront their points of view to help them resolve the dispute dividing them."[105] It is the judge who sets the duration of the mediation procedure and can end it at any time upon either party's request, at the mediator's initiative, or even *sua sponte*, when it seems that the possibility of settling is compromised.[106]

Ultimately, the regulations within the realm of civil law demonstrate a shift in the judiciary's role from being an indirect coercive force in private matters to becoming a mechanism focused on restoring relationships among involved parties. Additionally, the judge's inclination to consider interests to achieve a conciliatory resolution highlights a more significant disparity between the legal response and the customary conflict resolution. This characteristic particularly exemplifies the French judicial system's diverse and inclusive justice model.[107]

Owing to the challenges brought about by globalization, nations worldwide are undertaking reforms within their civil procedural systems. These reforms primarily focus on introducing new institutions, such as Alternative Dispute Resolution (ADR), to address the inefficiencies and ineffectiveness prevalent in civil processes. Among these reforms is promoting judicially-led settlements, which stands out as an alternative tool, despite taking place within the courtroom. The widespread adoption and support for settlements indicates a global shift towards a new procedural philosophy gaining traction globally. Furthermore, approaches like judicially-led settlement, which bolster conciliation, should be viewed as

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[104] Article 21 of the French Code of Civil Procedure states, "[t]o conciliate parties is part of the mandate of the judge." CODE DE PROCÉDURE CIVILE [C.p.c.] [CIVIL PROCEDURE CODE], art. 21 (Fr.), *translation at* https://allowb.org/acts_pdfs/CPC.pdf [https://perma.cc/662F-7GBV].
[105] *Id.* art. 131.1.
[106] *Id.* art. 131-10.
[107] *See* Francois Ruellan, *Les modes alternatifs de resolution des conflits: pour une justice plurielle dans le respect du droit*, SEMAINE JURIDIQUE 135 (1999).

something other than adversaries to adjudication. Adjudication and settlements complement each other; they are not mutually exclusive justice tools. On one hand, conciliation offers advantages to the involved parties by considering the interests and requirements of the litigants. Additionally, for the benefit of society, it strives to promote peaceful resolutions and strengthen, rather than weaken, the role of legal precedents, contributing positively to reducing caseloads and assisting judges in establishing sound precedents. These robust precedents serve as guidelines for shaping the terms of future settlements.

The necessity of addressing delays, costs, and limited access to justice has underscored the importance of introducing a new primary focus within the judicial process—one that extends beyond solely pursuing the truth, moving from substantive to distributive justice as a twofold but complementary framework. Hence, the judicial system's role extends beyond solely rendering just decisions based on law and facts; it also involves equitably allocating resources among all individuals seeking justice. The endorsement of in-court settlements as an effective means to improve efficiency and access to justice aligns seamlessly with this evolving philosophy in civil procedure.[108]

In summary, a global readiness exists within society for a fundamental shift in litigation culture and a fresh perspective on civil justice.

F. *STARE DECISIS, PRECEDENT, AND THE RULE OF LAW*

One of the most significant global civil justice principles is stare decisis (*et non quieta movere*). Although this principle classically means the "court's practice of following precedent, whether its own or that of a superior court[,]"[109] it basically "refers to the requirement on judges to treat like cases alike, which means treating past judicial decisions as sources of law."[110] Furthermore, stare decisis, often regarded as a hallmark of Anglo-Saxon legal systems where it explicitly serves as a legal source, has historically evolved to be intrinsically linked with the rule of law. This connection eagerly pursues the imperative of consistency while harmonizing the necessities of stability amidst evolving law.[111] Indeed, while the U.S. Supreme Court stated and is continuously repeating, "[*s*]*tare decisis* is not an inexorable command[,]"[112] the primary function of stare decisis is "to

[108] *See* ADRIAN ZUCKERMAN, CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 12 (1999); ALEXANDRE BIARD, JOS HOEVENAARS, XANDRA KRAMER & ERLIS THEMELI, NEW PATHWAYS TO CIVIL JUSTICE IN EUROPE: CHALLENGES OF ACCESS TO JUSTICE 1 (2021); SAMUEL ISSACHAROFF, CIVIL PROCEDURE 196 (2011).
[109] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003).
[110] Nina Varsava, *Precedent, Reliance, and Dobbs,* 136 HARV. L. REV. 1845, 1848 (2023).
[111] *See* Roscoe Pound, *Book Review*: *Precedent in English and Continental Law. An Inaugural Lecture Delivered before the University of Oxford*, 48 HARV. L. REV. 863, 863–64 (1935).
[112] Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see*, recently, Dobbs v. Jackson Women's Health Org., 142 U.S. 215, 218 (2022), *overruled* Roe v. Wade, 410 U.S. 113 (1973).

make law stable and predictable."[113] "Stability and predictability are integral to the rule of law."[114]

While the classical definition suggests that overturning precedent might appear to breach citizens' trust, it is crucial to recognize that it represents a complex yet inherent element in upholding the rule of law, albeit in exceptional and carefully considered circumstances, to address evolving legal issues. The Supreme Court's act of overruling precedents is an ongoing process, albeit infrequent, and aligning with legislative directives as a legal foundation allows for the possibility of change when such overruling takes place. This reflects the understanding that change is a reasonable outcome in the evolution of legal matters.[115]

These general considerations shed light on numerous resemblances between stare decisis and civil law systems, where the function of precedent has progressively become a vital instrument, compensating for the legislature's limitations in effectively governing a dynamic and evolving society.[116]

To begin with, it is worth mentioning a recent statement of the Italian Supreme Court of Cassation. It states that "while reiterating the formal position that precedent does not constitute a source of law, nonetheless, cannot fail to note how the consideration to be given to precedent has grown . . . in the main civil law systems."[117] In addition, the Italian Constitutional Court also recognized that consolidated judicial precedents become intricately woven into the legal provision, nearly indissoluble from it.[118] Yet, the commonalities between the two legal families regarding precedent law and the stare decisis principle are growing within both systems, interpreting both through the crucial role of the jurisdiction of the realm of the rule of law.[119]

Continuing along the same path and aiming to narrow the gap between the two legal systems, the U.S. Supreme Court demonstrates a multifaceted approach to the law of precedent and the stare decisis doctrine. Recent decisions eloquently assert that stare decisis is a cornerstone of the rule of

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[113] Varsava, *supra* note 110, at 1849.
[114] *Id. See, e.g.*, Walton v. Arizona, 497 U.S. 639, 673 (1990). In this regard, *see* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988); Richard H. Fallon, Jr. & Michael W. McConnell, *The Supreme Court, 1996 Term*, 111 HARV. L. REV. 54, 111–13 (1997); A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 946–47 (2008). Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 215 (2d ed. 2009); Sebastian Lewis, *Precedent and the Rule of Law*, 41 OXFORD J. LEGAL STUD. 873, 874 (2021).
[115] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1554 n.49 (2000).
[116] This significant correlation and its noteworthy implications find its origins in Italian legal literature. *See, e.g.*, Andrea Pin, *Rule of law, certezza del diritto e valore del precedente*, DPCEONLINE 67 (2021).
[117] Cass. civ., sez. un., 3 maggio 2019, n. 11747, 13.6, 13.7 (It.).
[118] *See* Corte cost., 1997, n. 350, 2 (It.). *See also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 34, at 47 (emphasizing how civil law courts do not act much differently towards case law decisions than courts in the United States do); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATH. U. L. REV. 1, 6 (1985).
[119] *See* MERRYMAN & ROGELIO PEREZ-PERDOMO, *supra* note 34, at 157; James Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4–5 (2012).

law. They emphasize that while precedents may be overturned, such action should not occur solely based on being wrong or unjust,[120] usually by abstaining from aligning with the legislative process, and, conversely expressing disappointment over a precedent's misinterpretation of earlier rulings or its inability to be practically applied.[121]

Yet, the possible clash between the judiciary and the legislature concerning the evolution of the law has been recently recognized, leading to an alternative approach to what is known as evolutive or creative jurisprudence. This slight shift brings the common law closer to the role of precedent law in Continental systems. This slow path is more recognizable in the U.S. than in the UK, because in the U.S. they are traditionally more severe in defending the separation of powers and the original scope of the common law as a system essentially devoted to solving conflict rather than regulating society.[122]

The reflections above, drawn from the cases of *Bell Atlantic Corp. v. Twombly*[123] and *Ashcroft v. Iqbal*,[124] which overturned *Conley v. Gibson*[125] align closely with the assumptions made in *Planned Parenthood v. Casey*.[126] Specifically, the decision to overturn the previous ruling on pleading determinations was rooted in eliminating the old rule's grounds for application or justification. This pertained directly to the original intention behind the concept of notice-pleading and its interaction with the discovery phase. It crafted a restructured framework for the pretrial phase within the U.S. federal civil process.

This apparent evolution of stare decisis within the context of the rule of law, while confined to the original realm of common law, aligns with the similar conceptual evolution seen in the role of precedent in civil law systems, such as in Italy, in the last two decades. The Court of Cassation expressly affirms that, also, the statutory law (as a prerogative of the Continental system, that is based on the Codes essentially) must be interpreted not by exclusively referring to itself and the tight context in which rules were written, but, even when deciding a single case, looking at the dynamic evolution of the system in line with social changes.[127]

However, despite advancements, specific theoretical disparities persist regarding the influence exerted by precedent law, particularly concerning the application of the doctrine of stare decisis within the framework of implementing the rule of law. These distinctions primarily stem from theoretical perspectives rooted in the historical divergence between the judiciary and the legislature concerning their roles in lawmaking. Therefore, in civil law systems, the foundation predominantly rests upon statutes, with

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[120] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); Allen v. Cooper, 589 U.S. 248 (2020).
[121] June Med. Serv. L.L.C. v. Russo, 591 U.S. _ (2020).
[122] *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013).
[123] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[124] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[125] Conley v. Gibson, 355 U.S. 41 (1957); *See infra* Section II.D.2.
[126] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S 883 (1992).
[127] *See* Cass. civ., sez. un., 11 luglio 2011, n. 15144 (It.).

the judiciary historically focused on interpreting laws established by the parliament. Conversely, common law systems traditionally limit statutory interpretation to areas where judicial law fails to suffice, particularly in cases necessitating system modernization.[128] Nonetheless, despite this historical divergence and the thriftiness of overruling in common law systems, it illustrates a hesitancy to admit to creating law.[129] The actual situation demonstrates a gradual convergence of both systems. The role of precedent, and the judiciary's creative function in shaping law progressively aligns, indicating a global trend in the judiciary's responsibility.

G. *RES JUDICATA: GLOBAL CONVERGENCIES*

Res judicata demonstrates that global civil justice is more effective than one could have considered. "The doctrine of res judicata is a principle of universal jurisprudence forming part of the legal systems of all civilized nations." [130] While civil procedure laws vary among countries, the points outlined in the text demonstrate that res judicata is a universally applicable doctrine. These considerations highlight how, despite some variations, there is a growing convergence in interpreting shared values and policies, making it more of a global principle with commonalities rather than disparities.

"American res judicata is much *more expansive* than res judicata law in other countries."[131] This sentence could represent the initial stage for comprehensively examining res judicata law worldwide. Despite its diverse origins, sources, and evolution, there is a growing recognition of commonalities, indicating that res judicata is emerging as a fundamental element of global civil justice.

Understanding that sentence involves assessing two fundamental aspects. Initially, it requires retracing the inception of the res judicata doctrine in both legal traditions, addressing the traditional differences concerning the binding effects of res judicata in subsequent litigation. Secondly, it allows for observing increasing similarities in the dominance of judge-made law in both systems.

To begin with, the U.S. system acknowledged a conceptual classification since the origins of common law. This classification emerged from the doctrine of *former adjudication*, which has always distinguished between res judicata and *estoppel by judgment*.[132] It encompassed within the principle of *ne bis in idem* (the identified goal of preventing re-litigation): both claim preclusion and direct or collateral estoppel, relating to the internal

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[128] *See generally* H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 143–44 (2d ed. 2004).
[129] *See* Pin, *supra* note 115, at 121.
[130] ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA (2001) (quoting ABRAHAM C. FREEMAN, A TREATISE OF LAW OF JUDGMENTS 1321 (5th ed. 1925)).
[131] *Id.* (emphasis added).
[132] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 616 (6th ed. 2021).

and external 'judgment' on issues (questions of fact or law) already decided in a previous legal process. [133]

The Restatement (Second) of Judgments, under the coordination of Professor Vestal, went beyond the traditional divide of common law. It advocated for consolidating both res judicata—embracing initially only claim preclusion—and issue preclusion (including direct and, to a large extent, collateral estoppel) into a *unified doctrine*.[134] This formulation established a notion of final decision that broadened the scope of *ne bis in idem* not solely for the claim or cause of action but also for the pivotal issues fixed upon resolving the dispute. Res judicata was ultimately separated into two distinct concepts: claim preclusion and issue preclusion, although there was not universal adoption of this specific terminology across all courts.[135]

Furthermore, since the inception of the doctrine of res judicata (or former adjudication), one of its primary purposes has been to discourage parties from bringing up related issues that ought to have been presented in the prior action.[136] This purpose evolved into the core principle of the res judicata doctrine, principally known as claim preclusion, a concept that persists to this day.[137]

I specifically mention this U.S. res judicata content because the same occurs in the UK legal system, which is well known as the rule provided in *Henderson v. Henderson*,[138] as well as the same concept of res judicata, divided in claim and issue preclusion.[139] Despite this apparent convergence, the Henderson principle, as it has been restated, reposes on the same public policy consideration, "namely that there should be finality in litigation, and that a party should not be twice vexed in the same matter[,]" [140] and it involves specifically a matter of abuse of process.[141]

However, irrespective of the varied policies that support it, this principle is directly linked to the res judicata doctrine in the U.S. system and indirectly connected to the UK system.[142] Through this association, a broader common

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[133] *See* RESTATEMENT (FIRST) OF JUDGMENTS §§ 47, 48 (AM. LAW INST. 1942). *See also* Edward Clearly, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342–43 (1948).
[134] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 131 (AM. LAW INST. 1982). *See also* Allan Vestal, *Res judicata/Preclusion/Expansion*, 47 SO. CAL. L. REV. 357, 359 (1974); FRIEDENTHAL ET AL., *supra* note 129, at 617.
[135] *See* FRIEDENTHAL ET AL., *supra* note 132, at 617.
[136] *Id.* at 616.
[137] *Id.* at 621. *See* Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 590 U.S._ (2020); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17 cmt. b, 19 (AM. LAW INST. 1982). It is worth noting that this principle constitutes one of the main aspects of claim preclusion, distinguishing it from the issue preclusion doctrine that precludes parties from relitigating an issue *previously decided* and essential for that judgment. However, this principle is a crucial part of the U.S. res judicata doctrine, different from the same aspect ruled by the UK legal system, as it follows in the text.
[138] This rule precludes a party from raising in subsequent proceedings matters what could *and* should have been raised in earlier proceedings. *See* Henderson v. Henderson (1843) 3 Hare 100, 115. The rule was restated in 2002, *see* Taylor v. Lawrence (2002) EWCA (Civ) 90, QB 528, [6]; *see also* Johnson v. Gore Wood & Co (2002) 2 AC 1, (HL) 31.
[139] *See* NEIL ANDREWS, ON CIVIL PROCESS, COURT PROCEEDINGS 463, 468, 474 (2013). *See also* Arnold v. Nat'l Westminster Bank, [1991] 2 A.C. 93 (HL) 104–05.
[140] *Id.* at 485.
[141] *See* Johnson v. Gore Wood & Co., *supra* note 138, at 30–31.
[142] *See* ANDREWS, *supra* note 139 (underlining that "in short, *Henderson* principle can be regarded as an adjunct to res judicata; but this principle should not be confused as an aspect of res judicata[]").

ground emerges, highlighting the historically expansive concept of res judicata as a public value in private matters.[143]

The continental systems diverged significantly in the origin. While rooted in Roman law, the evolution of civil law systems specifically dealt with the profound implications of the separation of powers in political theory. Continental systems were meticulously structured around written law and the development of code systems.[144] Res judicata followed this path also. Hence, while the Anglo-Saxon pattern is correctly defined as a system that "favors a *broad* scope [res judicata],"[145] the Continental one is described as a "*narrow*-scope . . . model[.]"[146] These effects prevent re-litigation only per the specific right presented and decided upon in court. This is usually regardless of the issues of fact the judge discusses and is argued between the parties to resolve the dispute. Accordingly, also the common law principle (well-known generally as the Henderson principle) is adapted to the Continental right system: it pertains seclusively to the specific "right" brought before the court, and it is known as a matter of *chronological* stability of res judicata, at least in the Italian law.[147]

Initially, res judicata was not supported by specific policies and differed from common law systems. Following the dogmatic civil procedure framework, it was considered a theoretical result of the "right" system. It was primarily seen as a tool for ensuring legal certainty, focusing on when an adjudication reached its finality rather than its implications. The "right" system inherently led to the establishment of the binding effects of res

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[143] NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE 501–12, 511 (1994), summarizing that:

> [t]he 'principle of finality' is rooted in several inter-related policies. If a decision were not treated as final, many inconveniences would result: the dispute would continue to drag on; greater legal expense and delay would result; scarce 'judge-time' would be spent re-hearing the matter; inconsistent decisions might follow; litigation would cease to be a credible means of settling disputes; finally, it would be a hardship on the victorious party if the first case were to be re-opened; the victor is entitled to assume that at the first action he was not merely attending a dress rehearsal for further performances.

Id. (quoting Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE L. J. 353, 362 (2011).)

[144] *See* Par. 3.2. *See also* Robert W. Millar, *The Premises of Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 8 (1940); MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 254–55 (1965).

[145] *See* Sinai, *supra* note 143, at 363 (emphasis added).

[146] *Id.* at 356 (emphasis added). Regarding the only German law, *see* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). *See also* Benjamin Kaplan et al., *Phases of German Civil Procedure* II, 71 HARV. L. REV. 1443, 1443–72 (1958). *See generally* Cesare Cavallini & Emanuele Ariano, *Issue Preclusion out of The U.S. (?) The Evolution of The Italian Doctrine of Res Judicata in Comparative Context*, 31 INDIANA INT'L & COMPAR. L. REV. 1 (2021) (properly addressing the development of the res judicata pattern in the civil law context and the recent reducing gap with the Anglo-Saxon area).

[147] *See* the very consolidated rule set forth by the Italian Court of Cassation, namely the principle of "*res judicata* copre il dedotto e il deducibile" (res judicata covers alleged facts and facts that should have been alleged), even related to the individuated "right" brought before the Court. For Italian law, *see*, recently, Cass., 12 settembre 2022, n. 26807 (It.); Cass., 4 marzo 2020, n. 6091 (It.). German law, differently, expressly provides a specific rule, ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 322, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1032 [https://perma.cc/MSF9-7ZBW] (Ger.), which states, "[j]udgments are able to attain legal validity only insofar as the complaint or the claims asserted by counterclaims have been ruled on."

judicata solely on the rights presented before the court rather than prioritizing policies to enhance the effectiveness or efficiency of civil justice and the adjudication system.[148]

Over time, the civil justice systems in the Continental region increasingly rely on economic assessment, essentially adopting efficiency as a guiding principle. This shift is particularly noticeable in legal systems grappling with prolonged proceedings, explicitly addressing the extensive duration of final adjudication.[149] This approach has been vast, initially stemming from the increasing dominance of judge-made law within civil law systems, sometimes followed by its subsequent legislative incorporation. This shift has prompted a reexamination of the traditional assumptions surrounding res judicata. As a result, it has initiated a trajectory toward a more expansive and comprehensive concept resembling the conventional configuration of common law systems.

A visible shift is minimal within the Italian civil justice legal system, particularly jurisprudence. There is a hasty evolution toward embracing a more expansive explanation of res judicata, seemingly to the common law traditional interpretation.[150] Hence, the Italian Supreme Court of Cassation, emancipating res judicata from the limitations of parties' claims,[151] broadens its preclusive influence to include prejudicial matters, thus acknowledging a form of typical common law issue preclusion doctrine.[152] The rationale

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[148] Otherwise, I cannot wholly agree with the general consideration on this point raised by Mirjan Damaška, *see* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 178–79 (1986), who explained in terms of "implementation of government policy" the narrow concept of res judicata, if compared to the broader concept of the common law systems.

[149] The French and Italian legal systems are prime examples highlighted in the Doing Business Report expanded by the World Bank since 2005. This report notably emphasized that the inefficiencies within the civil justice system significantly contribute to the economic shortcomings of a state in attracting foreign investments and fostering a more robust economy and society.

Recent observations have pointed to the Italian legal system: *Doing Business in the European Union 2020: Italy*, WORLD BANK, https://archive.doingbusiness.org/en/rankings/italy [https://perma.cc/C8MY-FGKA].

Efficiency standards have become crucial in addressing this problem. Courts and legal institutions are under pressure to streamline their processes, reduce backlogs, and expedite the resolution of cases. There's a growing recognition that prolonged legal proceedings can have adverse economic effects, impacting the parties involved and the justice system's overall functioning and economy.

Efforts are being made in various jurisdictions to reform and modernize civil justice systems to enhance efficiency. These reforms might involve changes in procedural rules, technology to facilitate quicker case management, alternative dispute resolution methods such as mediation or arbitration, and measures to ensure the timely disposition of cases.

The focus on efficiency doesn't necessarily compromise the fundamental principles of justice. Instead, it seeks to balance the need for a fair trial with timely resolution, aiming to provide effective remedies to litigants within a reasonable timeframe.

However, it is important to note that while efficiency is crucial, it should not come at the expense of due process and the quality of justice. Striking the right balance between efficiency and the protection of rights remains a significant challenge for legal systems as they evolve to meet the demands of contemporary society.

[150] *See* the landmark decisions set forth by Cass., sez. un., 12 dicembre 2014, n. 26242, 26243, Giur. it. 2015, I, 70 (It.). *See also* Cass., 15 maggio 2018, n. 11754, Riv. Dir. Proc. 2020, 1, 411 (It.).

[151] It is worth remembering that the res judicata Italian system is traditionally grounded on the principle ruled in the Article 112 I- C.c.p., which provides that "the judge shall decide upon all the claims and within its limits; he shall not sua sponte decide upon exceptions which may be raised only by the parties." *See* CODICE DI PROCEDURA CIVILE [C.c.p.] [CIVIL PROCEDURE CODE], art. 112 (It.).

[152] *See* Cavallini & Ariano, *supra* note 146, at 31, recognizing that:

behind these groundbreaking rulings has been notably unexpected when contrasted with the traditional reasoning employed by continental judges. In these instances, policy considerations have outweighed the strict adherence to Code of Procedural Law provisions, marking a significant shift towards a need, if not an obligation, to expand res judicata to encompass a more comprehensive concept and content. This approach prioritizes *decision stability* and *judicial efficiency* in interpreting written law.

A similar attempt to extend res judicata beyond the formalist provisions set forth at the Continental level can be recognized within the French legal system. French courts "have long extended the *autorité de la chose jugée* to the motives forming the so-called *antécédent logique necessaire de la décision*, that is to those issues that were the necessary steps to reach a final decision and support the holding (*motives decisifs* [(decisions)])."[153] Although German law seems to be stricter in observing the res judicata content as strictly connected to the claim (and the right) brought before the court, despite a few different ideas in the literature,[154] it is evident that notable global shifts are occurring, particularly concerning the controversial yet crucial subject of worldwide civil justice: res judicata.

CONCLUSION

Exploring the fundamental pillars underlying the civil process within the two primary legal frameworks—foundational structures that significantly influence the majority of legal systems globally—enables a reasonable transition from the somewhat nebulous realm of international or transnational civil procedure, subject to varied interpretations based on the prevailing sentiments, towards a more crucial concept: global civil justice. This initial exploration asserts that global civil justice transcends mere terminology. Instead, it signifies a fresh approach to researching the core elements that underpin every civil procedural system. This pursuit necessarily encompasses historical trajectories and inevitable transformations, culminating in establishing universally shared principles—more than mere technical regulations. These principles are open to reciprocal

> [i]t may well happen that the Court ascertains nullity and submits it to debate between the parties even though neither the plaintiff nor the defendant demand for a ruling on the question, instead of limiting themselves to request a decision on the merits on the original main claim (e.g., performance, termination for non–performance)). In the latter case, if the court acknowledges the presence of a vitiating factor that makes the contract void, it will have to reject the main claim, declaring the nullity in the motives but not in the holding. However, this judgment on the issue of nullity will produce res judicata effects to conclusively establish the nullity of the contract in any subsequent action between the same parties.

[153] *Id.* at 27–28. (quoting LOÏC CADIET & EMMANUEL JEULAND, DROIT JUDICIAIRE PRIVÉ 623–24 (10th ed. 2017)).

[154] *Id.* at 28 n.143 ("claiming that prejudicial questions dealt with in a first lawsuit could be covered by res judicata and so precluded from being relitigated insofar as there is a teleological connection between them and the subject matter of the second suit" (quoting ALBRECHT ZEUNER, DIE OBJEKTIVEN GRENZEN DER RECHTSKRAFT IM RAHMEN RECHTLICHER SINNZUSAMMENHÄNGE (1959))).

interpretation, fostering a deeper understanding of domestic procedural law.[155]

Global civil justice marks the conclusion of an era during which common law and Continental legal systems contended for supremacy in shaping the most effective and equitable legal framework for resolving citizens' rights. The semi-adversarial model has subtly emerged within the global landscape of civil proceedings' organization, gradually moving away from the traditionally rigid division between rights and remedies in law and the differing role of the judge in overseeing lawsuits. Universal principles governing due process, alongside the acknowledged significance of judicially-driven settlements as a suitable means of resolving disputes, have significantly narrowed the gap—perhaps more in storytelling than in concrete legal practice—between legal families. This shift has been eloquently and finally exemplified in the interpretation and application of res judicata.

The latest global challenges that have surfaced, such as the influence of AI on decision-making and legal processes and the necessity for worldwide collaboration in establishing overarching regulations, present an opportunity to begin global civil justice.

[155] *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS vii (1980); John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMPAR. L. 617, 636 (1998).