

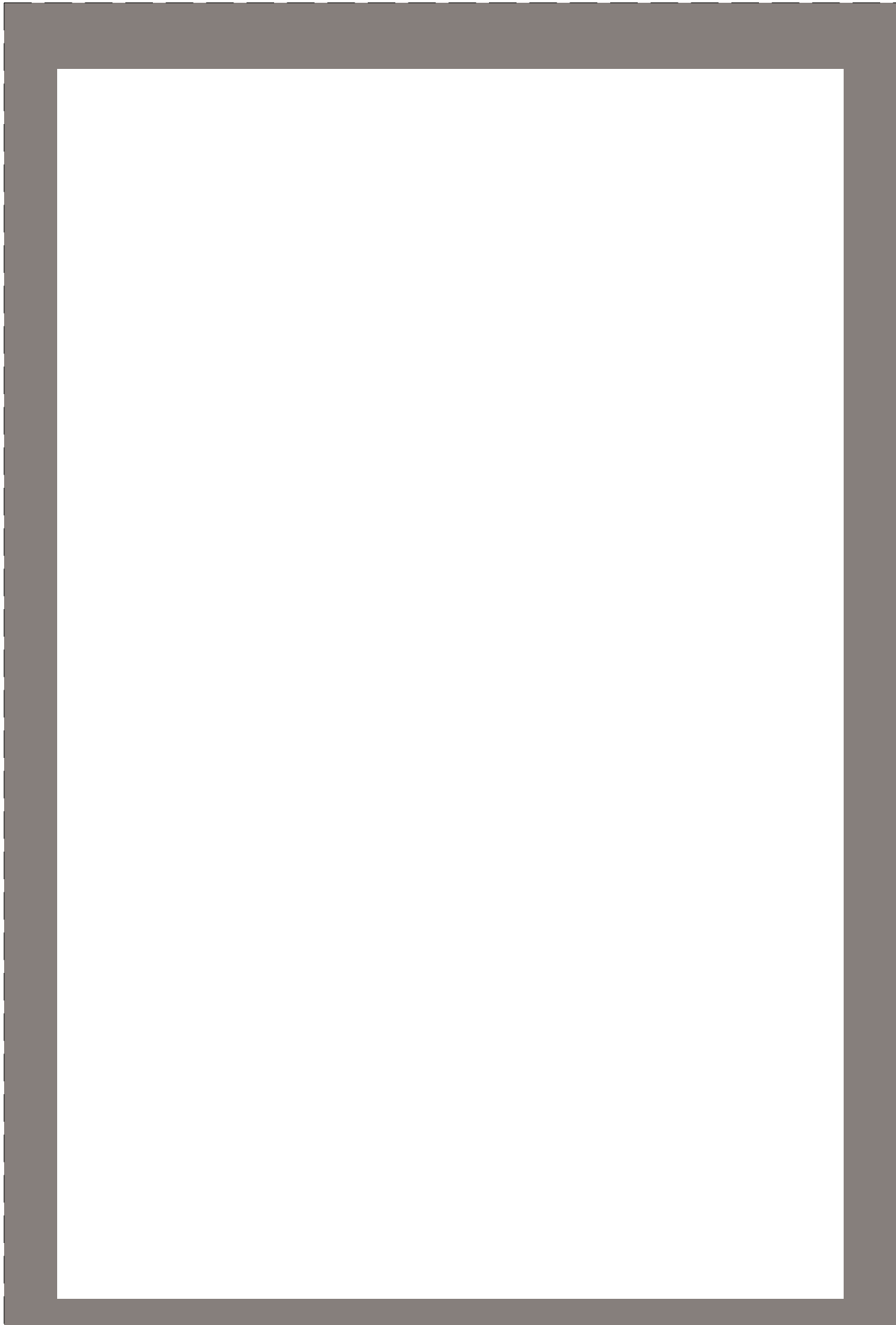
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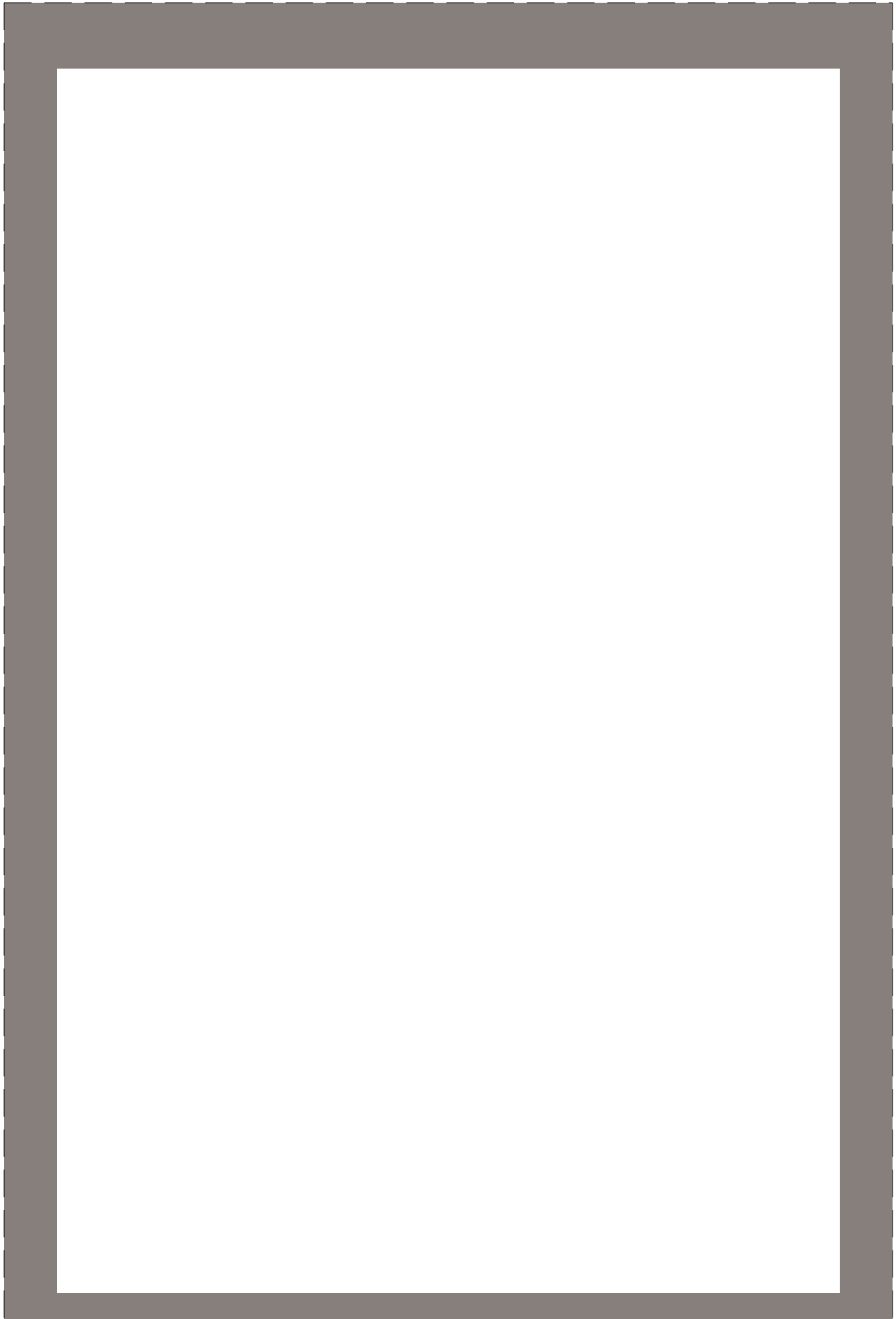
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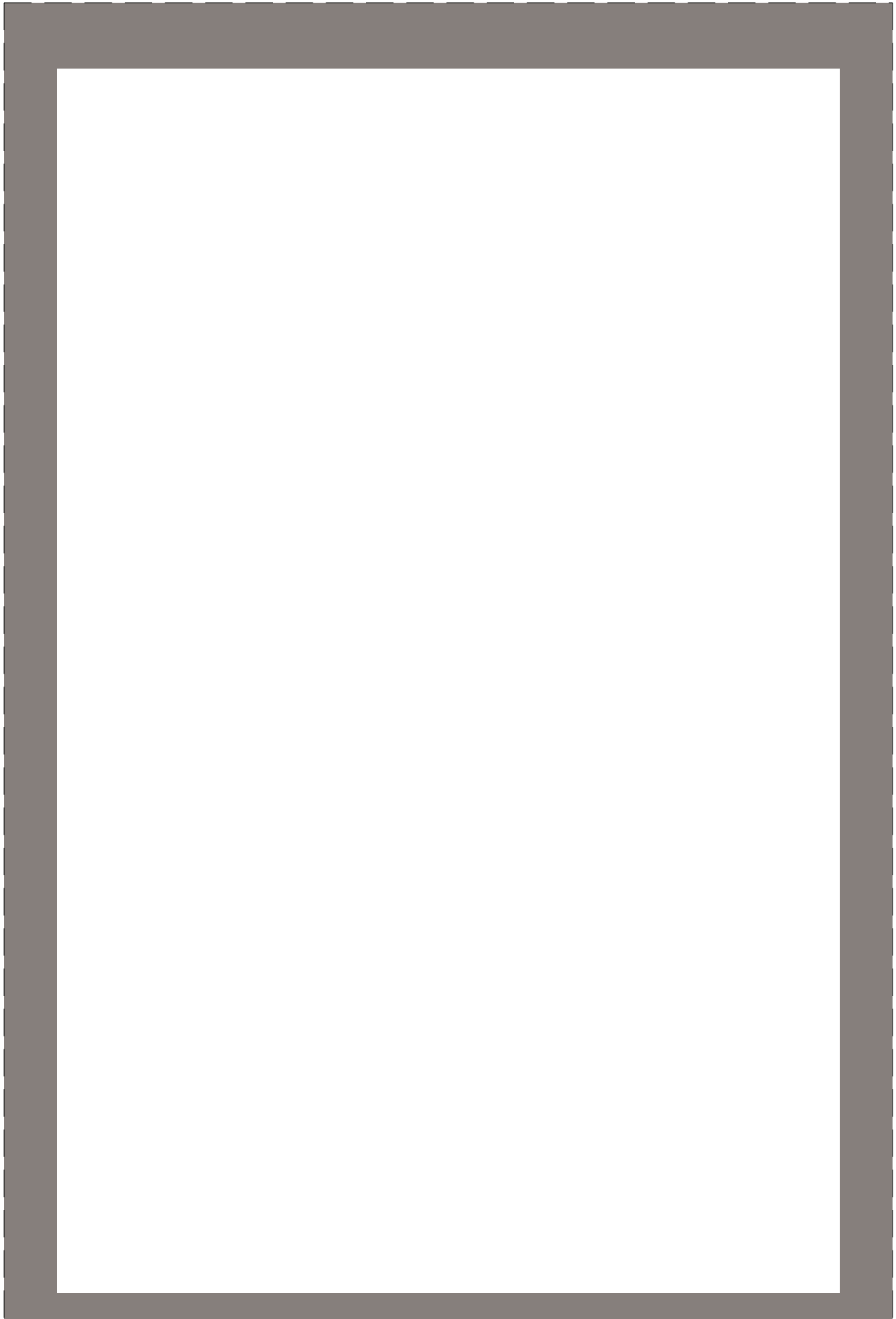
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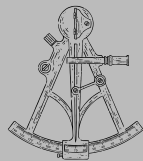
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## Olimpiad S. Ioffe Centenary

### Introduction

*Peter L. Lindseth\**

The centenary of the birth of Professor Olimpiad S. Ioffe (1920-2005) is an occasion to celebrate an extraordinary scholarly life that traversed the upheavals of the twentieth century. Born in the years just after the Russian Revolution and growing up in the Soviet Union to survive the horrors of World War II, Professor Ioffe became a giant of Russian and Soviet jurisprudence over the postwar decades. But then, in 1980, in circumstances ably recounted by my colleague Carol Weisbrod in her contribution below, Professor Ioffe found himself dismissed from Leningrad State University, expelled from the Communist Party, and compelled to emigrate. After an intervening year conducting research at other law schools in the United States, Professor Ioffe joined the faculty of the University of Connecticut School of Law in 1982. It was here that he finished his illustrious career teaching, researching and writing in the areas of Soviet Law, Civil Law, Comparative Law, Roman Law, and International Human Rights Law.

Our original plan was to hold a live symposium in October 2020 to celebrate Professor Ioffe's centenary. However, the pandemic—as with so much else in that year—unfortunately intervened and forced us to find an alternative. We are thus pleased to have this opportunity to commemorate Professor Ioffe's extraordinary contributions in the pages of the *Connecticut Journal of International Law*, and we thank the editors for making this possible. We must additionally thank Professor Ioffe's daughter, Zena Henkin, for serving as the driving force behind this commemoration. It was Ms. Henkin who both arranged (and translated from Russian) the contribution in this issue from one of Professor Ioffe's leading former students and colleagues, Professor Anatoly Didenko of Caspian University, in Almaty, Kazakhstan. As Professor Didenko recounts, just as Connecticut served as a physical refuge for Professor Ioffe, Kazakh law faculties provided a different sort of refuge for Professor Ioffe's prodigious Russian-language scholarship. After his forced emigration, Russian scholars were generally forbidden to cite Professor Ioffe's works. But the “wave of anti-Semitism” that underlay that ban “did not reach Kazakhstan,” writes Professor Didenko, and “even after his emigration articles were written and dissertations were defended [in Kazakh law faculties] with references to his works.” Indeed, as Professor Didenko further recounts, all of Professor Ioffe's “works of the post-Soviet period written in Russian were first published in Kazakhstan,” which included republication of many of his most important works on the history of civil thought and causality as a condition of civil liability, albeit now “freed [of] outdated ideological clichés.”

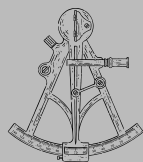
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\* Olimpiad S. Ioffe Professor of International and Comparative Law; Director of International Programs; Co-Director, Program in Corporate and Regulatory Compliance, University of Connecticut School of Law.



As so ably described by my colleague Mark Janis in his contribution below, in coming to UConn Professor Ioffe helped to transform what was then (in the words of our late, great former dean Hugh Macgill) “a country law school” into the formidable center of international and comparative law that is today. As Professor Janis notes, “[n]ow that the law school has an international program . . . , it is hard to remember how thin we were back in the middle 1980s.” At the time, only two faculty members—Professors Janis and Ioffe—specifically devoted themselves to international or comparative law in their teaching, research or writing. Today, there are, by my count, at least fifteen members of our faculty whose work is devoted in whole or part to international and comparative law, including a core group who specialize in those fields. We now offer six masters of law (LLM) programs that educate students from all over the world, including an Executive LLM Program in US Law based in Seoul, Korea. We augment our global footprint with the Martin-Flynn Global Law Professor Program, through which we welcome professors from around the world to enrich our academic programs and scholarly community. We send our own students to all corners of the world through an array of institutional partnerships with fourteen law faculties abroad and the Universitas 21 network.

In short, the institution that Professor Ioffe joined—and contributed mightily to transforming—is today a major player in the fields of international and comparative law. It is thus my great honor, as holder the chair that bears his name, to commend to you the contributions in the celebration of the centenary of Professor Ioffe’s birth. Let them stand as a lasting tribute not just to his contributions to our law school’s transformation, but also to his unmatched accomplishments in legal scholarship over the course of his extraordinary life.



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## Olimpiad S. Ioffe Centenary

### The Heritage of Olimpiad Ioffe's Scholarship

**A.G. Didenko\***

*Translated from Russian by Z. Henkin (née Ioffe)*

*Edited by P. Maggs*

General assessments of the heritage of Olimpiad Ioffe as an outstanding scholar are given in a number of important publications, among which I would name those of Yuri Tolstoy, Aleksandr Makovsky, Yuri Basin, Aleksandr Sergeev, and Konstantin Lebedev. I will limit my notes to the last decade of Professor Ioffe's scholarly activity.

Why did I decide to describe just this period? Perhaps not everyone knows that when O.S. Ioffe completed the book *Pre-Soviet, Soviet and Post-Soviet Russia* for his 75th birthday, he announced that it marked the completion of his scholarly career. But, thanks to the persistence of his Kazakh friends, this did not happen, and he wrote more than a dozen works after that.

It is flattering to note that he has been linked most closely with the Kazakhstan school of civil law theory. Since he was a very dynamic person by nature, he willingly accepted invitations to various scholarly events held in the Republic of Kazakhstan. Numerous visits to the Republic, in addition to purely friendly meetings, were linked to his participation in dissertation defenses, in discussions of the Leningrad textbooks on civil law, and talks at conferences. He repeatedly spoke at conferences in Alma-Ata in the discussion of textbooks, and was published in the Scholarly Papers of the Faculty of Law of Kazakh State University. All of it was the result of close personal friendship with Professor Yuri Basin, a World War II veteran, who was the head of the Department of Civil Law of the Kazakh State University. During his visits, Professor Ioffe willingly responded to requests from colleagues to hold meetings with students and teachers. All this definitely had a positive influence on the strengthening and development of Kazakhstan's civil law and the formation of local scholars.

Professor Ioffe published works in Kazakhstan during the Soviet period. One can mention his participation first in the Soviet-era article-by-article commentary on Kazakhstan's Civil Code and Code of Laws on Marriage and Family, and his joint article with Professor Krasavchikov disputing the theories of some Soviet scholars who argued for separating "economic law" from civil law.

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\* Professor of *Adilet* at the Caspian University School of Law in Almaty, Kazakhstan. "Adilet" is the word for "justice" in Kazakh.

It is well known that after his dismissal from Leningrad State University, expulsion from the Communist party, and emigration, the reference to his works in the Soviet Union were forbidden. The wave of anti-Semitism did not reach Kazakhstan, and there were no such consequences of that vile phenomenon as a ban on references to Professor Ioffe's works in scholarly discussions. In Kazakhstan, even after his emigration, articles were written and dissertations were defended with references to his works.

I would like to mention that all of his works of the post-Soviet period written in Russian were first published in Kazakhstan. I would also like to draw your attention to the fact that in the works republished in Alma-Ata by Professor Ioffe on the history of civil thought and causality as a condition of civil liability, the author made numerous editorial changes that freed the text from the outdated ideological clichés, details that are of little interest to the modern reader.

I am sure that a scholar of his level would take a worthy place in most of the historical expanses of the legal universe, being in the galaxy of associates of Justinian, Napoleon, and Speransky. But unlike the famous predecessors, whose works were to some extent based on the scholarship and practical experience of previous generations of scholars and lawyers, his generation had to deal with completely new challenges and answer the unusual questions about the patterns of unique social formation—socialist, and then, in post-Soviet period, about the nature and features of an unclear social system. It was quite obvious that new wine could not be poured into old wineskins. It was necessary to propose not just non-standard solutions and to put forward extraordinary ideas, but to set new tasks and offer solutions unknown to existing studies. On all these unexplored paths Professor Ioffe was in the forefront.

It was not easy to continue his scientific activity after emigration at his age in a different scientific environment, with linguistic problems. During our high school and student years, we were often told about the genius of Marx and were given as an example that he learned Russian at the age of 50. Ioffe learned English at the age of 60. It was not easy. By the way, he spoke several foreign languages, but he began to study English after leaving the University and before emigrating. When he thought that he had mastered the basics of the language, he invited a friend, an English teacher, to test his knowledge. She listened and said that such a language did not exist in nature. But he overcame the difficulty and mastered the language, with the friendly support of American colleagues, about whom he spoke often. He wrote a number of monographs in English in collaboration with his friend and former student, Peter Maggs.

The interests of the scholar went beyond the usual boundaries of civil law. Almost 50 years ago he wrote a number of works on the general theory of law. The most significant of these was the book published in 1961 in collaboration with Mikhail Shargorodsky and highly regarded by jurists: *Questions of the Theory of Law*, as well as a two-volume collective work, *General Theory of State and Law* (1961, 1968–1974).

Ioffe's last works, published in Kazakhstan, were also devoted to general issues of law and protection of the legitimate interests of individuals in pre-revolutionary, revolutionary, Soviet, and post-Soviet Russia, the concept of law, law ideology.

Before naming the works published in Kazakhstan, I will say a few words about their preparation for publication. The manuscript formatting process was challenging. Professor Ioffe did not use computer technology and sent me articles by mail in handwritten form. The handwriting was not always legible; it was necessary to reconcile the text again via mail. I am still carefully keeping these manuscripts in his flitting handwriting.

In the issues of the Kazakh series, *Civil Legislation: Articles, Comments, Practical Issues*, the following of Ioffe's works were published:

- *The Concept of Law and Its Types*
- *Private Law and Public Law*
- *Ideology of Law*
- *On Commercial Law (Theory and Practice)*
- *The Institution of Boyfriends and Girlfriends*
- *The Question of the Concept of Property Rights*
- *My Teachers*
- *Russia pre-Soviet, Soviet and post-Soviet*
- *Causality as a Condition of Responsibility*
- *About Funny and Unusual*
- *About the Update of the Methodology of Jurisprudence*
- *Law and Behavior*

His work *Reflections on Law* was published as a separate brochure. He also published sections of the book, *Course of Lectures on Civil Law*. We could also add Professor Ioffe's reflections on reforming the post-Soviet society, which are set out in my article *Separations and Meetings*.

The works listed above put forward new concepts of law, of the non-unlawfulness of laws, the nature of property law, *etc.*; they developed his older views into new ones.

As can be seen from the titles, the range of the author's interests was wide: from memoirs to purely theoretical reflections. His stories, published in Kazakhstan, about colleagues and scientists with whom fate confronted him, not only created living images of these people, but emphasized the subtle features of their work.

In the United States, Professor Ioffe remained a Russian jurist. Almost all of his works published abroad were devoted to the evaluation, development, and problems of

the Russian law. No wonder the famous scholar, Professor Sergei Alekseev, in an American publication called Olimpiad Ioffe the pride of Russian legal thought. Another recognition of the merits of his work is the publication of his main works in the series *Classics of Russian Civil Law*. Two years ago, a postage stamp with a portrait of O.S. Ioffe was issued in the series "Outstanding Lawyers of Russia." We celebrated this event at our law school.

For those who knew him, there is no need to remind about the brilliant oratorical gifts of the scientist. Tape recordings of some of his presentations in Alma-Ata have been preserved. Along with purely literary skill, they always demonstrate the depth of thought and the logical refinement of the judgments of the lecturer, who perfectly mastered the art of polemics with a deep respect for the opponent. Professor Ioffe was endowed with many talents; he was well versed in music and literature. He had a great sense of humor. Perhaps it was this polyphony of talents that enhanced his scholarship.

In modern teaching activity, we often have to resort to the concepts put forward by O.S. Ioffe. Here's one example. My students and I considered the following situation. Recently, near Alma-Ata, a plane crashed with casualties. The air carrier wanted to pass part of the losses onto the owner of the illegal building into which the plane crashed, arguing that if this building had not existed, the damage would have been less. The discussion was based mainly on Ioffe's doctrine of causality as a condition of responsibility. He divided the circumstances that lead to a result into those creating a concrete possibility of the result and an abstract one—only the former circumstance may serve as a basis for responsibility from the point of view of causality.

The students, I think, came to the correct conclusion about the inadmissibility of the responsibility of the building's owner. The main thing is not the conclusion, however, but the involvement in the resolution of the situation of the legal theory advanced by Professor Ioffe almost 70 years ago. As we can see, it still works today.

The ways of the influence of a prominent personality on others are complicated and bizarre. It is difficult, for example, with firm confidence to call any scholar a direct successor of Professor Ioffe's theories. But his ideas fell on fertile ground, and for some encountering them, they were the impetus for the development of research abilities; others were sent on a scholarly path; others were helped in defining the scope of their research scientific interests and enhancing the methodology of solving practical problems.

His work, ideas, and concepts, now as before, attract the most rapt attention of all those involved in legal thought. The contribution of this famous scholar to law in general, and to civil law in particular, is invaluable.



One can agree with Ioffe's views, follow them or argue with them. In any case, they still evoke vivid interest and therefore belong to the realm of legal discussions. This can be illustrated by many examples. For instance, in one of his most recent speeches Professor Maidan Suleimenov questioned Ioffe's view on the subject of civil law, which excludes from this subject personal non-property relations not regulated, but only protected by civil law.

At some point I was captivated by the originality and logical convincingness of his theory of causality, but later I abandoned it in favor of the theory of probabilities.

Igor Greshnikov argues that Ioffe's normative-behavioral theory of law does not take into account a number of new realities; he does not share the author's view that capitalism is not being built, but arises.

I have named but a few reactions and only to Kazakhstani works. I think there are many more on a world scale.

Due to the drop in the level of general education and the decline in the quality of training of legal personnel, Kazakhstan has lost the opportunity to train high-class specialists who can respond to the advanced demands of the time, including those presented in the Ioffe's latest works.

In Kazakhstan, there are not enough scholarly forces capable of embracing and developing Ioffe's views, especially when it comes to issues of general theory of law and civil law. Let us hope that this is a temporary phenomenon.

My portrait would be incomplete if I did not add at least some of the features of a living person. I happened to observe these features here in America. For example, he had a completely natural nostalgia for a past life in Leningrad, even if that did not extend to Soviet public holidays, the sole exception being Victory Day, the 60th anniversary of which he was looking forward to but died only one month before. But sometimes he suddenly yearned for unexpected things. With pleasure he recalled Russian food, including herring and potatoes, which he sometimes managed to buy in a Russian store. Wanting to please my teacher, I took a taxi and spent several hours looking for this Russian store. When I went in and asked if they had herring, I got the classic Russian response: "Will you take it?" The answer spoke for itself—this was a Russian store. Then we enjoyed the herring with potatoes over Kazakh cognac and his memories. He looked with condemnation at his wife and housekeeper, who believed that cognac was harmful for diabetics, but he had developed a theory about the benefits of the drink.

He gave individual sketches with great pleasure and retold them with humor, and even today we reproduce them to our students. For example, students learn well the norm about the need for reciprocal satisfaction to conclude a contract based on his story. One day

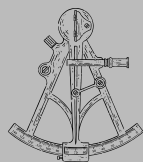
he was walking with a colleague along the Neva river and met his students laughing loudly over a book. He saw *The Civil Code* in their hands and asked about the reason for the laughter. "I know it," he said, "by heart, and I don't see anything funny there." "Well, of course," the girl exclaimed, bursting into laughter. "Look at an interesting meaning of the Article 144 of the Civil Code: he who did not grant satisfaction has no right for a claim to receive the counter-satisfaction."

Remembering a close friend one should always be aware of the danger of eclipsing his personality by a mass of small details dear to one's heart.

To avoid this danger I will take the liberty of giving a general assessment of the scientific activity of Professor Ioffe. His impressive mental constructions still retain their significance today. It is impossible to find publications both in Kazakhstan and throughout the post-Soviet space on general provisions of civil law, in which there would be no references to his works

Many people know the famous Biblical admonition: "Enter ye in at the strait gate: for wide is the gate, and broad is the way, that leadeth to destruction, and many there be which go in thereat: Because strait is the gate, and narrow is the way, which leadeth unto life, and few there be that find it."

The path to scholarly heights is unusually narrow and difficult, but a genuine talent cannot deviate from the destiny given by fate (or nature) to make its way along this path. Olimpiad Ioffe overcame all the difficulties with dignity, and his students and followers can only be proud of such a teacher.



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## Olimpiad S. Ioffe Centenary

### O.S. Ioffe in Connecticut

Carol Weisbrod

**Abstract.** The distinguished Russian jurist O.S. Ioffe (1920-2005) was forced to emigrate from the USSR and came to the United States in 1981. The following year, he joined the law faculty of the University of Connecticut and began a second career as a law professor, writing and publishing almost immediately from the time of his arrival.

This essay discusses Ioffe in two parts. The first part of this essay offers a biography of Ioffe within specific contexts of his life, including the repressive and sometimes murderous environment of the USSR, the devastation of World War II, and the tradition of anti-Semitism in Russian culture. The second part of this essay discusses Ioffe's work through his English language publication. There is some limited treatment of his writing on Russian civil law and the Western reception of that work, but the major emphasis is on the materials he wrote for American law students: an article on classical legal vocabulary and books on Roman law and human rights.

In his final book—written in English but essentially unknown in the West—Ioffe suggested that despite his emigration, he worked, in Russia and in Connecticut, in the same profession “in principle.” This discussion will outline some of the issues evoked by the qualifying phrase “in principle”. Ioffe was a distinguished civilian teaching in an American law school. A central point is that whereas an earlier group of émigrés—the German-speaking jurists of the 1930s—is frequently discussed in the academic literature in terms of their influence on American law, Ioffe is better understood as someone who essentially continued his work on Russia and Russian civil law in an American setting.

**Author.** Carol Weisbrod is Professor Emerita at the University of Connecticut School of Law. Thanks particularly are owed to Lea Wallenius, archivist at the law school library. I would also like to thank Mark Janis, Richard Kay, Leslie Levin, and Aviam Soifer for assistance of various kinds. I am, as always, grateful for the support of the law school of the University of Connecticut and the assistance of the staff of the law library. The citations to Ioffe are to his work in English, although I have had translation assistance from time to time. The citations to books about Russia, or the Soviet period, or the memoirs of dissidents or discussions of Roman Law are not to be taken as the references which would be provided by academic specialists. Law review processing on this piece was done with COVID-19 protocols in place. It was difficult to access materials and to coordinate editorial work. I appreciate the efforts by the staff of the law library and the editorial board of the Connecticut Journal of International Law to deal with these problems.



*O.S. Ioffe in Connecticut*

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*[An] individual life is the accidental coincidence of but one life cycle with but one segment of history....*

— Erik Erikson

This piece is dedicated to the late Hugh C. Macgill, who often referred to Connecticut's law school as a "country law school" while teaching that a country law school should reflect the values of a high culture and knowledge of a wider world.

## INTRODUCTION

The year 2020 marked the 100th anniversary of the birth of Olimpiad Solomonovich (O.S.) Ioffe. Born in Ukraine three years after the Russian revolution, Ioffe was a distinguished figure in the USSR and served as dean at the law school of Leningrad.<sup>1</sup> In 1981, he was effectively forced to emigrate. He described the conditions under which he left in a 2004 interview:

What caused my departure from the USSR? I worked at the law department of the Leningrad State University from 1947 to 1979. In recent years, I felt a dramatic change in attitude towards me. I lost my teaching, my research stopped, I was not published. I felt that I was losing even communication. All my attempts to restore the situation came to nothing. There was only one way out—to leave. [By] June 17, 1981, I was already in the United States.<sup>2</sup>

The change in attitude was a response to Ioffe's daughter's application to emigrate from the USSR. It was clear that her request would involve reprisals against her family.<sup>3</sup> In 1982, he joined the faculty of the law school of the University of Connecticut and, in 2005, he “died in emigration.”<sup>4</sup>

Ioffe himself, in the introduction to his last book, stressed his continuing connection to the world he had left:

This book is dedicated to Russia. All my books, dozens of them, as well as all of the hundreds of articles and reviews I have authored deal with the same subject. As a career professor of Soviet civil law—a legal branch

<sup>1</sup> The University with which Ioffe was associated was called the University of Leningrad. It was renamed the University of St. Petersburg in 1991 when the city of Leningrad was renamed. St. Petersburg University is one of the oldest universities in Russia, with its origins in a 1724 decree of Peter the Great. ST. PETERSBURG UNIVERSITY, *Six Reasons to Study at the St. Petersburg University*, June 14, 2016, <https://english.spbu.ru/news/810-6-reasonstostudy-at-the-st-petersburg-university>.

<sup>2</sup> Telephone Interview with Olimpiad Solomonovich Ioffe (2004). The interview was conducted by Anatoly Didenko, a longtime associate of Ioffe's, working in Kazakhstan. Ioffe told his interviewer in 2004, he was “tormented” by what he saw in the USSR. Professor Didenko is a contributor to this issue. See pages 80-87 for his essay, *The Heritage of Professor Olimpiad Ioffe's Scholarship in Modern Kazakhstan*.

<sup>3</sup> A detailed account of the emigration is offered by his daughter in *Didenko* (2009). See also OLIMPIAD S. IOFFE, *SOVIET LAW AND SOVIET REALTY* 67, 170, 207, 218–219 (1985) (discussing the difficulties of emigration under the Soviet regime, including reference to the implications for relatives). Ioffe published a number of essays in the Kazakhstan journal late in his life, dealing with his teachers and his ideas about law. Didenko's interview, done on the telephone in 2004, includes a number of personal statements concerning his religion (“respects all”), his comments on American students (too “pragmatic” to accept framework of civil law), and his view of the new Russia. His book on Gorbachev is subtitled “an Insider's view”. See OLIMPIAD S. IOFFE, *GORBACHEV'S ECONOMIC DILEMMA: AN INSIDER'S VIEW* 15–16, 320 (1989).

<sup>4</sup> “Died in emigration” is a term used in an English language book consisting largely of photographs of art and architecture of St. Petersburg. ALEXANDER MARGOLIS, *ST. PETERSBURG AND ITS ENVIRONS* 10 (2007). “Died in emigration” stresses the connections to the country of origin. Forced emigration, removals, and exile were familiar in the USSR from pre-Soviet eras, as applied to both individuals and groups.

encompassing the Soviet economic system—I could not do otherwise, and gradually not only the economic system but all other forms of societal life directly or even remotely connected with the economy have been the objects of my research interest. I lived most of my life in Russia from my birth in 1920 until my emigration to the United States in 1981.<sup>5</sup>

His home country remembered him. Vladimir Putin, his former student, sent him a message on his 80th birthday.<sup>6</sup> A stamp was issued in his honor in 2018.<sup>7</sup>

#### PART ONE: CONTEXTS FOR BIOGRAPHY

Ioffe's entry in the annual Directory of American Law Professors published by the Association of American Law Schools provides an outline of his formal academic associations and refers to some of his many books:

*IOFFE, OLIMPIAD S., (M) William F. Starr Prof. Emer. Connecticut. b. 1920. Cand. of Law, 1947; Dr. of Law, 1954, Leningrad Univ., USSR; Dr. Juris., 1965, Lodz Univ., Poland. Assoc. Prof., Leningrad Univ., USSR, 1947-55; Prof., 1955-66; Chrm., Dep't of Civil Law, 1966-80; Fellow, Comp. Law, Harvard, 1981-82; Prof., Connecticut, 1982-98; William J. Brennan Prof., 1990-92; Prof. Emer., since 1998. Subjects: Comparative Law; Roman Law; Russian Law. Private Roman Law, 1974; Development of Soviet Civil Law Doctrine, 2 vols., 1975-78; Soviet Law and Soviet Reality, 1985; Soviet Civil Law, The Netherlands, 1988. Member: Am. Ass'n for the Advmt. of Slavic Studies. Mer., Int'l Librarian.<sup>8</sup>*

The biography above is a professional entry, ending with his retirement from the University of Connecticut School of Law. A different kind of biography would add details on the individual's life, his career in the army and the academy, and the circumstances of his emigration to the United States.

<sup>5</sup> OLIMPIAD S. IOFFE, RUSSIA: PRE-SOVIET, POST-SOVIET at 4 (1999) [hereinafter IOFFE, RUSSIA]. This book was written in 1995 and published, in English, in Kazakhstan in 1999. WorldCat lists two libraries worldwide that have the book in English, the University of Leiden and the University of Connecticut. Ioffe considered it his "greatest book." A. Didenko, *Foreword* to OLIMPIAD S. IOFFE, RUSSIA: PRE-SOVIET, POST-SOVIET, at 3 (1999).

<sup>6</sup> Anne Hamilton, *From Russia to UConn, A Scholar and Teacher*, HARTFORD COURANT (May 1, 2005), <https://www.courant.com/news/connecticut/hc-xpm-2005-05-01-0505010401-story.html>.

<sup>7</sup> The stamp published in 2018 to honor Ioffe was accompanied by this text:

Prominent Jurist of Russia  
Ioffe Olympiad Solomonovich  
Legal Scholar

Author of Fundamental Works in the Area of Civil Law

<sup>8</sup> *Directory of Law Professors*, THE ASSOCIATION OF AMERICAN LAW SCHOOLS, <https://www.aals.org/publications/dlt/>.

Ioffe was born on January 22, 1920—the year of the summer Olympics in Antwerp, Belgium—in Synelnykove, Ukraine.<sup>9</sup> The youngest of four, Ioffe was once described as being a high-spirited child with musical talent and a sense of humor. In his memoir, he refers to someone as a Boy Motl—the mischievous boy in the Sholem Aleichem story—but apparently, it might easily have been said of him as a child.<sup>10</sup>

In the absence of specific information about Ioffe's early years and his thinking as a young man,<sup>11</sup> one can note several points relating to public events that would have shaped his early experience. He was born after the Kishinev pogrom of 1903, and while many more people were killed at Odessa in 1905, it is Kishinev which became the shorthand for Russian pogroms.<sup>12</sup> He was quite possibly in Ukraine during the famine of the early 1930s.<sup>13</sup> He spent some time in the army<sup>14</sup> and then made a long and distinguished career as a jurist at the University of Leningrad.

David Rome's biographical comments add additional details on Ioffe's life. He notes that:

Before applying to emigrate in the late 1970s, Olimpiad Ioffe was considered the Soviet Union's most prominent legal scholar. As Chairman of the Civil Law Department of the prestigious Leningrad State University, Ioffe had authored 32 books and over 150 articles that have been translated into twelve languages. He was also the principal drafter of the modern

<sup>9</sup> Yad Vashem provides this description of the town:

Jews started to settle in Sinelnikovo in the second half of the 19th century. Between 1882 and 1903 Jews were barred from living in the town. When the ban was lifted, the Jewish population of Sinelnikovo began to grow rapidly. In 1919, during the Russian civil war, Denikin's White troops staged a pogrom in Sinelnikovo, killing 17 Jews at the train station. In 1926 1,309 lived in Sinelnikovo, comprising 10.4 percent of the total population. During the Soviet period, many Sinelnikovo Jews, especially the younger ones, abandoned the town for cities to pursue their education or job opportunities. Only 715 Jews remained in 1939, when they comprised 3.1 percent of the total population. Before the town was occupied by German forces on October 2, 1941 a large number of Jews succeeded in leaving. The 200 Jews who remained were shot on May 13, 1942 on the southern outskirts of the town. Sinelnikovo was liberated by the Red Army on September 21.

*The Untold Stories: The Murder Sites of the Jews in the Occupied Territories of the Former USSR: Sinelnikovo*, YAD VASHEM <https://www.yadvashem.org/untoldstories/database/index.asp?cid=412> (last visited Mar. 7, 2021).

<sup>10</sup> *At War*, in O.S. IOFFE, ON THE HUMOROUS AND THE UNUSUAL: NOTES OF A LAWYER 11 (Z. Henkin trans., 2001). We are told that as a child he would suck lemons at band concerts to create problems for the instrumentalists. Note reference to Ioffe as a "free spirit" as a teacher. See *infra* text at note 27. Motl is the 9-year-old narrator in *Motl, the Cantor's Son*, unfinished novel of Sholem Aleichem, who sees that the death of his father, which makes him an orphan, also frees him from certain constraints in his shtetl environment.

<sup>11</sup> Ioffe published essays in Russian about his teachers. These were published in Kazakhstan. See A. DIDENKO, THE HERITAGE OF PROFESSOR OLIMPIAD IOFFE'S SCHOLARSHIP IN MODERN KAZAKHSTAN (Prof. P. Maggs ed., Z. Henkin trans., 2020).

<sup>12</sup> The Slavic term *pogrom*, now an English word, refers to organized violence against an ethnic or religious minority, particularly the Jews of Russia. See STEVEN ZIPPERSTEIN, POGROM: KISHINEV AND THE TILT OF HISTORY (2018).

<sup>13</sup> On the Ukrainian Famine, see generally ANN APPLEBAUM: RED FAMINE: STALIN'S WAR ON UKRAINE (2017).

<sup>14</sup> IOFFE, ON THE HUMOROUS AND THE UNUSUAL: NOTES OF A LAWYER, *supra* note 10.

Russian Civil code and the 1961 Fundamental Principles of Civil Legislation upon which much of Soviet civil law is based.

Rome goes on to describe Ioffe:

Like so many of the other hundreds of thousands of Soviet Jews who applied to emigrate in the 1970s and early 1980s, Olimpiad and his family were denied exit visas and became Refuseniks. Thanks only to special efforts by American legal scholars with whom Olimpiad had worked over the years were they able to leave in 1981. Olimpiad continued to teach and write about Soviet law at Harvard and Boston University before joining the faculty of the University of Connecticut School of Law in 1982.<sup>15</sup>

### IOFFE AS A RUSSIAN JURIST

We can get a sense of who Ioffe was in Russia from an account published after his death by Irina Zhilinkova, a Ukrainian law professor on a Fulbright at the University of Connecticut in 1998.<sup>16</sup> Professor Zhilinkova was “starstruck” by Ioffe when she visited him at home. Her feelings are communicated in the title of her essay, *In Life We Encounter Incredible Things*. She was amazed that a librarian referred to him by his first name, for he was to legal scholarship in Russia as Pushkin was to literature. In discussing Ioffe’s celebrity in Russia with Americans, she then identified Mark Twain as his comparable American figure so that the people she was talking with would understand her point more clearly.<sup>17</sup>

In one way at least, the faculty at the University of Connecticut knew Ioffe was a great man. Those were among the first words that came to mind when the school’s law professors were asked to comment on their former colleague.<sup>18</sup> The comments at his death from Deans Phillip Blumberg and Hugh Macgill, as well as Professor Mark Janis, make that perfectly clear.

In the words of Mark Janis, Ioffe was “a very great man. We were very fortunate to have him.”<sup>19</sup> Hugh Macgill said, “[a]t Olimpiad’s funeral, David Rome ’88 spoke of him by his nickname, Lipa. I knew Olimpiad reasonably well, but I didn’t know he had a nickname and I cannot imagine calling him by one. I’d as soon address Justice Holmes as Wendell or Einstein as Al.”<sup>20</sup>

<sup>15</sup> David A. Rome, *Enduring Lessons from Professor Ioffe’s ‘Brilliant Second Act’ in the United States*, in CIVIL LAW, Issue 33, 54–58 (A. Didenko ed., 2009) [hereinafter DIDENKO].

<sup>16</sup> She was pursuing an LLM in family law at UConn Law School.

<sup>17</sup> Irina Zhilinkova, *In Life We Encounter Incredible Things*, in CIVIL LAW, Issue 33, 59–63 (A. Didenko ed., 2009). See also the entry on Ioffe in the Russian Wikipedia, [https://ru.wikipedia.org/wiki/Иоффе,\\_Олимпиад\\_Соломонович](https://ru.wikipedia.org/wiki/Иоффе,_Олимпиад_Соломонович); Zhilinkova, *infra* note 62.

<sup>18</sup> *Olimpiad Ioffe (1920-2005)*, GRADUATE REPORT (Univ. of Conn. L. Sch. Alum. Ass’n) 2005 at 22. [hereinafter GRADUATE REPORT].

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

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

Ioffe's writing and his efforts were known, in general, to his colleagues in Hartford. The school was impressed, even stunned.<sup>21</sup> Consider Phillip Blumberg's summary:

Olimpiad Ioffe was a towering figure in Soviet jurisprudence. A scholar of rare distinction and an inspiring teacher, [and] even in a second language he speedily emerged as one of the most productive members of the faculty, publishing almost a dozen books pushing out the frontiers of his areas of interest. He accomplished this by preparing his manuscripts in Russian and then painstakingly translating them into English. He was a person of iron will and endless energy.<sup>22</sup>

At the same time, it is likely that most of the law school faculty knew little of his work in Russia, and less the conditions under which that work was done.<sup>23</sup> Ioffe worked on major legislation and was working at one of the most prestigious universities in Russia. As distinguished as he was, he was also of course subject to the ordinary restrictions of academics in his world. Some of these were evident in earlier periods, and while relaxed from time to time, the history was never forgotten.<sup>24</sup>

<sup>21</sup> The lists of Ioffe's work are ordinarily incomplete, since they are focused on his work in English and not even all of that work. And they do not, for example, include the work Ioffe published in the period before his death in Russian, under the auspices of the University of Kazakhstan in Almaty. His work in English displays some of his personality. His sardonic sense of humor, his certainties. Ioffe had prepared for his emigration by working on his English. He was, as he said, equipped financially and then also-linguistically for his new world. The interview with Didenko (2004) quotes one of his English teachers saying that Ioffe's English resembled no known language. Some of his idiosyncratic English remains even in references where the conventional English is easy to locate: "Justinian's body", "Sayings of the Sages of Zion". These do not impede understanding. Other usages, however, make comprehension difficult at times. Reviewers of his early work following emigration sometimes commented on the language issue.

<sup>22</sup> GRADUATE REPORT, *supra* note 18.

<sup>23</sup> See *infra* text at note 35.

<sup>24</sup> John N. Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, 32 AM J. OF INT'L L. 244, 251 (1938). Hazard reviewed the implications for future writing on international law of the attacks on Pashukanis: With these criticisms in mind, the American lawyer may piece together the elements which Soviet theoreticians are now demanding in any treatment of international law. They are declared not as new elements but as principles as old as Marxism. The need for reemphasis today arises from the fact that they had been lost sight of as theoreticians distorted and concealed them. Soviet jurists demand that the errors of the past be corrected.

The author of the future must show in no uncertain terms the definite class nature of international law as practiced by bourgeois states, outlining in detail the connection between internal and foreign policy. He must explain that both are directed towards consolidation of the rulership of the bourgeoisie and the suppression of the proletariat. He must make clear what the Marxian defines as the difference between the policies of the worker's socialist state and the bourgeois imperialist state and show by concrete example how international law relations between these states and the Soviet Union are those of class conflict. He must show how the Soviet Union uses and creates principles of international law to serve the worker's socialist state and to advance constantly its position at the expense of the imperialist states trying to bring about its annihilation.

While in the USSR, the stress of teaching in a system that insisted teachers work within a specific ideology is evident in some of Ioffe's accounts of his experiences as a Soviet legal scholar. See, for example, his comment on teaching Roman Law in Leningrad quoted below.<sup>25</sup> In his book on development of doctrine, Ioffe describes the criticism his writing received for failure to cite Stalin sufficiently either in the number of citations or in the number when compared to the citations of foreign scholars.<sup>26</sup>

Ioffe was an academic in Russia, and we have some descriptions of his work as a teacher. An American political scientist reported an anecdote concerning Ioffe's teaching at Leningrad:

There were some genuine free spirits. Olimpiad Solomonovich Ioffe, who chaired the civil law department in the 1970s, lectured in shirt-sleeves, smoking and joking with his listeners, deliberately ignoring the usual protocol. One student later recalled how Ioffe had opened his lecture series in February 1953, while Stalin was still alive and in his final paranoid, anti-Semitic phase. "I could tell you about the influence that Stalin's work *Marxism and Problems of Linguistics*<sup>27</sup> has had on Roman law," Professor Ioffe began, staring up at the dirty snow falling beyond the classroom's unwashed skylights, "but I will not say this and will get right down to business."<sup>28</sup>

We also have an account of Ioffe as a teacher at Leningrad, written by an American who had just graduated from Harvard Law School, he studied Russian and Soviet law.<sup>29</sup> Logan Robinson studied at Leningrad in the years 1976 and 1977 and published a book about his experience in 1982. To Robinson's great surprise, Ioffe, whom he had taken as a man who had made the kind of accommodation that successful Soviet bureaucrats made,<sup>30</sup> had been allowed to emigrate to the United States and Ioffe was teaching at Harvard.<sup>31</sup>

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Most certainly of all he must make clear that the Soviet Union has developed its own forms and is not merely using bourgeois international law. This will involve explaining that the change in substance has caused form to change as well in accordance with the principles of dialectic materialism. The future theoretician must show that the Soviet Union is unfettered in its choice of forms and in its ingenuity in developing new ones.

<sup>25</sup> See *infra* text at note 36.

<sup>26</sup> O.S. IOFFE, DEVELOPMENT ON CIVIL LAW THINKING IN THE USSR (1989).

<sup>27</sup> An article with this title signed by Stalin was published in 1950. For a discussion of Stalin's article and its impact, refer to ALEXEI YURCHAK, EVERYTHING WAS FOREVER, UNTIL IT WAS NO MORE: THE LAST SOVIET GENERATION 44 (2005).

<sup>28</sup> DANIEL TREISMAN, THE RETURN: RUSSIA'S JOURNEY FROM GORBACHEV TO MEDVEDEV 129 (2011).

<sup>29</sup> LOGAN ROBINSON, AN AMERICAN IN LENINGRAD (1982).

<sup>30</sup> Speculations on the "accommodations" made by those successful in the USSR commonly use a binary analysis. They are either forced to comply or are active supporters of the regime. For a recent attempt by an anthropologist to expand the categories. See YURCHAK, *supra* note 27. Steven Glick reports that Ioffe was not bitter towards the USSR, perhaps because he appreciated the opportunities which the system had given him. GRADUATE REPORT, *supra* note 18.

<sup>31</sup> Ioffe started his career in America with a year at Harvard and at Boston University. He included reference to the three schools in the biography he offers in his final book. Ioffe knew of Robinson's book. Z. Henkin, *Untitled*, in DIDENKO. See also ROBINSON, *supra* note 29, at 319.



Robinson's observations on Ioffe's personality and teaching style are worth quoting:

Even when critical he had a certain charm. He was heavy and not tall—a little Russian bear—and seemed the only person in the place capable of making decision.<sup>32</sup> . . . Professor Ioffe had all the characteristics I came to recognize: the successful Soviet bureaucrat. He was friendly, actually jovial, loving a little light repartee. Successful Soviet bureaucrats no longer have the doctrinaire, deathly serious, self-righteous approach I gather they had during the Stalinist period. Now they have, in informal situations at least, an almost light-hearted style that makes them thoroughly disarming.<sup>33</sup>

Ioffe was a popular teacher and joked with the students during those Thursday afternoon classes, although frequently his jokes seemed to be designed to avoid straight answers to sensitive questions. . . . Ioffe was basically a good lecturer with a kindly, avuncular style. His classes were always entertaining.<sup>34</sup>

Overall, Ioffe's critique of the ideology and the politics of the Soviet era, as well as his constant need for caution in publication and his life in the classroom are all notable in his writing. The law professors could not have forgotten the earlier history<sup>35</sup> or the disciplinary actions taken against those who deviated from the official version of the world. This is clear in Ioffe's account of how he started to teach Roman law. While he approached teaching with enthusiasm, an anecdote he provides in his memoir is one of a number involving the tensions of teaching in a Soviet era law school, even for someone as well regarded as Ioffe:

Once, arriving at a lecture, I became very involved and only with some effort noticed that on the last row, a group of students seemed to be distracted by something. Coming closer, I noticed one of the students lying on his back, and 5–6 students standing around him. “Well, I thought, of course! At a lecture on Roman law someone lost consciousness, and it is obvious why. This is a slaveholding law; if not properly prepared and delivered from the class struggle point of view, it can only confuse the mind of a Soviet student. And who was giving the lecture? Oh. . . well now it's clear. Down with such lecturers, from whose teachings students lose consciousness.”

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<sup>32</sup> ROBINSON, *supra* note 29, at 26.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.* at 38, 45.

<sup>35</sup> For a 1938 treatment, see Hazard, *supra* note 23, on Pashukanis. He “disappeared.”



All these thoughts ran through my head during the few moments necessary to get from the lectern to the fallen student. Coming closer and kneeling down to him, I noted a strong smell of vodka. My heart instantly calmed down. Roman law had nothing to do with it. It was all about vodka. And vodka does not have political aspects. It cannot be regarded as a method of spiritual influence.<sup>36</sup>

Roman law was a system in which it was said that criminal law was very close to the political world.<sup>37</sup> Ioffe worked on civil law. While at the University of Connecticut, Ioffe taught comparative law, Roman law, Soviet civil law, and human rights. He also had an interest in providing American law students with the sort of conceptual apparatus deemed essential in civil law systems but was not successful in that particular endeavor.

Ioffe's reputation in Russia rests not so much on his work as a teacher as on his activity as a civil law jurist and his participation in the struggles over economic law and civil law.<sup>38</sup> This was done in an environment marked by a constant sense of historic dangers. He summarized as much in his last book.

Ioffe described the controversy over economic law and civil law this way: there were two early modern codifications of Soviet law, the first in the 1920s and the second in the 1960s. The first included, in addition to civil law, material on criminal law and procedural law. Though Ioffe notes that "in terms of social characterization of the Soviet country, the Civil Code played the most significant role."<sup>39</sup>

However, he continues,

[B]ecause of certain peculiarities of further legislative development, not this code but current legislation became the center of attention...free institutions of civil law were either supplemented or replaced by "socialist" legal phenomena (e.g., plans in addition to or instead of contracts) Therefore, leading Soviet jurists of that time (Ginzborg, Pashukanis) rejected the very term "civil law" substituting for it the term "economic law."

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<sup>36</sup> *Academia*, in O.S. IOFFE: ON THE HUMOROUS AND THE UNUSUAL: NOTES OF A LAWYER, *supra* note 10 at 17 (Z. Henkin trans.) (Russ. 2001). Ioffe describes a world in which "[e]ven the most honest scholars are forced to distort legal reality, at least to the extent necessary to safeguard their personal safety and to make sure that their completed works will be published." To discuss Soviet law, "one must ideally be a Soviet scholar by origin and a foreign scholar in one's present position." OLIMPIAD S. IOFFE, SOVIET CIVIL LAW 2 (1988). This was the opportunity that Ioffe saw.

<sup>37</sup> See generally O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME (1995).

<sup>38</sup> Most of Ioffe's work was on Russian civil law. On the controversy over civil law and economic law, see *infra* text at note 41.

<sup>39</sup> IOFFE, RUSSIA, *supra* note 5, at 72–73.



The consequences for advocates of civil law were severe: “Adherents of civil law lost their jobs or even freedom, and proponents of economic law celebrated their victory.”<sup>40</sup> This, however, changed when the 1936 Constitution was adopted. As “Stalin’s hangman,” Vishinsky, restored the term “civil law” and abolished the concept of economic law, whose propagandists perished as “enemies of the people” in prisons and labor camps.<sup>41</sup>

Ioffe’s historical summary concludes with a comment on the period after the death of Stalin, when the second largest codification of civil law was being done. The “struggles between proponents of economic law and civil law were revived, if not in the form of repression, then as theoretical discussions of great practical significance.”<sup>42</sup>

We may also note that while Ioffe was a Russian culturally and by modern state-based understandings of nationality, he was also a Jew, and would not have been considered a Russian in the older sense of nationality or ethnicity. The issue of the anti-Semitism in pre-Soviet and Soviet Russia, which was so critical in the life of Ioffe and his family, involved a structure which was likely to be unfamiliar to his American colleagues. Jews were another ethnic minority, like Poles, Tatars or Germans.<sup>43</sup> Thus, Yuri Orlov indicates that the term “Russian Jew” is not a Russian term. It is, he tells us, Western.<sup>44</sup>

The general issue of the mistreatment of minorities would, however, have been familiar to Ioffe’s American colleagues—in part because of the large-scale emigration of Jews to the United States from Russia in the early part of the 20th century. There had been, particularly after the 1917 Revolution, a history of hostility and violence against Jews living

<sup>40</sup> *Id.* See also O. S. Ioffe, *The System of Civil Law in the New Commonwealth*, in *THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE: ESSAYS IN HONOR OF FERDINAND J.M. FELDBRUGGE* 94 (Donald D. Barry et al. eds., 1996) (describing economic law and civil law in the USSR in the 1930s).

<sup>41</sup> IOFFE, RUSSIA, *supra* note 5, at 72–73. Max Laserson makes explicit the connection between the first discussions of “economic law” and the earlier theories of the Revolution which rejected civil law, and indeed ordinary understandings of law, in favor of the idea that law, like religion, was properly understood as superstructure on the base of economic conditions. See generally MAX M. LASERSON, *RUSSIA AND THE WESTERN WORLD: THE PLACE OF THE SOVIET UNION IN THE COMITY OF NATIONS* 115–38 (1945). See also JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIAL STATES* 130–31 (1969), for Soviet law discussing the earlier and later use of the term “economic law.” Vishinsky and the prosecutor of the Moscow trials (as well as the soviet prosecutor in the Nuremberg trials) was, in the 1930s, an advocate of the civil law. On Vishinsky and “revolutionary legality” in the 1930s (to be found in rules and not only by “the nose”, meaning not only “intuition about what constituted revolutionary legal consciousness”), see PETER H. SOLOMON, *SOVIET CRIMINAL JUSTICE UNDER STALIN* 163 (1996).

<sup>42</sup> IOFFE, RUSSIA, *supra* note 5, at 72–73.

<sup>43</sup> On the significance of the nationalities issue in Russia, see, e.g. JACK F. MATLOCK JR., *AUTOPSY ON AN EMPIRE: THE AMERICAN AMBASSADOR’S ACCOUNT OF THE COLLAPSE OF THE SOVIET UNION* (1995). In the United States, Ioffe would have been described as a Russian or a Russian Jew. In the USSR, he would have been considered Jewish, understood as an ethnic category, and not a Russian under an ethnic definition. For discussions of the Russian Diaspora, the broadening definition of “Russian” to include various ethnicities, and the use of the term “compatriot” to refer to former citizens of the USSR, see *NATIONS ABROAD: DIASPORA POLITICS AND INTERNATIONAL RELATIONS IN THE FORMER SOVIET UNION* 39 (Charles King & Neil J. Melvin eds., 2018).

<sup>44</sup> Yuri Orlov (1924–2020) was a Russian dissident who emigrated to the United States. Paul Valentine, *Soviet Dissident Orlov Starts “a New Life” in U.S.*, WASH. POST (Oct. 6, 1986), <https://www.washingtonpost.com/archive/politics/1986/10/06/soviet-dissident-orlov-starts-a-new-life-in-us/b110d095-8d62-4471-800c-3f9d41bf5c9c/>. See also YURI ORLOV, *DANGEROUS THOUGHTS: MEMOIRS OF A RUSSIAN LIFE* 111, 125 (Thomas P. Whitney trans., 1991) (Orlov, who had curly red hair, reports (from the 1950s) that he, an ethnic Russian, was taken as a Jew, but never denied it. To have denied it would have been “indecent” in a time of such persecution, he wrote). On Orlov, see *infra* text at note 123.

in Russia.<sup>45</sup> The anti-Semitism of the Stalinist period also resulted in emigration to the United States and elsewhere.

Ioffe's emigration was facilitated by international Slavic scholars who knew of his work. He was a prominent jurist who wrote regularly on Russian civil law. He was active in the drafting of the civil law codification of the mid 1960s. This is what Ioffe worked on while in Soviet Russia, and what he continued to work on during his years in America. But it opens the question: how was it possible for such a figure to be hired at the University of Connecticut?

### EMIGRATION: CONNECTICUT

Former Dean Phillip Blumberg describes the process by which Ioffe arrived at Connecticut:

When Olimpiad fled the Soviet Union, he found a temporary haven at Harvard Law School. . . . I received telephone calls from the leading figures in Soviet legal studies at Harvard and Yale seeking to find a suitable and congenial place for him in American legal education. The Law School responded immediately to the opportunity. He joined the faculty the next semester and was a leading figure here until his retirement in 1998.<sup>46</sup>

We can add detail to Phillip Blumberg's account of how Ioffe came to Connecticut. How then did a school which often described itself as a "country law school" manage to hire an academic born in the USSR, who had made a distinguished career there, and who had found himself compelled to emigrate from his native country?

One answer may relate to the school's proximity to Yale, which provided a model for some of its activities. The school was close to great research centers with faculty trained at great schools, with a vision of legal education which was heavily influenced by the models of schools considered (by Americans at least) to be among the best in the world.<sup>47</sup> At the same time, the relationship to Yale, and an understood allocation of function between the schools, operated to reinforce a tradition of localism.

<sup>45</sup> Material on the interactions between the Jewish minority and the Russian state is not difficult to find. Solzhenitsyn suggested that he wrote his account because the existing literature, while rich, tended to be filled with reproaches and accusations on both sides. ALEKSANDR I. SOLZHENITSYN, *THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS* 489 (Edward E. Ericson & Daniel J. Mahoney eds., 2006).

<sup>46</sup> Dean and Professor of Law and Business, Emeritus, Phillip I. Blumberg, was dean of UConn Law from 1974–1984. He also notes that Ioffe was interested in UConn Law in part because his daughter, son-in-law, and grandson lived in Connecticut. Blumberg, *supra* note 22.

<sup>47</sup> We can use Mark Tushnet's term "elite adjacent" as part of a description of UConn Law School. Mark V. Tushnet & Louis M. Seidman, *On Being Old Codgers: A Conversation About a Half Century in Legal Education*, GEO. L. FAC. PUBLICATIONS AND OTHER WORKS NO. 2157, 4 (2019). Geographically it was close to Yale. Intellectually, it had many connections to the great law schools. As Newmyer notes, at the start, UConn Law did not aspire to compete with Yale (not then the great school it later became) but rather focused on doing a job that Yale "disdained." See KENT NEWMYER & JOHN KHALIL, *HARD TIMES AND BEST OF TIMES: THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW AT 39 WOODLAND STREET 3* (2016). Later, and by the time Ioffe arrived, the law school had been for some time using Harvard and other elite schools as a model for certain programs, (e.g., clinics.) *Id.*

The year 2021 marked the centennial of the University of Connecticut School of Law. Started as a night school, with an early history marked by various complications, it was a respectable law school, well regarded among American law schools by the mid-20<sup>th</sup> century, with a faculty often trained at the major training schools (Harvard, Yale, Columbia, and Chicago). As was true at other law schools, the interests of the faculty were commonly much different from the interests of the students who often wanted to practice law (rather than teach it) and who commonly were from Connecticut and wanted to remain in the state.<sup>48</sup> The state law school of Connecticut was, of course, a part of the national world of American law schools, whose history in general is often told with an emphasis on Harvard. The law school at Connecticut was perhaps, as much influenced by the approaches of Yale, in its early and continuing commitment to interdisciplinary work and its clinical programs.<sup>49</sup>

On one hand, the law school at Connecticut was like other law schools and unlike most American graduate schools—in that the faculty would teach students to do something, which they themselves usually did not do and possibly had never done. A necessary emphasis was, and is, on the training of practicing lawyers. Moreover, the concerns of the professional school and the graduate school in related areas were to some degree integrated, though law school faculties were not, in general, seeking to replicate their own careers in the careers of their students.

For a long time, only the most elite schools were seen as training full-time law teachers. Their programs were not focused on local law or on bar passage, for example. They varied in the degree to which they encouraged interdisciplinary work or theoretical or historical studies in law. The elite schools, and finally most law schools, were interested in the production of legal scholarship though it was true in law schools—and untrue of most graduate programs—that a person could be hired to teach at a great school with either minimal writing or no writing at all.<sup>50</sup>

The state of Connecticut is sometimes called the land of steady habits. Its law school for many years saw itself as a local law school, and most of its students were from the Connecticut area. The general expectation was that students would practice locally. Faculty often remained at the school for a long time, and only some faculty considered scholarship, particularly scholarship fashionable in a national academic market, a high priority.

Some things had changed by the mid-1970s and early 1980s,<sup>51</sup> particularly in relation to Connecticut's positioning itself in the world beyond its borders. With the encouragement of Dean Phillip Blumberg and under the leadership of Professor Mark Janis,

<sup>48</sup> See also BRUCE M. STAVE ET AL., RED BRICK IN THE LAND OF STEADY HABITS: CREATING THE UNIVERSITY OF CONNECTICUT (2006).

<sup>49</sup> See Robert Stevens, *History of the Yale Law School: Provenance and Perspective*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES, 1–16 (Anthony T. Kronman, ed. 2004).

<sup>50</sup> See James Gordley, *Mere Brilliance*, 41 AM. J. OF COM. L. 367, 368 (1993). The emphasis on nationally recognized published scholarship spread through the legal academy, both because of the emulation of the great schools and because computer research made scholarship both available and subject to quantitative analysis. Where the great schools could look to “promise”, other schools were as likely to want demonstrated achievement. Schools which once had one law review, often had several. Faculty had to publish, students wanted to be editors of law reviews. Legal scholarship is published based on the decisions of second- and third-year law students. This has to have shocked any émigré legal academic.

<sup>51</sup> The change was in part curricular and in part a change in personnel. Paul Baumgardner, *Originalism and the Academy in Exile*, 37 L. & HIST. REV. 787, 789 (2019).

an international program was thriving, building on an LLM program and some faculty exchanges, with exchanges established in several foreign universities. An intensified LLM program brought foreign students to the school from various countries. And the idea that Connecticut's law school should hire an eminent civil law academic who had been forced into exile did not seem as strange, in that moment, as it might have seemed 20 years before.

By the late 1970s and early 1980s, the international aspects of the program had been notably strengthened by the faculty and student exchanges (and later an LLM program), through the work of Professor Mark Janis. Courses were offered in international law and international human rights law. Various members of the faculty continued to be in contact with friends at Yale and Harvard. By the accident of such a contact, UConn Law learned of O.S. Ioffe.

While there were faculty familiar with the orientation of the civil lawyers in Europe, for the most part, the faculty was probably less well informed on the subjects of Ioffe's work, his approach, or his contributions.

Born in the USSR after the 1917 revolution, both Ioffe's sense of history and his canon of legal writing and his approach to the idea of law and a legal system would have been different from that of an American. As to a sense of history, it may be enough to recall, in relation to the 20th century, the differences in accounts of World War II.

Even the question of when the war began is treated differently.<sup>52</sup> In relation to law and legal development, it seems that not only does the common law/civil law divide exist but also, for many in the field of comparative law, whether “socialist” law is a distinguishable entity worth independent study is a subject for inquiry.<sup>53</sup> And the idea that American legal education is as parochial as the legal education of other countries, focused even at the more intellectually ambitious schools not only on the common law but also on the American version of the common law, will probably not shock many who teach in American law schools.

Ioffe had prepared for his emigration by working on his English. He was, as he said, equipped financially and then also linguistically for his new world.<sup>54</sup>

Ioffe started publishing in English immediately upon his arrival in the United States.<sup>55</sup> Early articles were published in the Harvard, Boston University, and Connecticut law reviews. Published through academic publishers and the University of Connecticut Law School Press, his books then focused on Eastern European subjects. Ioffe's intellectual work continued very much on the material he had worked on previously though sometimes he noted—as with his article on Roman law—that he would have been unable to publish

<sup>52</sup> For Russians, it may start with the German invasion of Russia in 1941. For Americans, it begins with the German (and Russian) invasion of Poland in 1939. See TIMOTHY SYNDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2012).

<sup>53</sup> Émigrés might also have a different sense of who the great figures in the field are. Thus, the sociologist Pitirim Sorokin (a student at St. Petersburg before his emigration, a sociologist at Harvard after) wrote in 1944 that Leon Petrazycky was “probably the most eminent legal theoretician of the twentieth century.” It is a description that reflects more the conventional understandings of St. Petersburg in 1917 than the understandings at Harvard in the 1940s. PITRIM SOROKIN, *RUSSIA AND THE UNITED STATES* 40 (Routledge 2017) (1944).

<sup>54</sup> His early contacts with the law school in Hartford included a talk to the faculty. See Hamilton, *supra* note 6.

<sup>55</sup> Ioffe worked with a number of faculty and students at the University of Connecticut, who would have assisted with some language issues.

particular work in his native country because the argument was not in accord with an official political position.<sup>56</sup>

In the eyes of Russia, America was both a competitor and a place to be envied.<sup>57</sup> It was a competition in which Western advantage was commonly assumed.<sup>58</sup>

Ioffe produced a good deal of work while in Connecticut and was highly regarded at the school. He traveled, though not to his native country. There were aspects of American life—its medical facilities, for example—which he experienced and appreciated late in his life. Presumably, there were aspects of Russian culture that he missed. He was in touch with dissidents and émigrés and kept up with current events.

Some of Ioffe's colleagues understood the significance of Ioffe's background as an individual born in the Soviet Union in 1920. Hugh Macgill, dean of UConn Law from 1990-2000, said of him:

Olimpiad was the toughest man I ever knew. As a child, he survived the disorders of the Soviet Union's infancy, as a young man he survived the Siege of Leningrad and, in April 1945, a German bullet. At 60, suddenly transplanted to a new country, language and legal culture, he kept on producing scholarship at the highest intellectual level. In his 70s, he survived pancreatic cancer—nearly impossible, as a statistical matter. Olimpiad's focus, drive and determination were unrelenting.<sup>59</sup>

Ioffe was not a defector.<sup>60</sup> He, like Yuri Orlov, wanted to stay in Russia, albeit a much-changed Russia.<sup>61</sup> In Orlov's case, the regime flew him out. In Ioffe's, the regime made it impossible for him to stay. Both men lived to see the collapse of the Soviet Union in 1989.

There was of course a status question. As noted, we have a description by a Russian law professor studying at the University of Connecticut on a Fulbright struck by the fact that librarians referred to Ioffe by his first name.<sup>62</sup> Perhaps she was also surprised that Ioffe was prepared to discuss with her his disappointment, as a faculty member in an American law

<sup>56</sup> The issue of Roman law and its possible connection to Soviet law was not a discussable subject—a point Ioffe makes in his law review article on Roman law. See Olimpiad S. Ioffe, *Soviet Law and Roman Law*, 62 B.U. L. REV. 701 (1982).

<sup>57</sup> Not least for its consumer goods. Ioffe was also heir to the Russian competition with the United States in various areas, from consumer goods—food being a problem in Russia—to medical care. Ioffe thought that American democracy would preserve it from dictatorship. See IOFFE, RUSSIA, *supra* note 5.

<sup>58</sup> A Russian joke I once read: "You can't report on scientific developments. All that work is secret." "Why? Russia is 20 years behind America." "That's the secret."

<sup>59</sup> GRADUATE REPORT, *supra* note 18.

<sup>60</sup> The term "defector" often raises images of dramatic escapes without the authorization of officials. The narrative of forced emigration is quite different. Ioffe was not permitted to travel in the years before his emigration, although he received many invitations from institutions abroad. His original application to emigrate was denied. Z. Henkin, *Untitled*, in CIVIL LAW, ISSUE 33, 5–9 (A. Didenko ed., 2009). Ioffe refers to denials of a request to emigration: "your emigration contradicts the interests of the Soviet State." See Olimpiad S. Ioffe, *Human Rights*, 15 CONN. L. REV. 687, 704 n. 65 (1993).

<sup>61</sup> Orlov discussed below.

<sup>62</sup> As to the common/law civil law divide, Ioffe was direct with Irina Zhilinkova about the efforts he had made in his early years at Connecticut to introduce American law students to the conceptual approaches of the civil law. But they were not interested, and he was not interested in *Smith v. Smith* which he took to represent the common law system. Irina Zhilinkova, *In Life We Encounter Incredible Things*, in CIVIL LAW, ISSUE 33, 59–63 (A. Didenko ed., 2009). Thanks to Daniel Gurvich for providing me with an English summary of this Russian language essay, *In Life We Encounter Incredible Things*.



school that he could not interest the American students in civil law.<sup>63</sup>

Ioffe's 25 years as a member of the faculty at the University of Connecticut School of Law can be better understood against this background. In one sense, he was perhaps more like Kelsen, the famous legal theorist who emigrated to the United States in 1940 than some other émigré academics. But where Kelsen did not work at a law school, Ioffe did, and the school honored and respected him even when it did not quite know him.

## PART TWO: THE SECOND CAREER

The emphasis here is not on the details of Ioffe's work on Soviet or Russian civil law, the subjects of his life's work. But it is appropriate to indicate the nature of that writing.

The abstract from the *Harvard Law Review*, written presumably by student editors, conveys the major theme of Ioffe's American work. The article, titled *Law and Economy in the USSR*, has the following abstract:

Western and Soviet commentators alike commonly treat the Soviet economy in isolation from its political context when proposing reforms in the systems of production and distribution; the legal means of regulating the economy have received little attention in American professional literature. In this Article, Professor Ioffe draws on his personal experience of the Soviet legal and economic systems to argue that the Soviet state pursues a consistent and successful policy of manipulating the legal structure and legal regulation of the economy to secure the regime's political position. He traces the implementation of this policy over the course of successive Soviet economic reforms and presents his view that no fundamental economic improvement can be affected as long as the Soviet political system remains unchanged.<sup>64</sup>

Ioffe's writing is directed largely to an international audience of specialists in Slavic studies and Russian and Soviet law. Its importance for the study of Soviet law has been repeatedly recognized in the many English language reviews of his books. Thus, it was noted that, "it may be doubted whether any treatise on Soviet law has shown more conclusively that sham and deceit can coexist durably with laws that are meant to work and do work."<sup>65</sup> The complexity described in Ioffe's work shows that the "legal system is not vacuous, but it is part of a larger interacting system that includes official illegality, Party protection, secret

<sup>63</sup> See *infra* text at note 88.

<sup>64</sup> Olympiad S. Ioffe, *Law and Economy in the USSR*, 95 HARV. L. R EV. 1591 (1982).

<sup>65</sup> Leon S. Lipson, *The Laws of Rule in the Soviet Union*, 11 YALE J. INT. L. 258, 271 (1985) (reviewing OLIMPIAD S. IOFFE, *SOVIET LAW AND SOVIET REALITY* (1985)).

instructions, perquisites and pull, economic monopoly, official coercion, administrative discretion, and freedom from substantive due process.”<sup>66</sup>

Ioffe himself discussed the special nature of the contribution of an academic in his position, both an insider and an outsider, could make to the understanding of his subject.<sup>67</sup> Ioffe did not disown his writing as a leading Soviet legal academic.<sup>68</sup> At the same time, the work he did in the United States surfaced a theme that would never have been published while in his home country: Soviet reality demonstrated that its law could not be separated from dictatorship, and arbitrariness.<sup>69</sup>

Perhaps one can assume that these general issues were part of his exposition of whatever he taught and wrote for an American audience, and particularly an audience of American law students.

Ioffe’s last book on Russia and its law is different from his other work. First, the book is his work only. It has no citations or sources. It is more ambitious than his other work, as an attempt to present an overview of centuries of social, legal, and political developments in Russia going far beyond the studies of civil law with which Ioffe had been associated.

The introduction to this last book has a section on the Russian soul. He sees five aspects of the Russian national character: paternalism, obedience, stability, undemandingness, and carelessness.<sup>70</sup> His discussion of national character presumably has sources in his reading and experience, but these are not identified. He is aware that some of these characteristics can be found in other societies but insists that their particular sequence and history in Russia is unique to Russia. In saying so, he makes the general point that Geoffrey Gorer offered in his book on Russian national character: “as far as we know, there are no items of behavior or experience which are unique to one society; as far as we know, the pattern and sequence of items, in their entirety, are all unique to specific societies.”<sup>71</sup>

Ioffe provides an overview of the development of the societal, economic, and legal aspects of Russian society as linked to those features of national character.

The argument is that rather than creating a new society as they claimed, the Soviets built a world in continuity of older patterns. The post-Soviet period is a stage in the history of Russia, rather than an entirely new society.<sup>72</sup> He did not annotate his final book but some

<sup>66</sup> *Id.*

<sup>67</sup> OLYMPIAD S. IOFFE, *SOVIET CIVIL LAW*, *supra* note 2.

<sup>68</sup> See Harold J. Berman, *Review*, 44 *THE RUSSIAN REV.* 72, 73 (1985) (reviewing OLYMPIAD S. IOFFE & PETER B. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE* (1983)).

<sup>69</sup> OLYMPIAD S. IOFFE, *GORBACHEV’S ECONOMIC DILEMMA: AN INSIDER’S VIEW* 15–16, 320 (David A. Rome ed., 1989).

<sup>70</sup> Paternalism roots in reverence for the Tzar, and obedience is its counterpart. Carelessness is also described as recklessness. *Id.*

<sup>71</sup> GEOFFREY GORER & JOHN RICKMAN, *THE PEOPLE OF GREAT RUSSIA: A PSYCHOLOGICAL STUDY* xvi (2d ed. 1962). Nathan Leites makes the same observation on the rules of the politburo. See NATHAN LEITES, *THE OPERATIONAL CODE OF THE POLITBURO* (1st ed. 1951). If Ioffe had wanted to use English language material on Russian national character, there were a number of discussions he might have found suggestive: Geoffrey Gorer, Nathan Leites, Margaret Mead all wrote on this under the auspices of the Rand Corporation, for example. Émigré writing might also have been used. Laserson and Sorokin, for example, without even reaching the use of literary materials, like Nabokov’s *Pnin*.

<sup>72</sup> This, again, is consistent with observations about the transmission of cultures through generations. See GORER & RICKMAN, *supra* note 71. Gorer’s book, as he indicated in 1962, had attained “a certain notoriety.”



English language discussions from specialists and observers, confirm his observations from the standpoint of a native son.

His central point—that Bolshevik thinking was connected to earlier patterns and that the 70 years following the revolution did not produce institutions and frameworks which were absolutely new was suggested by others.

George Kennan, for example, pointed out that the description of Nicholas I offered by the Marquis de Custine (based on a trip taken in 1839) fit Stalin remarkably well.<sup>73</sup>

The recklessness of which Ioffe writes might relate to the theme of gambling in Russian fiction, or even Russian Roulette. The Soviets themselves might be concerned about the larger implications of some Russian traits.

Nathan Leites in his work on the rules of the politburo and also his book on Soviet approaches to war, referred to several traits which the Bolsheviks viewed as Russian: passivity, inaction, and overemphasis on feeling. These might sometimes require adjustments. He also notes that some of the characteristics which might be taken as Russian one way or another, might be Bolshevik strategies: whether friendliness or shoe-pounding, all for effect.<sup>74</sup>

### THE VARIETY OF ÉMIGRÉ EXPERIENCES

Mark Janis' comments on Ioffe after his death suggest this comparison to the refugee scholars of the 1930s. "Olimpiad was one of a kind for us—not only our first professor of comparative law, but also an extremely distinguished European lawyer," Janis noted, "the only parallels that [he could] think of are the people who came to teach at America's great law schools after fleeing Europe in the 1930s.... Ioffe was like that...His arrival was a very special occasion for us." Janis reported as he traveled, in the United States and Europe, that people continued to stop and talk to him about Ioffe.<sup>75</sup>

Of course, Ioffe was not the first Russian lawyer to immigrate to the United States.<sup>76</sup> But if we focus on legal academics, we commonly look to the German legal academic

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because of a particular understanding of his discussion of the Russian swaddling of infants. Gorer argued in 1992 that this understanding was mistaken in suggesting that his argument (in 1949) had been that swaddling was a cause, perhaps the cause of Russian developments.

<sup>73</sup> Kennan wrote:

Here as though the book had been written yesterday...appear all the familiar features of Stalinism: the absolute power of the single man; his power over thoughts as well as actions; the impermanence and insubstantiality of all subordinate distinctions of rank and dignity—the instantaneous transition from lofty station to disgrace and oblivion; the indecent association of sycophants upwards with brutality downwards....

GEORGE F. KENNAN, *THE MARQUIS DE CUSTINE AND HIS RUSSIA IN 1839* 124 (2017).

<sup>74</sup> LEITES, *supra* note 71. See also LASERSON, *supra* note 41 at 2–11 for the point of view that allows inconsistencies and contradictions as possible within a larger framework.

<sup>75</sup> GRADUATE REPORT, *supra* note 18.

<sup>76</sup> Vladimir Nabokov is commonly cited for the Russian émigré experience. VLADIMIR NABOKOV, *SPEAK, MEMORY* (1st ed. 1951). A younger generation of émigrés from Russia (GARY SHTEYNGART, *LITTLE FAILURE: A MEMOIR* (2014); LEV GOLINKIN, *A BACKPACK A BEAR AND EIGHT CRATES OF VODKA: A MEMOIR* (2014)) has recently published accounts of the emigration of Jews who came to the United States as children. As to lawyers, one can note that several of the students of Petrazycki (who himself left St. Petersburg for Warsaw in 1917) came to the US and continued to write on Petrazycki after their arrival in the U.S.

émigrés of the 1930s for our material. The experience of that group of academics is treated often in terms of its influence on American law and legal institutions. The participants in that group were active in the creation of new curricular areas (notably comparative law) and the development of particular fields of law.<sup>77</sup>

Points made by John Langbein provide a helpful outline of some of the issues here: The German émigrés, while convinced of the superiority of their own system, were up against what Langbein calls "the cult of the common law."<sup>78</sup> The question of what is done is clearly related to the question of vested interest, or who is doing it. Proposed changes to legal procedures or institutions—Langbein's focus—with German law as a model were hard to bring forward. The German system they were advocating was associated with Hitler. And, then, the émigrés had the reluctance of a good guest, to criticize a country that had accepted them.<sup>79</sup> Langbein stresses the contributions of the émigrés to the curriculum, particularly in the field of comparative law. The curricular change that Ioffe was particularly interested in related to the failure of the American law schools to do anything systematic to teach the conceptual framework in which, as Ioffe saw it, all legal issues existed.

The foundational conceptual approach, as taught by Ioffe, might not be altogether successful.<sup>80</sup>

A common version of the story of the German academic émigrés in law and other fields, stresses their successful accommodation to the new environment, and, further, their influence on the American legal system. Indeed, influence is in the title of a major set of essays on the subject. Kessler, Rheinstein, Riesenfeld, Ehrenzweig, Friedmann—the names are part of the ordinary law school story. Their contributions to contracts, family law, international law and comparative law are as much part of the conventional history as the name Francis Lieber is in the 19th century history.

An English compilation, *Jurists Uprooted*, tells the story of the German-speaking legal academics in England with a somewhat different sound. It details the hardships and difficulties of the émigrés—finally finding influence in the specialized area of Roman law.<sup>81</sup>

Two stories suggest some possibilities. Stefan Riesenfeld (born in 1908) left Germany for Italy before the Nazis took power in 1933. His association with Boalt Hall, where he learned English, began in 1934. He was one of the German émigrés who received an American law degree. A quite different case is suggested by Hans Kelsen, who was

<sup>77</sup> See the summary in DER EINFLUSS EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND (M.H. Hoeflich, M. Lutter, & E.C. Stiefel, eds., 1993) of individuals and their fields. This group had been identified earlier, when a pamphlet listing them and their accomplishments was published by an aid organization attempting to find work for them in the United States after they had been ousted from their academic posts in Germany.

<sup>78</sup> John H. Langbein, *The Influence of the German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure*, in DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 1991, 328 (M.H. Hoeflich, M. Lutter, & E.C. Stiefel, eds., 1993).

<sup>79</sup> *Id.* at 331.

<sup>80</sup> *Cf. Law, the Law, a Law* as described by David Rome in DIDENKO, *supra* note 15, as well as his emphasis on Latin maxims.

<sup>81</sup> JACK BEATSON, *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* (Jack Beatson & Reinhard Zimmermann eds., 2004).

already famous when he arrived in the United States, who did not re-train in an American school, and who perhaps had an understanding of American law schools that would not facilitate teaching in that setting. Kelsen was born in 1881, left Germany after losing his post following the Nazi victory in 1933, and emigrated to the United States in 1940.

Kelsen thought that American law schools were not interested in "scientific theory" as he understood it. He saw the schools as training schools for practicing lawyers. He presumably saw and criticized the failure of the common law to provide a coherent sense of vocabulary, and its failure to relate concepts to each other. In addition, he seems to have had an unusual understanding of what the case method was about. He appears to have believed that because of the doctrine of precedent, the objective of the law school program was to master as many cases as possible.<sup>82</sup>

A part of the American story is, however, not about influence but about marginality, and even, in the case of Hans Kelsen, what is considered neglect. The Kelsen history reveals some difficulties that are not often surfaced in the "influence" narrative, the problems of the encounter of German legal science and American common law thinking, particularly in its Realist form.<sup>83</sup>

Ioffe's 25 years as a member of the faculty of the law school of the University of Connecticut is better understood against this background.<sup>84</sup>

If we expand the question of the adjustment of émigrés to the American situation, we see that for some of the German academics, notwithstanding their success in the new country, emigration had a particular sadness.<sup>85</sup> Relations between Russia and Europe were as complicated as the relations between Russia and the United States.<sup>86</sup> The memories of World War II were as intense for Russia as they were intense for Europe, generally. America was not only a victor in the war, but a country that had been spared the horrors of war in the homeland. For Ioffe's generation, these horrors were real.<sup>87</sup>

<sup>82</sup> Nicoletta Kadavac, *Philosophy of Law and Theory of Law: The Continuity of Kelsen's Years in America*, in HANS KELSEN IN AMERICA: SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE 230 (D.A. Jeremy Telman ed., 2016). Kelsen was not successful in getting a job at a law school, and never it seems understood why Harvard, having given him an honorary degree, did not hire him. He was hired by the University of California in the political science department. Kelsen described American law schools as "training schools", uninterested in scientific legal theory. "The training is oriented to practice and uses the case method. Since the American courts base their decisions essentially on precedents it is understandable that the law schools see it as their goal to acquaint their students with as many cases as possible...." *Id.*

<sup>83</sup> This encounter can be evidenced by a kind of dialogue held at Columbia in 1928. Kantorowicz was visiting Llewellyn's seminar. His paper was published, with annotations from Patterson. Herman U. Kantorowicz and Edwin W. Patterson, *Legal Science: A Summary of its Methodology*, 28 COLUM. L. REV. 679 (1928). The issues reflected in that dialogue remain recognizable.

<sup>84</sup> Blumberg, *supra* note 22 (referring to the efforts made on Ioffe's behalf by Slavic specialists).

<sup>85</sup> See Bernhard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 SYRACUSE J. INT'L L. & COM. 3, 4 (1992) (discussing the problem of the loss of identity, one dean commented as to one distinguished refugee: "we did not know who he was").

<sup>86</sup> See, e.g., LASERSON, *supra* note 41 at 161. (discussing the historic enmity between Russians and Germans, going back to the Teutonic knights).

<sup>87</sup> The family of Ioffe's wife was in Leningrad for most of the three years after the siege. Obituary, *Evgenia Ioffe*, HARTFORD COURANT (Nov. 25, 2006), <https://www.legacy.com/obituaries/hartfordcourant/obituary.aspx?n=evgenia-ioffe&pid=20024673&fhid=4076>. LOGAN ROBINSON, AN AMERICAN IN LENINGRAD 26 (1984). Among the photographs in Logan Robinson's book is one showing two signs on the walls of the law faculty building

While it is beyond the scope of this piece to attempt a discussion of the differences between the German academic émigrés and those of Russian origin, certain preliminary observations can be offered: the German (German-speaking) émigrés were often of a group that was highly assimilated and identified with Germany. The German émigrés often had trained, lived, and worked in Germany until the Nazis came to power. As one of the children of that group noted, they were sometimes not “free of the illusion of the superiority of German culture.”<sup>88</sup> The shock of the Nazi perception of them—some did not consider themselves Jews, for example—added to the experience of loss and displacement when the Nazi regime excluded them. These individuals had escaped the worst of the war in Europe and had not died in the camps. This did not mean that life in the United States (or England, or Canada or Australia) was easy for them. At the same time, it is clear why a distinction is commonly made between those Germans who escaped the Nazis—some indeed left Germany fairly early in the 1930s—and those who escaped the Holocaust.

Perhaps critically, the expulsions from Nazi Germany meant that, unlike the Russian émigrés, the German scholars did not generally have the long-term experience of adapting and surviving under a totalitarian regime.<sup>89</sup>

As noted, some discussions of the German émigrés stress their influence on American law. Reciprocally, one might also discuss the influence of American law on the German émigrés. In the case of Ioffe, it does not seem simple to think in terms of mutual influence. While Ioffe's work is important to those American academics who work on Soviet and Russian law, it is not likely that people beyond that group will read it. His approach to Roman law, discussed below, suggests that he taught in America very much how, and even what, he taught in Russia.

In general, Ioffe's thinking seems to be in the civil law tradition. He was frequently concerned with comparative questions of organization, classifications, and definitions.<sup>90</sup> He tried to expose his students in Connecticut to the comparative questions here in several ways. In one article he outlined a proposal for a course in classical legal vocabulary, and in a book he discussed the concepts and universals of Roman law.

### LEGAL SCIENCE AND ROMAN LAW

Like the German émigrés, Ioffe attempted to bring certain values of the civil law orientation to the American law school world. This is clear from the description of Ioffe's teaching offered by his one-time student, David Rome, in an account published several years

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in Leningrad. The first refers to artillery shelling in Leningrad during the siege. The second indicates that the first sign has been left in place to mark the courage of the Leningraders during the siege.

<sup>88</sup> HANNA HOLBORN GRAY, *AN ACADEMIC LIFE* 1 (2018).

<sup>89</sup> For the account of a child who emigrated (on his experiences and later reflections), see PETER GAY, *MY GERMAN QUESTION: GROWING UP IN NAZI BERLIN* (1998).

<sup>90</sup> In his article on legal education, Ioffe refers to various disadvantages of American legal education. He then writes: “An obvious disregard of universal legal vocabulary seems to be one of the most intolerable. To improve the situation there are probably only two solutions: the introduction of a new required course or the incorporation of the appropriate material into an existing but also required course.” Olimpiad S. Ioffe, *American Legal Education and the Classical Legal Vocabulary*, 16 *CONN. L. REV.* 753, 757 (1984). Beginning with the 1983-84 academic year, UConn Law applied the second solution.

after Ioffe's death. It is not clear how much Ioffe actually knew about the common law, in the United States or other countries. In this, again, he may have been like Kelsen, who seemed to think that the essential point about legal education in the common law system was the study of many cases for the purpose of learning rules.<sup>91</sup>

Rome says he received from Ioffe a “classical legal education.” He memorized a number of Latin maxims, including one that basically urged restraint.<sup>92</sup> Rome also indicates Ioffe may have missed the status of the continental jurist.

Ioffe attempted to introduce civil law legal science into an American law school curriculum. His overview was given in a law review article.<sup>93</sup> The first important point for him was that the study of concepts and categories had to be required. It was a necessary part of the training of lawyers. He offered several ways to do this: a required course or a supplement to other required courses. The approach he took was outlined in an article in the Connecticut Law Review and is evident in the examinations he gave.<sup>94</sup> The examinations Ioffe gave are reminiscent of Logan Robinson's description of the objectives of Ioffe's teaching at Leningrad. In general, Robinson notes:

Classes were nothing like at Harvard. There was no Socratic question-and-answer method, nor was there any analysis of actual cases and decisions to illustrate legal reasoning and techniques. Lectures reminded me of the way I was taught history in high school: there was no attempt to develop a historical method or make historians out of us—we were told the facts, and during examinations we were expected to give the facts back, not with analysis, not with differing interpretations.<sup>95</sup>

German legal science was highly conceptual and abstract. To a person trained in civil law, the legal system of the United States, in its various parts, would have seemed chaotic and confused. It is not merely, as is often said, that the civil law stresses statutes and codes while the common law is built on cases. The differences are deeper and long well known. In the 19th century, the question might be whether it was useful to study Roman law as Ioffe understood, as the source of the conceptual approach.<sup>96</sup>

<sup>91</sup> See *supra* text at note 82.

<sup>92</sup> Cf. There is an account in DEVELOPMENT OF CIVIL LAW THINKING whereby Ioffe's proposal for further improvement in a piece of legislation was supported by opponents—it would have gone back a stage in the approval process—and opposed by those who endorsed the main work. Ioffe describes his approach as a strategic mistake.

<sup>93</sup> Ioffe, *supra* note 90. This article was Ioffe's contribution to a volume honoring Phillip Blumberg.

<sup>94</sup> OLIMPIAD S. IOFFE, CLASSICAL VOCABULARY EXAM, Univ. of Conn. School of Law (1985).

<sup>95</sup> Robinson, *supra* note 29, at 320.

<sup>96</sup> For an American, some differences are captured in the familiar Holmes line about logic and experience: “The life of the law has not been logic, it has been experience.” OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). Other differences show in the curriculum. The American emphasis is on interdisciplinary approaches, on law as involving material beyond cases and statutes, and, in general, on the idea that law is an art as well as a science.

In 1968, Mirjan Damaska described his own reaction, as a continental lawyer, to the problems of adjusting to the common law:<sup>97</sup>

In order to gain an understanding of Continental legal grammar, Americans should imagine lawyers of an analytical turn of mind à la Hohfeld at work for a long time, studying the law as it emerged from legal practice. Americans should further imagine that both the analysts' dissection of law and their generalizations were generally accepted by the legal profession...

Many rather amorphous American legal concepts would be subjected to rigorous analysis... In the process of analysis, the twilight zone of the concepts would be somewhat reduced, sub-concepts isolated and separately labeled. A richer and more precise legal terminology would appear. Movement would also proceed in the opposite direction, that is, toward the creation of more general, sometimes almost cathedral-like concepts.... These newly created, broad concepts would become accepted as elements of standard legal terminology. Study would then proceed to the relationships between such legal concepts.

The emphasis on clarity, structure, and conceptual precision has sometimes been used as an argument for the teaching of Roman law as an introductory course in the common law environment. It was argued this way in the 19th century in the United States and can still be found as an argument today.<sup>98</sup>

Roman law is usually primarily discussed as private law. Many discussions focus on the Roman law of sales or of possession. The incarnations of Roman law in different countries is also often discussed. Roman law is said to underlie the continental codes, even in the USSR, which disclaimed the historical association with Roman law (or any other).<sup>99</sup>

Ioffe's book on Roman law is in the civilian tradition, in which there is a heavy emphasis on the Roman law as an organized presentation of material. Ioffe tells the history

<sup>97</sup> Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 UNIV. PA. L. REV. 1363, 1365 (1968). Damaska, a native of Croatia who moved to the United States in 1971, taught at the University of Pennsylvania and then at Yale Law School. See further discussion of generic common and civil law issues in Weisbrod, *Science, Art and the Pluralist Legacy of Leon Petrucycki*, in *THE LIVING LEGACY OF LEON PETRACYZKI* (Edoardo Fittipaldi & A. Javier Trevino, eds. 2023).

<sup>98</sup> Roman law is not taught much in American law schools. And where it is taught, it can be taught very differently. A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* (1978) (Schiller's desk book on Roman law, stressing the work of the classical jurists). For a discussion of the history of the debates over Roman law, see James Q. Whitman, *Long Live the Hatred of Roman Law!*, 2 *Rechtsgeschichte* 40 (2003). On Roman law teaching in the United States, see generally, M.H. HOEFELICH, *ROMAN & CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE 19<sup>TH</sup> CENTURY* (1997). For comments on teaching Roman law in the 20th Century, see *id.* at 144. For a description of the materials used in one 20<sup>th</sup> century course, Arthur Schiller's Roman Law course at Columbia University, see Peter Stein, *Obituary: Arthur Schiller*, 28 *RIVISTA INT'L DI DIRITTO E ANTICO* 316, 318 (1980).

<sup>99</sup> Olymptad Ioffe, *Soviet Law and Roman Law*, 62 B.U. L. REV. 701 (1982).



in terms of the problem and its later solution. A problem he sees is the disorder of the materials and the many cross references required by the weakness of organization. The solution, found by the Pandectists, is the approach that survives in the “general part” to those provisions that are generally applicable to all situations, followed by various specific parts.<sup>100</sup>

Ioffe describes two logical systems in European statutory development:

“[o]ne of these systemic—institutions—appeared in Ancient Rome and reappeared in modified form in the Napoleonic code. External simplicity is the principal virtue of this system, which consists of three parts: person, things and modes of acquisition...”<sup>101</sup> The weakness here is that it requires cross references and “legal provisions of general significance are not set apart.”<sup>102</sup> Ioffe notes that the second system—pandect—addresses these problems. The general part “encompasses all legal provisions of general significance.”<sup>103</sup> The subdivisions, deal only with certain specific issues.

This, he says, was the system of the German jurists of the 19th century and used by the German pandects of the 19th century and borrowed in the course of codification of Soviet civil law in the course of the 20th century.

It is not clear that he used the research tools available at the time of his emigration to access American writing.<sup>104</sup> For example, his article on Roman law and Soviet law does not cite an article on that subject published in 1957.<sup>105</sup> It seems likely that the Roman law book is based on his materials teaching Roman law in Russia, updated to include some comments on Soviet and Western approaches.

He does not stress, at least in the published material (I do not know what his actual courses were like), the affinities between a certain period of Roman law and Anglo-American law.<sup>106</sup> Ioffe's book is an exposition, in German tradition, a textbook, which at times roams free, including comments about Tsarist Russia and the Soviet response to the idea that Roman law could be a source of Soviet law. Ioffe cites very few secondary sources, though his book includes a short bibliography of books in English.

<sup>100</sup> O. S. Ioffe, *The System of Civil Law in the New Commonwealth*, in *THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE: ESSAYS IN HONOR OF FERDINAND J.M. FELDBRUGGE 94* (Donald D. Barry et al. eds., 1996)

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* See also W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* (1936).

<sup>104</sup> He came to the law school when computers were only used by some faculty. In his article on Soviet and Roman law, he notes that the description of cases and illustrations cited were based on his recollections, since reports were not available for citation. There are sometimes references to a broad international conversation which includes American material in Ioffe's writing, notably in the work, *Human Rights*. See Ioffe, *Human Rights*, *supra* note 60.

<sup>105</sup> Darrell P. Hammer, *Russia and the Roman Law*, 16 *AM. SLAVIC & EAST EUROPEAN REV.* 1 (1957). In general, while Ioffe kept up with his field through contact with émigrés, dissidents and former colleagues, as well as American Slavic specialists, I have no reason to think that he used the research resources of the internet, for example. Palmer stresses the influence of the German Pandectists in Russia, noting that it was their work—not the earlier work of the classical Roman jurists—that was studied. Ioffe's approach was in this tradition. Palmer quotes a Russian teacher in 1910, speaking to law students at Moscow: “[T]he scientific theory of civil law...takes its principles from the works of the Roman jurist. Thus, an acquaintance with Roman law in its developed aspect is absolutely necessary for anyone who pretends to the title of a scientifically trained jurist.” *Id.* at 9.

<sup>106</sup> A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* 24 (2010). This affinity was noted by W.W. Buckland in *COMMON LAW AND ROMAN LAW* (1936).

Ioffe begins with a discussion on why a course in Roman law is useful to American law students. He points out that one can study Roman law, as part of legal history, and also that Roman law belongs to the present as well as the past—a force in numerous countries about numerous legal provisions. Each profession has a vocabulary; the broader this vocabulary, the higher the professional cultural level. “The vocabulary of the legal profession is primarily based on legal terminology from Roman law....”<sup>107</sup> Professions have professional instruments and “the clearer the substance of these instruments, the stronger the effect of professional activities.... Instruments of the legal profession consist of legal norms and legal constructions, regardless of their forms—statutory acts, judicial precedents, customs or habits.”<sup>108</sup> A great number of these originated with Roman law. True, Rome was a slave society, but still “the creators of Roman law managed to develop general, abstract and comprehensive legal constructions that can be employed by any country in any era and that are actually employed presently to one degree or another all over the world.”<sup>109</sup>

Ioffe raises this question: how can we identify only the relevant part of Roman law and study it? He notes that “[a]ncient Roman lawyers themselves indicated the methods of solving this complicated problem[ , as] they distinguished between public law and private law.”<sup>110</sup> Public law is “closely connected with the peculiarities of the Roman state and the epoch in which it existed. No one except historians study it.”<sup>111</sup> But “private law contains general provisions whose significance exceed the restricted limits of the Roman Empire and the Roman epoch.”<sup>112</sup> Private law is studied “within the commonly adopted broad title of Roman law.”<sup>113</sup>

Still, Ioffe concludes that since American development was less influenced, “the purpose of studying Roman law in the US is more modest than those in Continental Europe or even in the UK.”<sup>114</sup>

Ioffe’s interest in systematic presentation of legal material is clear in his Roman Law book,<sup>115</sup> where he describes two systems, the institutional system and the Pandectist system, outlines the advantages of each, and then chooses to go with the institutional system, though modified. As noted, Ioffe’s concern with classification and the appropriate placement of materials in a code is evident in much of his work.<sup>116</sup>

Ioffe seems to be not so much a researcher in the field of Roman law as a scholar interested in it as a foundation of civil law. His exams test knowledge of Roman Law.<sup>117</sup>

<sup>107</sup> O.S. IOFFE, ROMAN LAW (1987). David Rome assisted on this book. *See also Enduring Lessons from Professor Ioffe’s “Brilliant Second Act” in the United States* in DIDENKO, *supra* note 2, at 2–3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> O.S. IOFFE, ROMAN LAW (1987).

<sup>113</sup> *Id.* at 2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 17–20

<sup>116</sup> Classification is part of the work on *Human Rights*. Ioffe includes a section headed, “How to Classify Human Rights.” It divides the subject first into “The Subject of Classification” (subheads: quantity and quality) and then “Principles of Classification” (legal, referring to treaties for example and doctrinal, referring to theoretical discussions.)

<sup>117</sup> OLIMPIAD S. IOFFE, CLASSICAL VOCABULARY EXAM, Univ. of Conn. School of Law (1985).



He does not test students through factual patterns used by the jurists or modern hypotheticals like those Jhering used in *Law in Daily Life*.

### HUMAN RIGHTS AND LEGALITY

Ioffe's book on human rights is different from his book on Roman law. Roman law is an exposition of the basic categories of an ancient legal system whose current importance is largely as a source of modern law. The human rights book discusses issues of current significance. Ioffe's highly theoretical discussion is unlike those books on human rights which draw on a much wider range of materials—historical, sociological, literary—focusing on the debates over specific rights, stressing the difficulties in establishing consensus on some points and noting the uncertainties in interpreting the particular rights in relation to each other.<sup>118</sup>

The contrast here is to works on human rights, which first focus on the content of specific rights<sup>119</sup> and then engage a question relating to normative universality. This is not Ioffe's interest. He is comfortable talking about a universal human nature, which is protected by human rights.<sup>120</sup> *Human Rights* offers a solution to some problems of theory framed in the idea of legality. By this, Ioffe seems to mean something like the principles of legality, which Lon Fuller offered in 1967 via the *Morality of Law*.<sup>121</sup> This usage of legality is to be distinguished from the Soviet "Revolutionary Legality" or "Socialist Legality," also discussed by Ioffe. These usages reinforced a dogma to the effect that laws were subordinate to the purposes of the state or the Party. Ioffe's version of the principles are resolved in two propositions: (1) with reference to individuals, the rule should be that everything is permitted except what is forbidden, and (2) as to administrators (*i.e.* officials) the rule is that everything is forbidden except what is permitted.<sup>122</sup>

<sup>118</sup> A book on human rights can be arranged so that individual chapters address specific rights: housing, free speech, *etc.* Here there can be a stress on the problem of balancing rights, and the need to decide what and whose rights are to be protected. See, for example, ANDREW CLAPHAM, *HUMAN RIGHTS: A VERY SHORT INTRODUCTION* (2015). The effort here is to provide a vocabulary for the debates rather than, as is usual in Ioffe's work, an effort to provide conceptual clarity. Ioffe reviews some jurisprudential positions as to law generally and then to those positions in relation to human rights discussions. He identifies problems and suggests solutions. He then considers the various documents considered the basic materials of human rights law, their strengths and weaknesses.

<sup>119</sup> A different contrast might be to work that doubts the idea of Human Rights more broadly. See, *e.g.*, George Kennan, *Morality and Foreign Policy*, 64 *FOREIGN AFFAIRS* 205 (1985).

<sup>120</sup> Gurvitch was able to suggest the right to a happy childhood as a human right. G. GURVITCH, *THE BILL OF SOCIAL RIGHTS* 76, 146 (1946).

<sup>121</sup> Ioffe refers to principles of legality but does not draw on Lon Fuller's discussion.

<sup>122</sup> Ioffe, *Human Rights*, *supra* note 60 at 694–701. Ioffe further writes:

The principle under consideration declares to those who create law: everything not permitted by human nature is forbidden. At the very moment when law violates this demand, it deserts the ground of legality and ceases to be law. The purpose of law is to assure the welfare of mankind.

This purpose becomes attainable only on the condition that law conforms to human nature is an indissoluble unity of the psycho-physical, intellectual, and social being.

*Id.* at 704. Ioffe's longest discussions of human rights concentrate on large questions about different conceptions of law, of legality, and of rights while also addressing textual issues in the legal materials relating to human rights. As a usual in Ioffe's work, a certain amount of Ioffe's discussion is directed against arbitrary and sometimes secret power and uncertainty in regulatory material. Human rights are not all the same: "[in] order to discover their

In his discussions of human rights, a reader sees the world of experience on which Ioffe draws. His anecdotes about food shortages, corruption, bribes, and, finally, emigration are a constant reminder of the USSR.

The emigration of a dissident of Ioffe's generation, the physicist Yuri Orlov, born in 1924, was an example used by Ioffe in a talk about human rights in Russia. Orlov was a defender of Sakharov who had spoken out on human rights and was tried and sentenced to deprivation of liberty for seven years, followed by exile for five years. Orlov did not, however, serve his full sentence.<sup>123</sup> He left the Soviet Union in 1986, expelled suddenly and without his consent.<sup>124</sup>

In an address to a symposium later published, Ioffe, in remarks given shortly after Orlov's arrival in the United States, provided little detail about the Orlov case, assuming presumably that it was in the category of current events for his listeners.<sup>125</sup> He noted that Orlov's departure from the Soviet Union—in exchange for an American journalist—was so sudden that he arrived at the airport not knowing that he was leaving Russia.<sup>126</sup> A *New York Times* story reports the complex emotions of Orlov and his wife.<sup>127</sup> Orlov had hoped for freedom as a free man in Russia. As it was, he and his wife were expelled with little, leaving behind their sons and his wife's family. It was a new life, a new language.<sup>128</sup> Orlov had always refused emigration, looking to a better future in his homeland.<sup>130</sup> He became an American citizen.<sup>131</sup> It is hard to imagine that Ioffe, speaking of Orlov, was not also thinking of his own case.

*Human Rights* may also be read in connection with Ioffe's book on *The Development of Civil Law Thinking in the USSR*. That book begins with a conceptual chart of research in the sciences. Ioffe notes that the European countries, in contrast to the U.S., use the word science to include the hard sciences and sciences of a different kind, which he called humanistic. The humanistic sciences include jurisprudence. Ioffe's work on *Human Rights* and his solutions to certain problems in human rights material and in law more generally may

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similarities or differences, human rights must be classified. And only after being included in comparatively enlarged logical groups are they fit for isolated analysis...." Ioffe offers a classification whose "premises rest in a correct outlining of the classified subject and in a reasonable choice of classificatory principles...." *Id.* at 721. He explains that this is not only a matter of logic, but also has significance in the real world. Ioffe argues that legal classification has important practical consequences, including the prediction of future activity in the field. He states, "classification of human rights not only facilitates their theoretical analysis and practical application, but simultaneously contributes to the exposure of open or concealed violations of these rights. In this way classifications aids in their efficacious protection." *Id.* at 743.

<sup>123</sup> Sam Robers, *Yuri Orlov, Bold Champion of Soviet Dissidents, Dies at 96*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/world/europe/yuri-orlov-dead.html>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> YURI ORLOV, CURRICULUM VITAE, <http://physics.cornell.edu/sites/people/files/Orlov%20c.v.%20and%20pubs%202018.pdf>. This curriculum vitae provides details on Orlov's life as a physicist and a Russian dissident.

<sup>130</sup> ORLOV, *supra* note 43.

<sup>131</sup> In 1990, Gorbachev restored eligibility for citizenship to a number of dissidents, including Orlov. AP, *Solzhenitsyn Cool as Moscow Confirms Offer*, N.Y. TIMES (Aug. 17, 1990), <https://www.nytimes.com/1990/08/17/world/solzhenitsyn-cool-as-moscow-confirms-offer.html> (Solzhenitsyn returned to Russia in 1994.).

be read in connection with some of Ioffe's comments in his book on the development of civil law thinking in the USSR.

Ioffe's point about research is that the constraints to which theorists were subject to were different in the two categories. In the humanistic sciences, particularly in civil law research, there was a possibility of more creative research in at least part of the work. In an afterward, responding to a review of one of his books, Ioffe identifies general purposes of his work: to make a contribution to the American scholarship on Russian law. To do this, he had to work in his own way.<sup>132</sup>

A somewhat different sense of Ioffe's purpose is offered in an English language book published in Italy (with an introduction by Ajani, who notes that the book is a revision of earlier work published in the USSR.)<sup>133</sup> This book discussed the history of numerous controversies, and then offered some conclusions. First, "Soviet civil law doctrine is a very peculiar doctrine." It is on the one hand, filled with abstract concepts, each of which produces discussions "resulting in numerous theories for preventing the achievement of final solutions."<sup>134</sup> On the other hand, "this doctrine emphasizes purely Soviet legal features, to separate Soviet civil law, and if possible, to oppose it to the homogenous branches of the legal systems of Western countries."<sup>135</sup>

Second, the Soviet civil law contains legal institutions "unknown to previous and contemporary legal systems employed by countries with different political structures. Of course, Soviet civilists strive to pay attention mainly to these institutions."<sup>136</sup>

Third, and most relevant here, "Soviet scholars, limited in their creative activity insofar as the official dogma present insurmountable barriers to them, manage nevertheless to develop theories original in substance and attractive in details...."<sup>137</sup>

Ioffe argues that by "assessing the theoretical achievements of various Soviet scholars, one must take into consideration not only what these scholars have done but also what they can do under the appropriate circumstances."<sup>138</sup> Soviet civil law doctrine has some material that is "universal for this branch of law all over the world (responsibility, fault, causation, *etc.*) and those which mirror the peculiarities of the same legal branch existing in the USSR (operative administration, planned distribution, planned contracts, *etc.*)."<sup>139</sup>

But, "[a]s to the former case, one cannot deny that Soviet civilists have made their contribution to the universal development of civil law thought."<sup>140</sup> This contribution, he wrote, "must be known by Western scholars either as an issue or polemics or as a source of

<sup>132</sup> *Afterward*, in OLYMPIAD S. IOFFE, SOVIET CIVIL LAW, *supra* note 36 at 373. There is a note accompanying this short essay in which the editor indicates that he advised against this afterward.

<sup>133</sup> O.S. IOFFE, DEVELOPMENT OF CIVIL LAW THINKING IN THE USSR, *supra* note 26.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> O.S. IOFFE, DEVELOPMENT OF CIVIL LAW THINKING IN THE USSR, *supra* note 26, at 405. It is these comments which suggest that Ioffe, as an elderly man, had reached the life-stage which Erikson saw as "integrity." as opposed to despair. On the eighth stage, see ERIK ERIKSON, CHILDHOOD AND SOCIETY 268 (1950).

<sup>137</sup> O.S. IOFFE, DEVELOPMENT OF CIVIL LAW THINKING IN THE USSR, *supra* note 26.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

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

further development... .”<sup>141</sup> He concludes that in order to understand civil law doctrine of the “USSR, one must understand its history.”<sup>142</sup>

There is no attempt here to summarize Ioffe's contributions to Russian civil law or to American understandings of Russian law. Instead, I would offer a suggestive comment made by Paul Stephens, who wrote that there was a “compelling comparison...between Ioffe's approach to legal scholarship (for which many other examples by distinguished émigrés can be found) and that of the critical legal studies movement in the United States.”<sup>143</sup> Stephens continued:

I realize that in some sense the comparison is preposterous. The émigré scholars such as Ioffe do not draw on either the critical philosophical fathers or critical literary theory for their methodology, and their policies are hardly those of the critical legal studies movement. But both the critical studies scholar and the émigrés aspire to expose the ways in which formal legal structures disguise political conflicts in which the dominant elite attempts to impose its will on the remainder of society. More significantly, the critique stems directly from casual empiricism—the participant's senses and impressions—rather than from some more structured social science methodology. And at heart, the émigrés and the critical studies movement are attempting to articulate a perception of law and its uses that flows from the observer's fundamental alienation from and antagonism with the society under observation. Both are voices of radical disenchantment, turned to the subject of law.<sup>144</sup>

### CONCLUSION

Ioffe lived to see a change in his relations to his native country.<sup>145</sup> After his death, there were tributes.<sup>146</sup> He spent the last decades of his life at an American law school with strong traditions of intellectual and professional work in law. Ioffe contributed to these by bringing with him the traditions of the civil law and giving depth and intensity to the ideas of legality and the rule of law.

Some of the writings on émigrés stress influence and recognition. Other accounts are about marginality and difficulty. Ioffe's story involves elements of both stories. It is not clear that he had a general influence on Slavic studies, though his is a critically important voice in the academic work on Soviet law. He did not influence American law. But he left a

<sup>141</sup> *Id.*

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

<sup>143</sup> B Paul B. Stephan, III, *The Soviet Law of Property*, 34 AM. J. COMP. L. 816 (1986) (reviewing GEORGE M. ARMSTRONG, *THE SOVIET LAW OF PROPERTY* (1983) (original footnotes omitted)).

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

<sup>145</sup> An account of a conference in Leiden in *Moscow News* B-12 (Aug. 22, 1993) describes Ioffe's departure as a tragedy, and includes a reference to Ioffe's interactions with Russian legal scholars at the conference. Thanks to Anastasia Petukhova for translation. It is clear from his late work that Ioffe was concerned with the legislative work in Russia in the early 1990s.

<sup>146</sup> See, for example, the Russian Wikipedia entry, with Russian references and English references.

legacy in the school with which he was associated for the last decades of his life.<sup>147</sup> Ioffe is remembered with affection and respect.

In 2006, a professorship was created to honor him:

**Olimpiad S. Ioffe Professor of International and Comparative Law**

Named for a colleague who brought great distinction to the Law School as our first professor in the field of comparative law and as an internationally known scholar of Soviet law and legal institutions. He was the dean of Leningrad State University, but was forced to immigrate to the United States when he lost his position for political reasons. We welcomed him to the Law School, where he became the first William F. Starr Professor of Law, a beloved teacher, and a brilliant scholar until his retirement in 1998....The Ioffe Professorship is designed to reward achievement and promise in the areas of comparative or international law.

The school also put up a plaque on the hallway wall leading to his office:

Olimpiad S. Ioffe  
1920-2005  
Preeminent Scholar of Russian Law

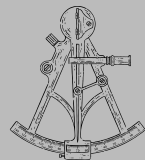
Chairman Faculty of Civil Law  
State University of Leningrad

First William F. Starr Professor of Law  
University of Connecticut School of Law

The school has honored various people in different ways but the plaque directing attention to his office is, like Ioffe himself, unique in the history of the school.

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<sup>147</sup> The year 2020 was the centennial of Ioffe's birth. A conference marking this date was put off because of the COVID-19 pandemic.



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## Olimpiad S. Ioffe Centenary

### International Law at a Country Law School

Mark Janis\*

I am delighted to contribute to these recollections about Olimpiad Ioffe. Let me add to the words of my colleague, Carol Weisbrod, and reflect on how and why Olimpiad came to what our dear friend, Hugh Macgill, called the University of Connecticut School of Law at the time of Ioffe: “a country law school.” It was never obvious that Olimpiad would want to come to our law school or, indeed, that our law school would want him to come to us.

By 1980, when Dean Phillip Blumberg invited me to join the law school and inaugurate its international law program, Phillip and Hugh, the founding fathers of the modern law school, had already been on the faculty for six or seven years. Phillip served as Dean from 1974 to 1984, Hugh from 1990 to 2000. They had some similar ambitions for the law school—most importantly, to recruit a first-class faculty and student body, and to move the school from an over-crowded facility in West Hartford to the gothic cluster of buildings of what had been the home of the Hartford Seminary in Hartford’s West End. How did Olimpiad and an international program fit within their ambitions? First, let us turn to the international program since it pre-dated Olimpiad’s arrival in 1984 by several years.

When, in February 1980, I flew from France where I was an associate at Sullivan & Cromwell’s Paris office, the law school was still in West Hartford. Phillip’s assistant, Bev Pratt, did not drive me from the airport first to the law school, but took me to the promised campus, assuring me that when I came on board in September, the law school would have already moved. The promised campus had been prominently illustrated on the cover of the law school’s catalogue for a number of years. For me, these were early demonstrations of Phillip’s extraordinary talents as a salesman. As I learned when I chatted with the faculty, there was no possible way the law school could move to the seminary buildings in six months. Indeed, the betting was that a move at any time was at best 50/50. The problem was persuading the state to fund renovations and the move. Only in 1984, did Phillip, with help especially from Hugh, did the law school make the move. When it finally moved, much still needed to be done, including the renovation of Hosmer Hall, the faculty building. This was put off to 1985 in what was then called “Phase 2” but which, almost forty years later, is still undone. I was discovering that UConn’s pockets were a lot emptier than those of Princeton, Oxford, and Harvard, where I had been a student.

Lack of funding aside, UConn Law School had many personal attractions. Phillip and, later, Hugh gave me freedom (within financial limits) to build the international program

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\*William F. Starr Professor of Law, University of Connecticut School of Law.

from scratch much as I liked, something I could have never done at the other better-endowed law schools at which I was looking and where I would have had to fit in with established professors and programs. Indeed, two of the more prominent possible other law schools, both in the top ranks, wanted me as a corporate law professor where I could, as a side show, teach an international seminar. But corporate law was what I was leaving and I was enticed by the prospect of realizing my own vision of international legal education. That enticement played out over the next decade in exchange programs for students and faculty, visiting professors, foreign sister schools, library additions, and, in time, hiring international faculty. Olimpiad was our first additional international faculty addition, an important goal for me.

It was Carol Weisbrod who first identified Ioffe as a possible hire. She had heard of him from her contacts at Yale. After his forced emigration from the Soviet Union, Olimpiad and his wife, Jena, were living near New Haven with their daughter, son-in-law, and grandson. As I was told the story then, Olimpiad wanted to recreate his Soviet status in the U.S.—a full-time faculty member, publishing now in English which he was learning, and recreating his works in the new language, fearful that his legacy in the Russian language would be wiped out by the Soviet government. He had an impressive group of Western Soviet Law scholars who had backed up his pleas to leave the USSR and were now working to find him employment. These included Peter Maggs at Illinois, John Hazard at Columbia, Leon Lipson at Yale, Hal Berman at Harvard, Bill Butler at London, and F.J.M. Feldbrugge at Leiden. His first year as an emigrant saw Olimpiad land semester-long visiting posts at Harvard and Boston University, and a lecture at Columbia. The word was that Western law schools with strong programs in comparative or Russian law were interested in him for longer-term posts in the future, but only on fixed-terms and not on the regular faculty. Olimpiad wanted a full tenure-track faculty post.

Carol asked me to travel with her to see Ioffe at his daughter's Stamford home in southern Connecticut, meeting him, his wife, and his daughter. We stayed for about an hour and a half. Olimpiad's English was already workable—it would become stronger, of course, over time. He explained he had never been permitted to learn English or even to travel outside of the Soviet bloc. He could and had gone to Poland, East Germany, Hungary, *etc.*, and even so far as Finland, but never anywhere where he might be a flight risk. So, this meeting was early on in his life in an English-speaking world. He was looking for an offer from Carol and me, but we explained that we were only getting to know him; hiring decisions were made by a faculty appointments committee. We did get to know him and we reported back to Phillip and the hiring committee, on which both Hugh and I sat, but it was too early to seriously consider Olimpiad. There were more prominent and richer law schools interested in Ioffe. He had impressive publications and references. Our law school had no tradition in Russian law studies, indeed the law school had, I think, never had a professor of comparative law, except that in the early 1980s I taught such a course alongside my main subjects, international law and international business transactions.



Phillip, Carol, and I kept up with Olimpiad as he visited at Harvard and Columbia in his first American year. He began to teach and to publish in English, articles and work on some books, largely reproducing his publications in Russian. But neither Harvard nor Boston University nor other likely richer law schools like NYU and Yale were interested in hiring Olimpiad as a full-time tenured faculty member. By the spring of his first year, Olimpiad and our law school were more seriously back in touch. He did not commit himself and we did not commit ourselves, but in March 1982, Ioffe was invited to a one-day look-see visit, giving a lecture to faculty, meeting with small groups of faculty, students, and administrators. And, then, it went nowhere.

I was again on the appointments committee and, save Hugh and I, there was no enthusiasm to offer Olimpiad a tenure-track position. The other four members of the committee could see no likely prospect that he would adequately teach U.S. law courses. Despite protestations from Hugh and me that many of the Nazi-era emigrants to American law schools in the 1930s became good teachers of U.S. law, the majority of the committee protested that, from what they had seen, Olimpiad was too old and too set in his ways to master an American law school subject like contracts, torts, property, or criminal law. They turned out to be right. Olimpiad never really tried to learn U.S. law. He was never really a “comparative law” teacher or scholar, rather, in American academic terms, he was a “foreign law” teacher and scholar. However, as a foreign law teacher, he was outstanding, one of the strongest faculty members ever to have been on the law school faculty at Connecticut. What gave Olimpiad a slim majority on the appointments committee, late in the day, was a third position. We thought we had two positions to fill and we filled them with two promising young lawyers, both excellent choices—fine teachers and scholars, who ably fit existing needs. But when, unexpectedly, a third position turned up, we could and did turn to Ioffe at the last minute of the hiring season.

Our law school was willing to appoint Olimpiad to a tenure-track position, giving him status, albeit not as high as what he had at the University of Leningrad, one of the premier law faculties in the Soviet Union, or Harvard or Columbia. But we were respectable and there was a good salary and much time for him to write and publish. There would be money for travel. I think one reason Olimpiad did not search more vigorously for comparable law schools across the country was that our law school was near his daughter and her family, and near to his Russian law friends at Harvard, Yale, and Columbia. Not Harvard, our law school would do.

From my point of view, appointing Olimpiad was splendid. We now had two professors dedicated to the new international program. Olimpiad could and did teach Soviet Law, Civil Law, Comparative Law (with a strong emphasis on the Soviet system), and, for him and our law school, a new course, International Human Rights Law. His classes were not large, usually somewhere between eight and twenty students, but the law school’s elective classes were usually of that size. We always had several students in each class who

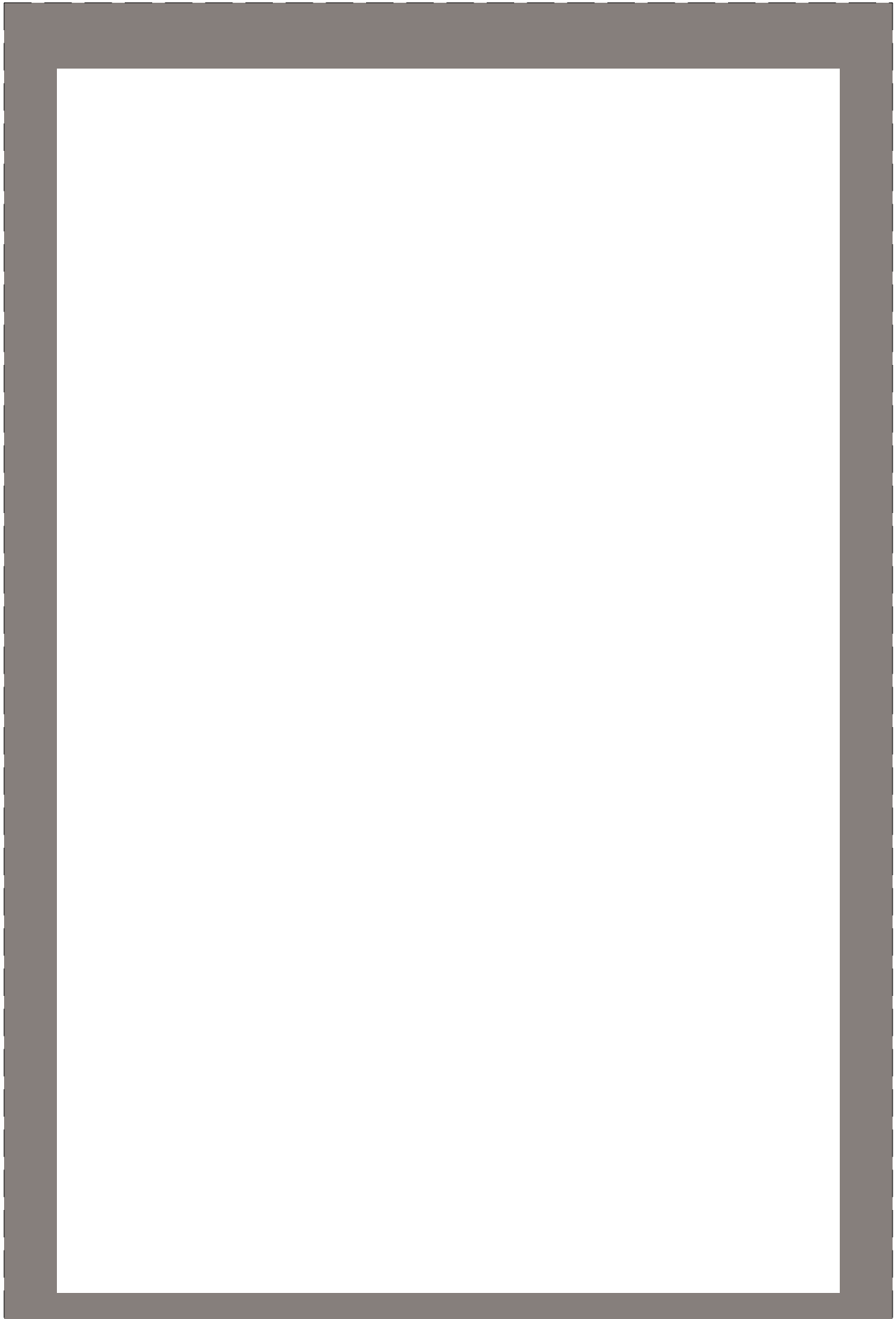


had an academic or family background in Russian studies or the Russian language. Olimpiad, while an active faculty member, was always able to find at least one able research assistant fluent in Russian to help him with his publications. Nowadays that the law school has an international program with about eight professors, twenty courses, and several LL.M.s devoted to international and comparative law, it is hard to remember how thin we were back in the early 1980s. Without Olimpiad, we would have been truly shallow. Moreover, Olimpiad was always a huge presence. He commanded attention and respect, on the campus, in America, and around the world. He was articulate, learned, and funny. He also played a mean guitar.

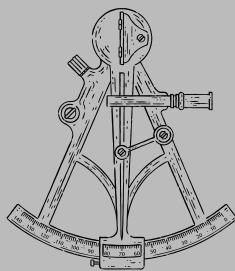
Looking at Olimpiad's appointment from the viewpoints of others, let me begin with Carol Weisbrod, the match-maker who brought Olimpiad to our attention in deepest Connecticut. Carol has always been fascinated by scholarship and loves to read, more so than most anyone I know. Olimpiad was a writer, someone who could not put down the pen. One of his favorite sayings to me was: "Mark, Mark, Mark, write, write, write, someday I must read again." However, unlike Carol, who takes only a day or two to read anything I recommend, my suggestions as to what he might read, never led to anything; Olimpiad had too much to write.

As for Phillip, Olimpiad was part of his larger jigsaw puzzle for his law school. Phillip was proud of his Harvard degrees – Harvard always had his greatest respect. To try to replicate, in a smaller way, the prestige of the Harvard Law School, its faculty, buildings, and alumni, was Phillip's vision. The University of Connecticut gave Phillip the wonderful opportunity to create his own great law school. Olimpiad was a significant piece of Phillip's ambitious puzzle achieving greater institutional prestige. It was our boast in the 1980s that the University of Connecticut School of Law was more prestigious as an international institution than it was as a national institution. Olimpiad was an important part of that boast.

Hugh, too, was interested in boosting the status of the law school, but he always realized that their head starts in age, alumni, and endowment would always put others ahead of the University of Connecticut School of Law. Cursed by its proximity to Harvard and Yale, Columbia and NYU, Hugh knew that our law school could never compete with those great institutions on their own terms. What Hugh sought were ways for our law school to be great in our own way—as a "country law school." As the fine small colleges of New England—Williams, Amherst, and the rest—could never be Harvard or Yale, they might suit some somehow, someday, so our law school might suit some who would prefer it, for whatever reasons, to its neighbors. Olimpiad was living proof of Hugh's ambitions—Ioffe was an academic treasure who was ours alone.







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**Love Blocked by the Border: How Taiwan’s Restriction on Cross-Border Same-Sex Marriage Violates Its Promises Under International Law and Contravenes Customary Practices**

**Shannon Nolan**

**Abstract.** While Taiwan’s same-sex marriage legislation marked a historic first in Asia, it specifically limited cross-border same-sex marriages to instances when a foreign partner’s country of origin also recognizes same-sex marriages. Although the applicable law is facially neutral and only stipulates that any marriage in Taiwan “is governed by the national law of each party,” it is *de facto* discriminatory in practice because one class of its citizens—those who wish to marry their same-sex partners from countries that do not recognize gay marriage—are unable to meet Taiwan’s marriage requirements. Taiwan’s restriction of same-sex cross-border marriages is problematic in two ways: (1) it violates Taiwanese domestic law and its promises to uphold international law, and (2) it goes against the choice of law norms of every other country in the world that has legalized same-sex marriage. In keeping its international law promises, and in order to follow standard same-sex marriage conflict of laws principles, Taiwan should issue a new interpretation of its own cross-border marriage law and grant all individuals the same rights and privileges related to marriage.

**Author.** University of Connecticut School of Law, J.D. 2021; Drexel University, B.A. 2016.

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## INTRODUCTION

In the aftermath of *Obergefell v. Hodges*, the U.S. Supreme Court case that declared the right to same-sex marriage fundamental under the U.S. Constitution,<sup>1</sup> Taiwanese legislators and political leaders across the globe saw this as a sign that the time was ripe to act on their own soil. In a combined case with petitioners representing the capital city of Taipei and a long-time gay rights activist, Taiwan's Constitutional Court ruled that certain provisions in Taiwan's Constitution require equal protection for all its citizens, including those whose sexual orientation does not align with heterosexual norms.<sup>2</sup> *Interpretation No. 748* was issued in May 2017 and officially signed into law two years later.<sup>3</sup> In 2019, Taiwan<sup>4</sup> became the "first in Asia" to legalize gay marriage.<sup>5</sup>

While Taiwan's same-sex marriage legislation marked a historic first in Asia—no other nation in Asia had legalized same-sex marriage—it came with a specific limitation. As Taiwan's current legislation stands, cross-border same-sex marriages may occur in Taiwan only if the foreign partner's country of origin also recognizes same-sex marriages.<sup>6</sup> For example, the law allows a Taiwanese citizen and her same-sex American partner to marry because the United States recognizes same-sex marriages. But, it would not allow a Taiwanese citizen and her same-sex Japanese partner to marry because Japan does not recognize same-sex marriages.<sup>7</sup> Although the applicable law is facially neutral and only stipulates that any marriage in Taiwan "is governed by the national law of each party," it is *de facto* discriminatory in practice because one class of its citizens—those who wish to marry their same-sex partners from countries that do not recognize gay marriage—are unable to meet Taiwan's marriage requirements.<sup>8</sup> Even giving full credence to Taiwan's sovereignty to decide which law is applicable in choice-of-law matters, Taiwan's restriction of same-sex cross-border marriages is problematic in two ways: (1) it violates Taiwanese domestic law and its promises to uphold international law, and (2) it goes against the choice of law norms of every other country in the world that has legalized same-sex marriage. In keeping its international law promises, and in order to follow standard same-sex marriage conflict of laws principles, Taiwan should issue a new interpretation of its own cross-border marriage law and grant all individuals the same rights and privileges related to marriage.

<sup>1</sup> See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>2</sup> Stewart Chang, *Made in Taiwan: Alternative Global Models for Marriage Equality*, 34 CONN. J. INT'L L. 143, 145 (2019).

<sup>3</sup> *Id.* at 145.

<sup>4</sup> Taiwan is also sometimes referred to as the "Republic of China" or "R.O.C."

<sup>5</sup> Laurel Wamsley, *Taiwan's Parliament Legalizes Same-Sex Marriage, a First in Asia*, NPR (May 17, 2019, 5:02 AM), <https://www.npr.org/2019/05/17/724222598/taiwans-parliament-legalizes-same-sex-marriage-a-first-in-asia>.

<sup>6</sup> Rik Glauert, *Taiwan's Same-Sex Marriage Law Yet to Fulfill Marriage Equality*, THE NEWS LENS (Nov. 1, 2019), <https://international.thenewslens.com/feature/taiwan-pride-2019/126872>.

<sup>7</sup> *Id.* See also Lily Kuo, *Taiwan's Marriage Law Brings Frustration and Hope for LGBT China*, THE GUARDIAN (July 5, 2019, 12:00 AM), <https://www.theguardian.com/world/2019/jul/05/taiwan-marriage-law-frustration-hope-lgbt-china>.

<sup>8</sup> Act Governing the Choice of Law in Civil Matters Involving Foreign Elements 涉外民事法律適用法, Art. 46, (2010), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007>.

This Article proceeds as follows. Part One discusses Taiwan's road to legalizing same-sex marriage and its interpretation of a choice-of-law provision on marriage that in practice restricts some, but not all, same-sex marriages. Part Two discusses Taiwan's commitments under international treaties and argues that Taiwan's failure to recognize all same-sex marriages equally violates its promises under the International Covenant on Civil and Political Rights (ICCPR.) Part Three discusses the cross-border marriage laws adopted by every other nation that recognizes same-sex marriage and argues that Taiwan's interpretation of its marriage laws governing cross-border couples contravenes customary practices. Finally, Part Four offers solutions that would allow Taiwan to retain its sovereignty in resolving conflicts of law while also meeting its promises under international law, aligning with customary practices, and promulgating a law that is no longer *de facto* discriminatory.

### **I. Taiwan's Path to Legalizing Same-Sex Marriage**

To understand how Taiwan came to legalize same-sex marriage, one must first understand where it has been. At the conclusion of World War II, the Chinese socialist party Kuomintang (KMT) lost to China's communist party and fled to Taiwan.<sup>9</sup> Once there, the KMT ruled the Taiwanese under strict martial law, creating an atmosphere in the authoritarian state that restricted individual liberties and turned neighbors against one another.<sup>10</sup> In the late 1980s, however, martial law ended and Taiwan quickly shifted to a democratic platform.<sup>11</sup> Liberties that were once stifled were now at the forefront of Taiwan's budding democracy, newly recognized and protected. Student leaders who grew up after the conclusion of martial law formed coalitions that bolstered individual freedoms,<sup>12</sup> including the right to love and be loved, regardless of gender.<sup>13</sup> By the mid-2000s, the government was led by officials representing the first Taiwanese generation raised in a democracy, some of whom became the first to run on a platform that included gay rights.<sup>14</sup> Taiwan's development of constitutional law also became particularly sensitive to safeguarding civil liberties and Taiwanese judges tended to interpret constitutional law in a light that gave human rights greater respect and accord.<sup>15</sup>

By the time the decision in *Obergefell* was announced, the atmosphere in Taiwan was ripe for change. However, the country remained largely divided; on the one hand between Christian groups espousing traditional values that discouraged the acceptance of homosexuality, and on the other by the younger generation who grew up with strong notions

<sup>9</sup> Chang, *supra* note 2, at 155.

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

<sup>11</sup> *Id.* at 155-56.

<sup>12</sup> See generally Ming-sho Ho, *Taiwan's Road to Marriage Equality: Politics of Legalizing Same-Sex Marriage*, THE CHINA QUARTERLY, Dec. 2018 (discussing the "Sunflower Movement," a national student-led protest that originated from a dispute over a free-trade agreement with China that subsequently allowed marriage equality activists to "ride the wave of youthful enthusiasm" and for the first time hold mass rallies in support of same-sex marriage).

<sup>13</sup> *Id.* at 13-15.

<sup>14</sup> Chang, *supra* note 2, at 148-49. In 2014, Dr. Ko Wen-je ran for Taipei mayor as an independent, which was quite unconventional. In order to garner the support for progressive constituents, he promised to support the legalization of same-sex marriage. President Tsai Ing-Wen's election platform also pushed for same-sex marriage legislation, though efforts stalled after she entered office.

<sup>15</sup> *Id.* at 155-56.

of civil liberties influenced by western values.<sup>16</sup> Then, in 2016, the suicide of a French professor in the wake of his long-time Taiwanese partner's death sent shockwaves through the nation and sparked outrage from gay-rights activists, many of whom blamed the professor's death on the legislature and its failure to recognize marriage equality.<sup>17</sup> This event evoked massive public sympathy and kick-started efforts to legalize same-sex marriage on the Pacific island.<sup>18</sup> Change finally came when a legislator from Taipei and another long-time gay rights activist had their cases consolidated and heard before Taiwan's Constitutional Court. The issue at hand was the provision on marriage in Taiwan's Civil Code, which did not allow a same-sex couple to "create a permanent union" for the purpose of spending a life together.<sup>19</sup> Government officials had previously taken a strict interpretation of this provision and categorically denied marriage to same-sex couples.<sup>20</sup> The consolidated case questioned the constitutionality of this provision, arguing that this interpretation of marriage violated Taiwan's Constitution, specifically equal protection under Article 7 and fundamental freedoms under Articles 22 and 23.<sup>21</sup>

In its decision, dubbed *Interpretation 748* (司法院釋字第748號解釋施行法),<sup>22</sup> Taiwan's Constitutional Court took a broad reading of the articles on equal protection and fundamental freedoms in the Constitution and declared that the Marriage Chapter of the Civil Code was unconstitutional.<sup>23</sup> In so doing, it found that Article 22 included the freedom to decide "whom to marry" and held this autonomous decision a fundamental right "vital to the sound development of personality and safeguarding of human dignity."<sup>24</sup> As such, the provision of the marriage chapter that restricted same-sex unions was "incompatible with the spirit and meaning of the freedom of marriages" under the Constitution.<sup>25</sup> And while "sex, religion, race, class, or party classification" are the only enumerated classes under Article 7, the Constitutional Court held that the "five Articles are only exemplified, neither enumerated nor exhausted. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under [Article 7]."<sup>26</sup> Because the Court found no legitimate reason to treat same-sex marriage differently from

<sup>16</sup> Ho, *supra* note 12, at 7.

<sup>17</sup> Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, THE GUARDIAN (Oct. 28, 2016, 12:00 AM), <https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage>. Frenchman Jacques Picoux died in what his friends believe was a suicide, one year after the death of his Taiwanese partner of 35 years. At the time of his partner's death, Picoux had been unable to obtain legal status that would have allowed him to participate in his partner's "crucial" medical decisions. And when his partner died, Picoux had no legal claim over the property they shared.

<sup>18</sup> Chang, *supra* note 2, at 149.

<sup>19</sup> Press Release, Constitutional Court, Judicial Yuan, On the Same-Sex Marriage Case, R.O.C. (Taiwan), (May 24, 2017), <https://cons.judicial.gov.tw/jcc/en-us/contents/show/p2kdmcv4dakngi>.

<sup>20</sup> Chang, *supra* note 2, at 150.

<sup>21</sup> *Id.*

<sup>22</sup> Act for Implementation of J.Y. Interpretation No. 748 (English version) (2019), <https://law.moj.gov.tw/ENG/Law/Class/LawAll.aspx?pcode=B0000008>.

<sup>23</sup> Constitutional Court, Judicial Yuan, R.O.C. *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Chang, *supra* note 2, at 151.



opposite-sex marriage, the Court held that the gender-restricted language in the Marriage Chapter of the Civil Code violated equal protection under the law.<sup>27</sup>

Taiwan's path toward same-sex marriage took a "big bang" approach in that it side-stepped civil unions and directly replaced the ban on same-sex marriage with the right to such marriages.<sup>28</sup> The ruling created a wave of celebration (and objection) that swept through all of Taiwan and across the world.<sup>29</sup> The Constitutional Court recognized, however, that by issuing a court order for the legislature to act, the decision could be perceived as an act of "judicial overreach."<sup>30</sup> Wanting to avoid this label, it issued a two-year grace period in which the legislature could correct the marriage law to conform with its decision. Two years later, in 2019, Taiwan's legislature achieved its directive by passing the "Act for Implementation of J.Y. Interpretation No. 748," which offered same-sex couples marriage protections similar to those of opposite-sex couples.<sup>31</sup> Gay marriage was thus legalized all throughout the island.<sup>32</sup>

#### A. Amid Celebration, Disappointment Remains

On May 24, 2019, when same-sex marriage became legal in Taiwan,<sup>33</sup> thousands of people took to the streets waving rainbow flags and cheering for the recognition of a fundamental right that only one year earlier nearly disappeared due to a referendum that had a majority in favor of retaining the Civil Code's definition of marriage as between a man and a woman.<sup>34</sup> Amid the throng of celebrators was "Lois," a university professor and Taiwanese citizen whose same-sex partner is Chinese.<sup>35</sup> For her and her partner, however, the joy of this new law was short lived: because of a provision in Taiwan's "Act Governing the Choice of Law in Civil Matters Involving Foreign Elements (涉外民事法律適用法)"<sup>36</sup> (Choice of

<sup>27</sup> *Id.* at 153.

<sup>28</sup> Ho, *supra* note 12, at 486. "Most countries that recognized same-sex marriage first tried to include lesbian and gay couples in civil unions or domestic partnerships, constituting a watered-down version of heterosexual marriage because of the weaker protection of rights and benefits under such arrangements." *Id.* at 485.

<sup>29</sup> David KC Huang, *The Court and the Legislation of Same-Sex Marriage: A Critical Analysis of the Judicial Yuan Interpretation No. 748*, 14 U. PA. ASIAN L. REV. 63, 64 (2017).

<sup>30</sup> Chang, *supra* note 2, at 153.

<sup>31</sup> Act for Implementation of J.Y. Interpretation No. 748 (2019), <https://law.moj.gov.tw/ENG/LawClass/LawAll.asp?pcode=B0000008>.

<sup>32</sup> Wamsley, *supra* note 5.

<sup>33</sup> Beh Lih Yi, 'Happily Ever After' Eludes Taiwan, a Year After Asia's First Gay Marriages,' REUTERS (May 20, 2020, 9:08 PM), <https://in.reuters.com/article/us-taiwan-lgbt-rights-feature-trfn/happily-ever-after-eludes-taiwan-a-year-after-asias-first-gay-marriages-idUSKBN22X03A>.

<sup>34</sup> *Taiwan Voters Reject Same-sex Marriage in Referendums*, BBC (Nov. 25, 2018), <https://www.bbc.com/news/world-asia-46329877>. In 2018, one year after the Constitutional Court ruled that the right to same-sex marriage was "fundamental," Taiwan voters rejected same-sex marriage in a referendum by achieving the majority vote to keep Taiwan's Civil Code, which defines marriage as between a man and a woman, unchanged. However, the vote ultimately had no effect on the 2017 ruling as the Secretary-General shortly after declared that verdicts from the Constitutional Court could not be overturned. See Ryan Drillsma, *Judicial Yuan SG: Constitutional Court Ruling on Same-sex Marriage Cannot be Overridden by Referendums*, TAIWAN NEWS (Nov. 29, 2018 1:00 PM) <https://www.taiwannews.com.tw/en/news/35585861>.

<sup>35</sup> Yi, *supra* note 33.

<sup>36</sup> Act Governing the Choice of Law in Civil Matters Involving Foreign Elements 涉外民事法律適用法, Art. 46 (2010) <https://law.moj.gov.tw/ENG/LawClass/LawAll.asp?pcode=B0000007>.

Law Act) and its application to same-sex marriages, Lois and her partner still had no legal right to marry in Taiwan.<sup>37</sup>

All marriages in Taiwan between Taiwanese citizens and their foreign-born partners are governed by the Choice of Law Act.<sup>38</sup> The English version of Article 46 of the Act stipulates that “[t]he formation of a marriage is governed by the national law of each party. However, a marriage is also effective if it satisfies the formal requisites prescribed either by the national law of one of the parties or by the law of the place of ceremony.”<sup>39</sup> While the law in English may read as allowing greater flexibilities, it has been officially interpreted as requiring that a marriage between a foreign national and a Taiwanese citizen “comply with the domestic laws of the [Republic of China] as well as the laws of the country where the foreign national is from” before such marriage is legally recognized in Taiwan.<sup>40</sup> Even after *Interpretation No. 748*, Article 46 remained unchanged. This meant that while some same-sex couples could marry in Taiwan, many others were still barred from marriage since their partners came from countries that did not recognize same-sex marriages.<sup>41</sup>

This gap in Taiwan’s same-sex marriage law effectively separates its citizens into two groups: those who can marry in Taiwan because their partner is either Taiwanese or a citizen of a nation that also recognizes their marriage,<sup>42</sup> and those who cannot marry in Taiwan because their partner is from a country that does not recognize same-sex marriages.<sup>43</sup> For the first group, foreign-born partners are now eligible for a dependent visa to join their spouse in Taiwan.<sup>44</sup> The second group, however, is neither entitled to marry in Taiwan nor have their relationship legally recognized at all.

To date, more than 3,500 same-sex couples have wed in Taiwan. And while Taiwan has lauded itself as “one of the first locales in Asia to extend spousal visa rights to same-sex partners,”<sup>45</sup> its failure to permit all same-sex cross-border marriages has meant that many more partners of Taiwanese citizens are left with few legal options for joining their same-sex partner. LGBTQ+ groups in Taiwan estimate that nearly 1,000 gay couples have been barred from marrying in Taiwan due to restrictions on foreigners.<sup>46</sup> In an effort to remain

<sup>37</sup> Yi, *supra* note 33.

<sup>38</sup> Act Governing the Choice of Law in Civil Matters Involving Foreign Elements 涉外民事法律適用法, Art. 46 (2010) <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007>.

<sup>39</sup> *Id.*

<sup>40</sup> Ying-jeou Ma, *Contemporary Practice and Judicial Decisions*, CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS, Vol. 37, at 346-47 (2019) <https://bit.ly/34qunaW>.

<sup>41</sup> Adam K. Dedman & Victoria Hsu, *Same-Sex Marriage, One Year Later*, TAIPEI TIMES (May 17, 2020), <https://www.taipeitimes.com/News/editorials/archives/2020/05/17/2003736539>.

<sup>42</sup> PEW RESEARCH CENTER, SAME-SEX MARRIAGE AROUND THE WORLD, (Oct. 28, 2019); fact sheet listing the 30 nations that recognize same-sex marriage. All nations in the world, at a basic level, recognize one’s right to opposite-sex marriage.

<sup>43</sup> Ann Maxon, *FEATURE: Same-Sex Marriage Depends on Nationality*, TAIPEI TIMES (Feb. 1, 2020), <http://www.taipeitimes.com/News/taiwan/archives/2020/02/01/2003730184>.

<sup>44</sup> Berry Appleman & Leiden LLP, *Same-Sex Spouses from 26 Countries Now Eligible for Dependent Visas* (July 2, 2019), <https://www.balglobal.com/bal-news/same-sex-spouses-from-26-countries-now-eligible-for-dependent-visas/>. This article was published at a time before three additional nations legalized gay marriage: Ecuador, Northern Ireland, and Costa Rica. For a full list of nations that at the time of this article’s publishing recognize same-sex marriage, see PEW RESEARCH CENTER, *supra* note 42.

<sup>45</sup> Appleman & Leiden LLP, *supra* note 44.

<sup>46</sup> Yi, *supra* note 33.

together, many foreign-born partners have begun enrolling in Taiwanese universities as full-time students to gain a student visa that would permit them to legally live on the island for the duration of their studies.<sup>47</sup> This was the reality for Lois's Chinese partner, who quit her job in 2017 and became a student in Taiwan so the couple could remain together and raise their young child.<sup>48</sup> Others, like Malaysian-born Tan Bee Guat, rely on Taiwan's tourist visa to stay with their Taiwanese partners. In Malaysia, Tan and her partner Kaili Lai had held an unofficial marriage ceremony.<sup>49</sup> However, because Malaysia does not legally recognize their marriage, they are also barred from having it officially recognized in Taiwan.

Since the spread of COVID-19 and bans on international travel, the restriction on cross-border same-sex couples has been more acutely felt as many couples are now separated with no legal remedy for reunification. On March 18, 2020, Taiwan closed its borders to all foreign nationals entering without special permits or an "Alien Resident Certificate."<sup>50</sup> Just before Taiwan's borders closed, the foreign-born partner of Taiwanese citizen "Swatchx" had just returned to Hong Kong;<sup>51</sup> after March 18, foreign travel to Taiwan was banned for twelve months until March, 1, 2021 when Taiwan amended its travel ban and allowed foreigners to apply for a special entry permit to enter.<sup>52</sup> In the past, the couple lived together in Taiwan and Swatchx's partner would fly from Taiwan to Hong Kong and back every six months to renew her tourist visa.<sup>53</sup> However, because Hong Kong does not recognize same-sex marriage for its citizens and the couple has been unable to get married in Taiwan, the couple were separated while their respective nations' borders were closed.

Since March 2020, campaigns aimed at amending the law restricting cross-border same-sex marriages have been gaining steam. The Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR), the organization whose attorneys helped win the marriage equality case under *Interpretation 748*,<sup>54</sup> launched an online petition collecting signatures in support of cross-border same-sex marriages. The group received over 13,500 signatures and garnered support from human rights watchdogs throughout Asia and the United States.<sup>55</sup> TAPCPR's fundraising campaign, "SEA You Soon" (飄洋過海來看你), also raised more than \$83,000 within one week. The campaign featured the music video "Across the Ocean to See You" that highlights the difficulties a Taiwanese man and his Japanese partner must

<sup>47</sup> *Id.*

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

<sup>49</sup> Emerson Lim, *Rights Group Urges Taiwan to Allow Cross-National Same-Sex Marriage*, FOCUS TAIWAN (May 17, 2020), <https://web.archive.org/web/20200523000506/https://focustaiwan.tw/society/202005170011>.

<sup>50</sup> Chang Ming-hsuan, Frances Huang & Christie Chen, *Taiwan to bar entry of foreign nationals to combat COVID-19*, FOCUS TAIWAN (March 18, 2020), <https://web.archive.org/web/20200831005507/https://focustaiwan.tw/society/202003180007>.

<sup>51</sup> Ryan Drillsma, "We Cannot Get Married Here. But Our Life is Here." *Marriage Equality in Taiwan is Not Equal*, KETAGALAN MEDIA (June 14, 2020), <https://ketagalanmedia.com/2020/06/14/we-cannot-get-married-here-but-our-life-is-here-marriage-equality-in-taiwan-is-not-equal/>.

<sup>52</sup> BUREAU OF CONSULAR AFFAIRS, ENTRY RESTRICTIONS FOR FOREIGNERS TO TAIWAN IN RESPONSE TO COVID-19 OUTBREAK (April 13, 2021), <https://www.boca.gov.tw/cp-220-5081-c06dc-2.html>.

<sup>53</sup> *Id.*

<sup>54</sup> TAIWAN ALLIANCE TO PROMOTE CIVIL PARTNERSHIP RIGHTS (台灣伴侶權益推動聯盟), <https://tapcpr.org/main-topics/tssm> (last visited Mar. 5, 2021).

<sup>55</sup> Lim, *supra* note 49.

go through to be together; the video was based on the stories of cross-border couples in similar situations.<sup>56</sup> Posted on YouTube on April 30, 2020, the video to date has been viewed over six million times.<sup>57</sup> Although Taiwan recently relaxed its border restrictions on some foreigners, many Taiwanese citizens and their same-sex partners remain separated.<sup>58</sup> TAPCPR also issued a plea to different government departments in Taiwan, including the National Immigration Agency, Department of Household Registration, and the Mainland Affairs Council. In their separate responses, TAPCPR reported that none of the agencies “directly opposed instituting an official form of recognition for cross-national marriages” but rather that the decision to recognize all cross-border marriages is “up to the [legislative] government.”<sup>59</sup> In May 2019, Taiwanese woman Xiao C (小C) and her Singaporean partner Mei Ping (美蘋) were rejected from registering their same-sex marriage at Taiwan's Household Registration Office. The office cited the Choice of Law Act's disallowance of such marriages as its rationale for the rejection.<sup>60</sup> The couple petitioned the Taipei High Administrative Court and ultimately won their case in November 2021, becoming the third cross-border same-sex couple to now obtain a victory and register their marriage in Taiwan.<sup>61</sup> However, the Choice of Law Act remains in effect. For hundreds of couples without the time and means to petition the court for their right to register their marriage in Taiwan, they are still barred from having their marriage recognized.

Taiwan's Choice of Law Act as applied to same-sex marriage is discriminatory against its same-sex citizens who wish to marry their foreign partner. Although the law applies to all citizens, regardless of their sexual preference, its application is discriminatory because it creates a distinction between Taiwanese citizens based on their sexual orientation. A law that allows a Taiwanese man and a Japanese woman, or a Taiwanese man and an American man, to marry, for example, but excludes a Taiwanese man and a Japanese man (or Taiwanese woman and Japanese woman) from marrying is *ipso facto* discriminatory. Beyond raising doubts of its validity under Taiwan's constitution, this restriction also violates Taiwan's promises to uphold human rights covenants under international law.

<sup>56</sup> Fish Leong & Eve Ai, *SEA You Soon, Official Music Video*, YOUTUBE (April 30, 2020), [https://www.youtube.com/watch?v=LzCPcJHx5y8&feature=emb\\_logo](https://www.youtube.com/watch?v=LzCPcJHx5y8&feature=emb_logo).

<sup>57</sup> *Id.*

<sup>58</sup> Chang Ming-hsun et al., *CORONAVIRUS/Taiwan to Allow Return of All Final Year International Students*, FOCUS TAIWAN (July 22, 2020), <https://focustaiwan.tw/society/202007220027>.

<sup>59</sup> Drillsma, *supra* note 51.

<sup>60</sup> Keoni Everington, *Taiwan-Singapore Couple Win Right to Register Same-Sex Marriage*, TAIWAN NEWS (Nov. 26, 2021), <https://www.taiwannews.com.tw/en/news/4357335>.

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

## II. Taiwan's Commitments Under International Law

Forty-two years after Taiwan first signed the ICCPR, the legislature implemented it into domestic law in 2019<sup>62</sup> through the "Taiwan Act,"<sup>63</sup> which called on the island's governmental institutions to take on the responsibility of "preparing, promoting, and implementing" the human rights protections provided by the ICCPR into existing laws and regulations.<sup>64</sup> Additionally, the Taiwan Act directed those agencies to amend "[a]ll laws, regulations, directions and administrative measures" that were incompatible with the ICCPR and implement "new laws, law amendments, law abolitions and improved administrative measures" that upheld Taiwan's promises under the international Covenant.<sup>65</sup> However, these calls for action and change are already implicit within the ICCPR itself. The Human Rights Committee has stated that countries ratifying the ICCPR must take measures necessary "to give effect to the Covenant right in the domestic order" and that "the provisions of [the ICCPR] should not be taken lightly. All branches of government must take responsibility."<sup>66</sup> By implementing the ICCPR's provisions into domestic law, Taiwan promised to uphold for its citizens all the rights found in the ICCPR, without distinction of any kind.

However, because Taiwan's interpretation of its Choice of Law Act restricts same-sex couples—but not opposite-sex couples—from marrying their foreign-born partner, and because the Taiwanese government has not yet remedied this discrimination with new or amended laws, it has violated its obligations under Articles 2, 26, and 23 of the ICCPR.

### A. Taiwan Must Ensure Equality & Non-Discrimination of All Citizens

International human rights law requires countries to protect their citizens from discrimination on the basis of sexual orientation and ensure that same-sex couples are entitled to the same rights and benefits as opposite-sex couples in the same position.<sup>67</sup> The United Nations High Commissioner on Human Rights, in an annual report to the Human Rights Council, explicitly called on UN Member States to protect its citizens from discrimination on the basis of their sexual orientation and "ensure that combating discrimination on grounds of sexual orientation . . . is included in the mandates of national human rights institutions."<sup>68</sup> Beyond merely recommending greater protections for citizens on the basis of sexual

<sup>62</sup> Wendy Zeldin, *Taiwan: Two International Human Rights Covenants Ratified*, LIBRARY OF CONGRESS (April 15, 2009), <https://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/>. At the time of signature, Taiwan held a seat at the UN. Since 1971, however, the UN no longer recognizes Taiwan's membership. Taiwan's ratification of the ICCPR, however, is still binding on all levels of its government under domestic law. *See also* Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Taiwan Act) (English version), art. 2, FAWUBU FAGUI ZILIAOKU (2009).

<sup>63</sup> Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR and the ICESCR*, 22 IND. INT'L & COMP. L. REV. 159, 160 (2012).

<sup>64</sup> Taiwan Act, *supra* note 62, at Art. 5.

<sup>65</sup> Taiwan Act, *supra* note 62, at Art. 8.

<sup>66</sup> Shope, *supra* note 63, at 175.

<sup>67</sup> Shope, *supra* note 63, at 175.

<sup>68</sup> Rep. of the U.N. High Comm'r for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Nineteenth Session, ¶ 84(e) (Nov. 17, 2011), [https://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf).

orientation, however, the UN has *required* such protections for citizens of countries that have ratified the ICCPR.

Equality and non-discrimination of individuals before the law, barring any distinction whatsoever, “constitute a basic and general principle” of human rights.<sup>69</sup> In fact, this principle is so fundamental that it represents the ICCPR’s second article, just behind an individual’s right to self-determination.<sup>70</sup>

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>71</sup>

Put plainly, Article 2 obligates nations to uphold for their citizens the rights that are recognized by the ICCPR, without distinction of any kind.<sup>72</sup> Although sexual orientation is not a trait specifically enumerated in Article 2, the Human Rights Committee has stated that “sex” should be read to include an individual’s sexual orientation<sup>73</sup> and later reaffirmed this reading through its adoption of general recommendations on international human rights instruments.<sup>74</sup>

The first step in determining whether a state violated Article 2 is to identify which rights recognized by the ICCPR were not respected. In the case of Taiwan, its interpretation of the Choice of Law Act denied its citizens with same-sex partners the right to equality before the law under Article 26 and the right to marriage under Article 23. As further presented below, these violations in turn determine that Taiwan violated its obligations under Article 2 of the ICCPR.

### **B. Taiwan’s Choice of Law Act Discriminates Against its Citizens’ Rights to Equality & Freedom from Discrimination**

<sup>69</sup> U.N. General Comment No. 18: Non-Discrimination, 37th session of Human Rights Comm. (Nov. 10, 1989).

<sup>70</sup> Int’l Covenant on Civil and Political Rights, Art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

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

<sup>72</sup> U.N. General Comment No. 18: Non-Discrimination, *supra* note 69.

<sup>73</sup> U.N. Human Rights, Office of the High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, p. 41, U.N. Doc. HR/PUB/12/06 (2012) <https://www.ohchr.org/documents/publications/bornfreeandequalowres.pdf>. In *Toonen*, the Human Rights Committee found that the Tasmanian Criminal Code, which outlawed “indecent” sexual contacts between consenting men but not women, violated Article 2 of the ICCPR, having noted that both Arts. 2 and 26 include sexual orientation. *See Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), <http://hrlibrary.umn.edu/undocs/html/vws488.htm>. *See also* U.N. General Comment No. 18: Non-Discrimination, *supra* note 69.

<sup>74</sup> *See* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. I), May 27, 2008. The General Assembly specifically obligated that States guarantee the right to social security, health care, water, and equal access to employment without discrimination on the ground of sexual orientation.



Taiwan's Choice of Law Act violates Article 26 of the ICCPR because it discriminates against its citizens on the basis of their sexual orientation. Article 26 provides that:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As with Article 2, "sex" under this article includes sexual orientation.<sup>75</sup> And while both articles obligate State Parties to ensure that their citizens are protected from discrimination on the basis of their sexual orientation, Article 26 provides "an autonomous right" of equality and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."<sup>76</sup> In other words, all citizens of State Parties are guaranteed the right to equal protection, free from discrimination on the basis of their sexual orientation, in *any* law promulgated by the state.<sup>77</sup> Further, the Human Rights Committee has stated that the term "discrimination" as used in the Covenant should be understood as implying:[A]ny distinction, exclusion, restriction or preference which is based on any ground such as . . . sex . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>78</sup> This interpretation includes "indirect" discrimination, which is found when a "requirement or condition or practice that is [the] same for everyone . . . has an unfair effect on a particular group of people."<sup>79</sup>

Although Taiwan's Choice of Law Act applies to all Taiwanese citizens who wish to marry a foreign national, Taiwan's interpretation of this Act has the effect of "impairing the recognition [and] enjoyment"<sup>80</sup> of Taiwanese citizens who wish to marry their foreign-born partner but whose partner's home country does not recognize same-sex marriage. Put plainly, all Taiwanese citizens in opposite-sex relationships who wish to marry their foreign-born partners may presumably do so under this Act because every country in the world allows

<sup>75</sup> U.N. Human Rights, Office of the High Commissioner, *supra* note 73. The Human Rights Committee decided that the differential treatment of persons awarded pension benefits to a same-sex partner violated the right to be free from discrimination "on grounds of sex or sexual orientation." *Id.* at 41. In addition, "[t]he Committee on Economic, Social and Cultural Rights has affirmed that the non-discrimination guarantee of the International Covenant on Economic, Social and Cultural Rights includes sexual orientation." *Id.* at 42. And in recent recommendations to parties, the Committee has specifically called for States to eliminate discrimination on the basis of sexual orientation in their marriage laws. See Kristie A. Bluett, *Marriage Equality Under the ICCPR: How the Human Rights Committee Got it Wrong and Why it's Time to Get it Right*, 35 AMERICAN UNIV. INT'L L. REV. 605, 617 (2020).

<sup>76</sup> UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS, 638 (2003), <https://www.un.org/ruleoflaw/files/training9chapter13en.pdf>.

<sup>77</sup> Bluett, *supra* note 75, at 618.

<sup>78</sup> U.N. General Comment No. 18: Non-Discrimination, *supra* note 69, at ¶ 7.

<sup>79</sup> AUSTRALIAN HUMAN RIGHTS COMMISSION, SAME-SEX: SAME ENTITLEMENTS FINAL REPORT, 44 n. 30 (2007) [https://humanrights.gov.au/sites/default/files/content/human\\_rights/samesex/report/pdf/report\\_ch3.pdf](https://humanrights.gov.au/sites/default/files/content/human_rights/samesex/report/pdf/report_ch3.pdf). Any form of discrimination is prohibited by the ICCPR.

<sup>80</sup> U.N. General Comment No. 18: Non-Discrimination, *supra* note 69, at ¶ 7.

opposite-sex couples to marry, and Taiwan recognizes opposite-sex marriages that are *also* recognized abroad. However, the same would not be true for Taiwanese citizens with same-sex partners. Since only 15% of the world's countries recognize same-sex marriage, Taiwanese citizens whose same-sex partners are *not* from a country that recognize same-sex marriage are unable to marry in Taiwan. As such, this Act “has an unfair effect”<sup>81</sup> on Taiwanese citizens based on their sexual orientation. This unfair effect is discriminatory and reveals that Taiwan does not ensure that “all persons are equal before the law” as required by Article 26. And because the rights to non-discrimination and equality of persons based on their sexual orientation are protected by the ICCPR, “a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under Article 26, unless otherwise justified on reasonable and objective criteria.”<sup>82</sup>

Taiwan has not provided any explanation justifying the denial of its citizens' rights to marriage under the Choice of Law Act, so such discrimination is clearly prohibited under Article 26.

To date, the Taiwanese government has offered no official explanation as to the discriminatory effect of its Choice of Law Act. Taiwan's officials have neither justified the law as a security exception, nor publicly acknowledged its discriminatory nature as applied to same-sex marriages. However, legislators were purportedly aware of this gap when reviewing the same-sex marriage bill before it was passed but chose not to remedy its inherent problems because of public fear—sparked by anti-LGBT groups—that transnational marriage would bring AIDS patients to Taiwan and bankrupt Taiwan's National Health Insurance system.<sup>83</sup> Although these rumors have been refuted by the Ministry of Health and Welfare, legislators purportedly “found it difficult to persuade people to give up their fears.”<sup>84</sup> “Naysayers” also took to social media claiming “national security concerns” to justify the current restrictions on transnational same-sex marriage.<sup>85</sup>

However, even if Taiwan had tried to justify the Act's discriminatory effect using a “concern for safety” argument, such explanation would not be reasonable. The Human Rights Committee has previously stated that a country's concern for security does not justify a law that creates an adverse distinction on the grounds of sex.<sup>86</sup> This rule was born out of the “Mauritian Women Case,” in which an immigration law allowed foreign wives of Mauritian men to be immune from deportation and reside as de facto residents, but failed to extend these rights to the foreign husbands of Mauritian women because of “security reasons.”<sup>87</sup> In making its decision, the Committee stated that while “it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons,” legislation that restricts the rights of Mauritian women's husbands but not

<sup>81</sup> AUSTRALIAN HUMAN RIGHTS COMMISSION, *supra* note 79.

<sup>82</sup> *Id.* at 43 n. 28. Quote taken from *Joslin* concurring opinion.

<sup>83</sup> Maxon, *supra* note 43.

<sup>84</sup> Maxon, *supra* note 43.

<sup>85</sup> Dedman & Hsu, *supra* note 41.

<sup>86</sup> Convention on the Elimination of All Forms of Discrimination against Women: Examples of Cases Where Women Have Used the First Optional Protocol to the ICCPR to Challenge Sex Discrimination, *The Mauritian Women Case (Communication No. 35/1978)*, <https://www.un.org/womenwatch/daw/cedaw/protocol/cases.htm>.

<sup>87</sup> *Id.*



of Mauritian men's wives is discriminatory and "cannot be justified by security requirements."<sup>88</sup>

Taiwan's discriminatory legislation must also not "be justified by security requirements." If Taiwan was sincerely concerned with foreign-born nationals marrying Taiwanese citizens, specific restrictions that applied to *all* Taiwanese citizens would be reasonable. The Cambodian government enacted such restrictions on its citizens when it barred them from marrying Taiwanese citizens due to human trafficking concerns.<sup>89</sup> Nevertheless, the Taiwanese Ministry of the Interior continues to recognize such marriages despite Cambodia's prohibition.<sup>90</sup> Surely, then, Taiwan would also recognize same-sex marriages between Taiwanese and Cambodian citizens if all other Cambodian marriages were allowed. Barring such marriages merely because Cambodia does not also recognize same-sex marriages cannot be justified by concerns about security.

Taiwan cannot reasonably justify the discriminatory effect of its Choice of Law Act: the act creates a distinction between Taiwanese citizens on the basis of their sexual orientation, violating these citizens' rights to equal protection and freedom from discrimination under Article 26. And, because these rights, which are specifically recognized in the ICCPR, were *not* respected because of these citizens' sexual orientation, the act also violates Article 2.

### C. Taiwan's Choice of Law Act Violates its Citizens' Right to Marry

Because Taiwan recognizes married same-sex couples as a family but does not allow all citizens in same-sex relationships to exercise their right to marriage, Taiwan also violates Article 23 of the ICCPR.

The right to marry is recognized under Article 23 of the ICCPR, which states that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."<sup>91</sup> Although this provision has not been formally interpreted as protecting same-sex marriages in every country, the Human Rights Committee has commented that "when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23."<sup>92</sup> Additionally, some scholars note that the use of the terms "men" and "women" should not be interpreted as protecting the right to marriage only between a man and a woman, but is better understood as lacking any such restriction.<sup>93</sup> Indeed, a law that restricts marriage on the basis of an individual's sex would go against the ICCPR's own protections from discrimination on the basis of sex.

<sup>88</sup> *Id.*

<sup>89</sup> *After Jane Zhijie and Xu Xiuwen/the Same-Sex Marriage Pass, They Still Don't Know Where the End Is-What Is the Interpretation of Transnational Same-Sex Marriage?*, UNITED DAILY NEWS (UND) [English Version] (August 05, 2019), [https://opinion.udn.com/opinion/story/10124/3970652?fbclid=IwAR38yP1Cr3EYQ7YpHK\\_3HJ6bb0zQ-m8yvQNbjCHBgy498geie6sgu7Pmwfk](https://opinion.udn.com/opinion/story/10124/3970652?fbclid=IwAR38yP1Cr3EYQ7YpHK_3HJ6bb0zQ-m8yvQNbjCHBgy498geie6sgu7Pmwfk).

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

<sup>91</sup> G.A. Res. 2200A (XXI), art. 23, International Covenant on Civil and Political Rights (Dec. 16, 1966).

<sup>92</sup> U.N. Off. of the High Commissioner for Human Rights, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* (July 27, 1990), <https://www.refworld.org/pdfid/45139bd74.pdf>.

<sup>93</sup> Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. OF PA. J. OF L. AND SOC. CHANGE 53, 88 n.37 (2010).

Taiwan recognizes “the freedom of marriage for two persons of the same sex” under the “family” provisions of its civil code.<sup>94</sup> This means that two persons who are legally married in Taiwan are considered a family, irrespective of their sexual orientation. However, Taiwan’s Choice of Law Act does not allow all Taiwanese citizens to exercise their right to marriage. As noted above, Taiwanese seeking to marry their same-sex partner may be barred from doing so if their partner’s home country does not also recognize same-sex marriages. By refusing to recognize the rights of *all* “men and women of marriageable age” to marry their foreign-born partner and found a family, Taiwan’s Choice of Law Act infringes on its citizens’ right to marry and thus violates Article 23. And, since these recognized rights under the Covenant were not respected because of Taiwanese citizens’ sexual orientation, the Act also violates Article 2 of the ICCPR.

### III. Recognition of Transnational Same-Sex Marriages: A Global Comparison

While Taiwan may not have offered an explanation for its failure to remedy the discriminatory effect its Choice of Law Act has on same-sex marriages and would likely be unable to justify the discrimination under the guise of national security, it would be fair to assume that the small island is concerned that couples with no ties with Taiwan may wish to take advantage of newfound rights to same-sex marriage and wed within its jurisdiction. This may prove especially problematic for Taiwan’s diplomatic relations with neighboring nations, given that it is the sole location in Asia to recognize such marriages. However, Taiwan’s situation is not wholly unique, as it would not be the first time that a nation faced—and addressed—such concern.

Currently, 30 countries and territories across the world recognize same-sex marriage.<sup>95</sup> Besides Taiwan, only two countries recognize its citizens’ right to same-sex marriage currently lack any laws that address cross-border same-sex marriage.<sup>96</sup> The remaining 27, however, all have laws granting same-sex couples the right to marry their foreign partner within that country’s territory, irrespective of the partner’s nationality and the laws that govern marriage in their home country. While these laws are not uniform, they all recognize the right of their citizens to marry their partner, foreign national or not, on their territory without any distinction on the basis of their sexual orientation. In remedying the discriminatory effect that its Choice of Law Act has on gay Taiwanese citizens, Taiwan may wish to consider the ways in which other nations have remedied their own laws on cross-border same-sex marriage.

#### A. Validity of Cross-Border Same-Sex Marriages by Global Comparison

After the Netherlands become the first country in the world to recognize same-sex marriage, its government added a provision to its marriage laws that explicitly allowed same-sex couples to marry in that country if they met general marriage requirements, “even if the

<sup>94</sup> Constitutional Court, Judicial Yuan, R.O.C. May 5, 2017, Interpretation No. 748 [Same-Sex Marriage Case].

<sup>95</sup> David Masci, Elizabeth Sciupac, & Michael Lipka, *Same-Sex Marriage Around the World*, PEW RESEARCH CENTER: RELIGION & PUBLIC LIFE (October 28, 2019), <https://www.pewforum.org/fact-sheet/gay-marriagearound-the-world/>.

<sup>96</sup> These two countries are Costa Rica and Ecuador.

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country of the non-Dutch partner(s) does not permit it.”<sup>97</sup> When Belgium first legalized same-sex marriage, the laws governing marriages between foreign nationals was similar to Taiwan’s in that it applied “the law of the nationality of each spouse.”<sup>98</sup> Without remedying this language, Belgian citizens in a same-sex relationship with a foreign national would have been barred from exercising their right to marriage.<sup>99</sup> However, Belgium’s legislature remedied the discriminatory effect of the law by adding additional provisions specific to same-sex marriages to ensure that all couples wishing to marry were treated equally. Belgium’s law on cross-border marriage now reads:

Marriage: The law of the nationality of each spouse applies; this may not apply to marriage between persons of the same sex to the extent that provisions of foreign law prohibiting such a marriage are disregarded if one of the spouses is a citizen of a state or has his habitual residence in a state whose law applies such a marriage is allowed.<sup>100</sup>

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<sup>97</sup> See generally, *What Do I Need to Take Into Account if I Want to Marry a Foreign National in the Netherlands?*, Government of the Netherlands, <https://bit.ly/2QDdAhk>. The Dutch government does remind couples that while same-sex marriages that take place in the Netherlands may be valid, such marriages may not be recognized abroad. *Id.*

<sup>98</sup> *Which Law is Applicable?—Belgium*, §3.5.1(2), THE EUROPEAN E-JUSTICE PORTAL (December 17, 2020), [https://e-justice.europa.eu/content\\_which\\_law\\_will\\_apply-340-be-de.do?member=1#toc\\_3\\_3](https://e-justice.europa.eu/content_which_law_will_apply-340-be-de.do?member=1#toc_3_3) [hereinafter *Belgium*].

<sup>99</sup> See also Paul Borghs and Bart Eeckhout, *LGBT Rights in Belgium, 1999-2009: A Historical Survey of a Velvet Revolution*, INTL. J. OF L. POL’Y AND THE FAM., (2010). At the time, only the Netherlands had legalized same-sex marriages, meaning that Belgian citizens wishing to marry their same-sex foreign partner were all but barred from doing so unless that partner was Dutch. Rosie Perper, *The 29 Countries Around the World Where Same Sex Marriage is Legal*, INSIDER (May 27, 2020, 8:06 PM), <https://www.businessinsider.com/where-is-same-sex-marriage-legal-world-2017-11?r=US&IR=T#1-in-2001-the-netherlands-became-the-first-country-to-legalize-same-sex-marriages-1>.

<sup>100</sup> See *Belgium*, *supra* note 98.

Like Belgium, many countries have cross-border laws for same-sex marriages that require at least one of the partners to have a “habitual residence,”<sup>101</sup> be “domiciled,”<sup>102</sup> or be a citizen of that country or city where the marriage occurs<sup>103</sup> before such marriage is legally recognized within that jurisdiction. Spain, which expressly acknowledged that same-sex marriages may not be recognized in the foreign partner’s home country, nonetheless recognizes cross-border marriages that occur in Spain, irrespective of an individual’s sexual orientation.<sup>104</sup> However, unlike Belgium or other nations that provide some flexibility with their cross-border marriage laws by recognizing marriages between one citizen and one foreign national or two habitual residents that occur within the county’s jurisdiction, Spain is perhaps the most flexible of all. Under Article 9(2) of the Spanish Civil Code, all marriages in Spain are “governed by the personal law common to the spouses at the time of the marriage.”<sup>105</sup> If no such personal law common to both exists, then Spain allows both couples to choose the “personal law or law of the place of residence of any of them.”<sup>106</sup> If neither choice is applicable, Spain applies the “law of the place of habitual residence common to

<sup>101</sup> See, e.g., Austria: If spouses do not have the same nationality, their “common habitual residence” is decisive, DAGMAR COESTER-WALTJEN, *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW: Marriage*, 1234 (JÜRGEN BASEDOW ET AL. EDS., 2017); Belgium: Same-sex couples can marry and have their marriage recognized so long as “one of the spouses is a citizen of a state or has his habitual residence in a state whose law applies.” EUROPEAN JUDICIAL NETWORK, *Belgium*, §3.5.1 Marriage, [https://e-justice.europa.eu/content\\_which\\_law\\_will\\_apply-340-be-de.do?member=1#toc\\_3\\_5](https://e-justice.europa.eu/content_which_law_will_apply-340-be-de.do?member=1#toc_3_5); Brazil: Applies the law of the first marital (habitual) residence. See DAGMAR COESTER-WALTJEN, *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW: Marriage*, 1234 (JÜRGEN BASEDOW ET AL. EDS., 2017); Colombia: Same-sex marriages performed in Colombia are recognized as long as one partner has been a resident of the city where the marriage will take place for six months prior to the marriage, JONES DAY, *Legal Recognition of Same-Sex Relationships: Colombia*, <https://bit.ly/3eIBIqP>; France & Germany: Marriage is valid under nationality. However, if one spouse does not have the same nationality, the “common habitual residence” is decisive. See DAGMAR COESTER-WALTJEN, *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW: Marriage*, 1234 (JÜRGEN BASEDOW ET AL. EDS., 2017); Luxembourg: At least one of the future spouses must have an official residence in Luxembourg, JONES DAY, *Legal Recognition of Same-Sex Relationships: Luxembourg*, <https://bit.ly/3t6hIn7>; Norway: Both parties must be lawful residents of Norway before their marriage can be performed or recognized, JONES DAY, *Legal Recognition of Same-Sex Relationships*, <https://bit.ly/3t6hIn7>; Scotland: One party must be a habitual resident or national of Scotland, or else domiciled in part of the UK or Ireland. See *Marriage and Civil Partnership (Scotland) Act of 2014*, (ASP 5) § 4(1).

<sup>102</sup> See, e.g., Canada: A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile. *Civil Marriage Act*, S.C. 2005, c 33 (Can.).

<sup>103</sup> See, e.g. Denmark and note that these provisions apply to Greenland as well, PRIDE LEGAL, *Denmark LGBT Laws*, <https://pridelegal.com/denmark-lgbt-laws/> (last visited Feb. 11, 2021); Finland: Also allows non-Finish individuals who are habitual residents to be married, JONES DAY, *Legal Recognition of Same-Sex Relationships: Finland*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*); Netherlands, GOVERNMENT OF NETHERLANDS, *OPTIONS FOR MARRIAGE OR REGISTERED PARTNERSHIP IN THE NETHERLANDS*, <https://bit.ly/3e3Ys5g> (last visited Feb. 11, 2021).

<sup>104</sup> JONES DAY, *Legal Recognition of Same-Sex Relationships: Spain*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*).

<sup>105</sup> Art. 9(2) C.C. 2013 (Spain).

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

both immediately after the ceremony.”<sup>107</sup> And, if that option also does not apply, then the “place of the marriage ceremony” is the law that governs the marriage.<sup>108</sup>

While Spain may have a “catch-all” for laws governing one’s right to marry, a handful of other nations look merely at the place of celebration to determine the validity of such marriage. This includes South Africa, whose law provides that a marriage “is based on the place where the marriage was celebrated.”<sup>109</sup> Essentially, so long as the marriage takes place within its own borders, South African law applies to all marriages. Countries with laws like South Africa tend to be popular for same-sex “destination” weddings because they are more straightforward and clearly apply the law of the place of marriage so long as the ceremony takes place within its borders, irrespective of the marriage laws governing the home countries of the couple.

Couples wishing to wed in one of these “destination” locations, however, must first ensure that they meet certain prerequisites, if any, before their marriage will be recognized. For example, foreign nationals wishing to get married in Argentina, one of the popular “destination” wedding locales, must first prove that at least one of the partners is a resident of Buenos Aires.<sup>110</sup> In Uruguay, couples wishing to marry will have Uruguayan marriage law automatically applied so long as the couple proves that at least one partner is a resident of the city where the marriage will take place.<sup>111</sup>

Other “destination” countries, however, do not require that couples prove residency requirements before they can legally wed under the law of the country where the marriage took place. This is the case for much of northern Europe, including Iceland,<sup>112</sup> Sweden,<sup>113</sup> and parts of the United Kingdom.<sup>114</sup> In Ireland and Portugal, all same-sex couples are eligible

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

<sup>108</sup> *Id.*

<sup>109</sup> In South Africa, “law of marriage is based on the place where the marriage was celebrated.” Thalia Kruger, South African Conflict of Law Rule for Validity of Marriage: Law of the Place of Conclusion of Marriage, CONFLICTS OF L., (Aug. 14, 2007), <https://conflictoflaws.net/2007/south-african-conflict-of-law-rule-for-validity-of-marriage-law-of-the-place-of-conclusion-of-marriage/>. See also the United States, which has a broad recognition of marriage and has historically used the place of celebration to determine a marriage’s validity. See Ann Laquer Estin, *Marriage and Divorce Conflicts in International Perspective*, 27 DUKE J. COMP. & INT’L L. 485, 491-92 (2017).

<sup>110</sup> Simeon Tegel, *Buenos Aires is Becoming a Mecca for Gay Marriage Tourism*, THE WORLD (Sept. 12, 2015), <https://www.pri.org/stories/2015-09-12/buenos-aires-becoming-mecca-gay-marriage-tourism>.

<sup>111</sup> JONES DAY, *Same Sex Relationship Guide: Uruguay*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/southamerica/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/southamerica/*).

<sup>112</sup> Iceland has no residency requirement for marriages. Anyone who wishes to get married in Iceland may do so, so long as both parties are “staying legally in Iceland when the wedding takes place.” See JONES DAY, *Same Sex Relationship Guide: Iceland*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*).

<sup>113</sup> JONES DAY, *Same Sex Relationship Guide: Sweden*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*).

<sup>114</sup> See, e.g., England & Wales: To get married by the Church of England or Church of Wales, parties do not have to prove a legal residency requirement but only a link to the parish. For civil marriages conducted outside of these churches, both parties must be residents of England or Wales for seven days prior to giving their notice of intention to marry. In addition, a UK national living overseas can ordinarily marry a same sex partner at the UK consulate or embassy in that overseas territory. This is allowed if the marriage is otherwise not possible in that overseas territory and if they nominate England, Wales or Scotland as their deemed place of marriage. The UK

to be married, regardless of their nationality and without needing to prove residency.<sup>115</sup> This is also true in Malta, which legalized gay marriage in 2017 and has been called one of the most “gay friendly” nations in the world.<sup>116</sup>

For the world’s two most recent countries to recognize same-sex marriage, Costa Rica and Ecuador, neither legislature has yet written laws expressly allowing same-sex marriage despite mandates from court rulings to do so.<sup>117</sup> As such, it is unclear how both countries will treat transnational same-sex marriage. Ecuador has previously recognized *de facto* same-sex civil unions and required that both parties be residents of Ecuador for at least two years.<sup>118</sup> Costa Rica, too, has been called a “paradisiacal destination for gay weddings,”<sup>119</sup> a nod perhaps to the purported flexibility of its impending same-sex marriage laws.

In March 2021, a court in Japan held that the nation’s same-sex marriage ban violates its constitutional guarantee of equal treatment after a case involving thirteen couples was filed challenging the constitutionality of Japan’s rejection of same-sex unions.<sup>120</sup> In its decision, the court stated that “[n]o matter what sexual orientation people possess, there is

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consulate or embassy will decline to conduct ceremonies if the local authorities object. See JONES DAY, *Same Sex Relationship Guide: United Kingdom*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/file/ssruid/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/file/ssruid/europe/*); Northern Ireland: There are no citizenship or residency requirements for marriage; couples must give notice of intent to marry within six months of arrival to Northern Ireland. Nidirect, *Visiting Northern Ireland to Marry or Form a Civil Partnership*, <https://www.nidirect.gov.uk/articles/visiting-northern-ireland-marry-or-form-civil-partnership#toc-1>.

<sup>115</sup> JONES DAY, *Same Sex Relationship Guide: Ireland*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*); Portugal: “Same-sex couples may marry in Portugal without the need either to establish residency or to prove Portuguese citizenship with respect to one or both of the prospective spouses and may marry in Portugal even if their home nation will not recognize their marriage.” Jones Day, *Same Sex Relationship Guide: Portugal*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/europe/*).

<sup>116</sup> Liran & Yoad: *A Gay Destination Wedding in Malta*, MEN’S VOWS, <https://mensvows.com/blog/2020/2/3/gay-destination-wedding-in-malta-liran-amp-yoad>.

<sup>117</sup> An advisory opinion issued by the Inter-American Court of Human Rights held that member states are obligated to recognize same-sex marriage. See Int’l Justice Res. Ctr., *Inter-American Court: States must Recognize Gender Identity, Same-sex Marriage*, <https://bit.ly/3aTui2O>. Both Costa Rica and Ecuador’s courts used this recommendation to find a ban on same-sex marriages within their own country was unconstitutional, effectively legalizing gay marriage. See ASSOCIATED PRESS, *Costa Rica is the Latest Country to Legalize Same-Sex Marriage*, L.A. TIMES (May 26, 2020, 12:17 AM), <https://www.latimes.com/world-nation/story/2020-05-25/costa-rica-latest-country-to-legalize-same-sex-marriage>. See also Suyin Haynes, *Costa Rica Becomes First Central American Country to Legalize Same-Sex Marriage*, TIMES (May 26, 2020, 12:53PM), <https://time.com/5842537/costa-rica-legalizes-same-sex-marriage/>; Graciela Rodriguez-Ferrand, *Ecuador: Constitutional Court Upholds Same-Sex Marriage*, LIBRARY OF CONGRESS (July 25, 2019), <https://www.loc.gov/law/foreign-news/article/ecuador-constitutional-court-upholds-same-sex-marriage/>.

<sup>118</sup> JONES DAY, *Same-Sex Relationship Guide: Ecuador*, [https://web.archive.org/web/\\*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/southamerica/\\*](https://web.archive.org/web/*/https://www.samesexrelationshipguide.com/-/media/files/ssrguide/southamerica/*).

<sup>119</sup> Unofficial English translation. See Jeffrey Garza, “Costa Rica es un Destino Paradisiaco para Bodas Gais”: *Presidenta de Asociación de Agencias de Viajes*, LA REPUBLICA (May 28, 2020, 10:25AM), <https://www.larepublica.net/noticia/costa-rica-es-un-destino-paradisiaco-para-bodas-gais-presidenta-de-asociacion-de-agencias-de-viajes>.

<sup>120</sup> Suryatapa Bhattacharya & Chieko Tsuneoka, *Japan Court Rules Same-Sex Couples Have Marriage Rights, in Landmark Decision*, WSJ (Mar. 17, 2021), <https://www.wsj.com/articles/japan-court-rules-same-sex-couples-have-constitutional-right-to-marry-in-landmark-decision-11615956338>.



no distinction in the legal privileges they enjoy.”<sup>121</sup> This ruling paved the way for Japan’s parliament to pass legislation recognizing same-sex marriages, which would make it the second locale in Asia to do so.

#### IV. Solutions

Taiwan’s Choice of Law Act, which discriminates against Taiwanese citizens on the basis of their sexual orientation and thus violates Articles 2, 26, and 23 of the ICCPR, must be remedied so that Taiwan meets its promises for equal protection and equal rights of all its citizens as promised when it implemented the Covenant into domestic law.

Parties to the ICCPR have a “legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation.”<sup>122</sup> When a Party violates this obligation, Article 2(3) requires them to remedy any violations and ensure that its “competent authorities” enforce remedies that are granted.<sup>123</sup>

Because Taiwan incorporated these promises into domestic law when it ratified the ICCPR via the Taiwan Act, its failure to remedy the discriminatory effect of its Choice of Law Act not only violates its own laws but also transgresses its promise to adhere to international law. As such, Taiwan must amend or repeal the Choice of Law Act to ensure that all of its citizens have equal access to cross-border marriage. In doing so, it may wish to consider the following solutions.

Taiwan may wish to look at Belgium’s cross-border marriage law and amend the Choice of Law Act by adding additional language that creates an exception for same-sex marriages. This may acknowledge that while some cross-border marriages may not be recognized abroad, marriages that take place in Taiwan between same-sex couples will be exempted from applying both laws to the marriage and instead be governed solely by Taiwan’s marriage law. Additionally, given Taiwan’s precarious situation as the “first” in Asia to legalize same-sex marriage, it may also wish to adopt Belgium’s “habitual residence” standard and specify that all cross-border couples wishing to marry in Taiwan may do so if one partner has their domicile or permanent residence on the island. This amended language would give same-sex couples the same rights to wed as opposite-sex couples while also ensuring that some connection is maintained to the island so that Taiwan is not suddenly inundated with couples from across the world seeking to marry there.

Taiwan may also wish to completely re-write its Choice of Law Act to simply apply its own marriage law if the cross-border couple’s marriage “place of celebration” is in Taiwan and they prove some connection to the island, as with Argentina’s law on cross-border marriages. This would further simplify the language and provide clear, uniform marriage requirements that would also be applied in a neutral and non-discriminatory manner.

Finally, Taiwan may just wish to re-interpret its Choice of Law Act so that the second clause of Article 46 gives couples the flexibility to apply either “the national law of

<sup>121</sup> *Id.*

<sup>122</sup> Human Rights Comm., Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant at 25, CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), <https://undocs.org/CCPR/C/USA/CO/3/Rev.1>.

<sup>123</sup> G.A. Res. 2200 (XXI), ¶ 2 (Dec. 16, 1966).

one of the parties” or “the law of the place of the ceremony” without also requiring all marriages to be “governed by the national laws of each party,” as currently required. By interpreting the law to provide for such flexibility, the Act would no longer be discriminatory against individuals on the basis of their sexual orientation and would also require little from the legislature so that such change could be made immediately.

Whichever path Taiwan chooses, one thing is for sure: it must amend its language to meet its obligations under domestic law and promises under international law. This should not be a difficult task since Taiwan’s Constitutional Court has referred to international human rights laws on numerous occasions since the 1990s,<sup>124</sup> including in majority and separate opinions and using these treaties at times to aid their interpretation of certain legal concepts in domestic law.<sup>125</sup> Given the Court’s familiarity with the application of international law and its requirements under the ICCPR, it is in a good position of authority to re-interpret Taiwan’s Choice of Law Act to conform to protections required under the ICCPR.

#### CONCLUSION

Heralded as the “first in Asia” to legalize same-sex marriage, Taiwan took the progressive steps that no nation in the region had taken by extending marriage protections to most of its citizens, including many in the LGBTQ+ community. However, Taiwan’s same-sex marriage law does not provide a remedy for its current law that governs marriage between cross-border couples, found in its Choice of Law Act, which provides that marriages between a Taiwanese citizen and a foreign national are valid in Taiwan *only* if the marriage is also valid under the law of the foreign partner’s home country. As a result, Taiwanese citizens in a same-sex relationship with foreigners whose home countries do not recognize same-sex marriage find themselves excluded from the newfound law promoting marriage equality and barred from exercising their equal right to marriage as promised under international law.

However, because Taiwan committed itself to being bound by international law and the provisions of the ICCPR, it is obligated to ensure that no law discriminates against its citizens directly or indirectly. And because Taiwan’s Choice of Law Act in effect discriminates against individuals on the basis of their sexual orientation, Taiwan has violated its own obligations under domestic law and its promises to uphold international law. Therefore, it must take steps to remedy such discrimination.

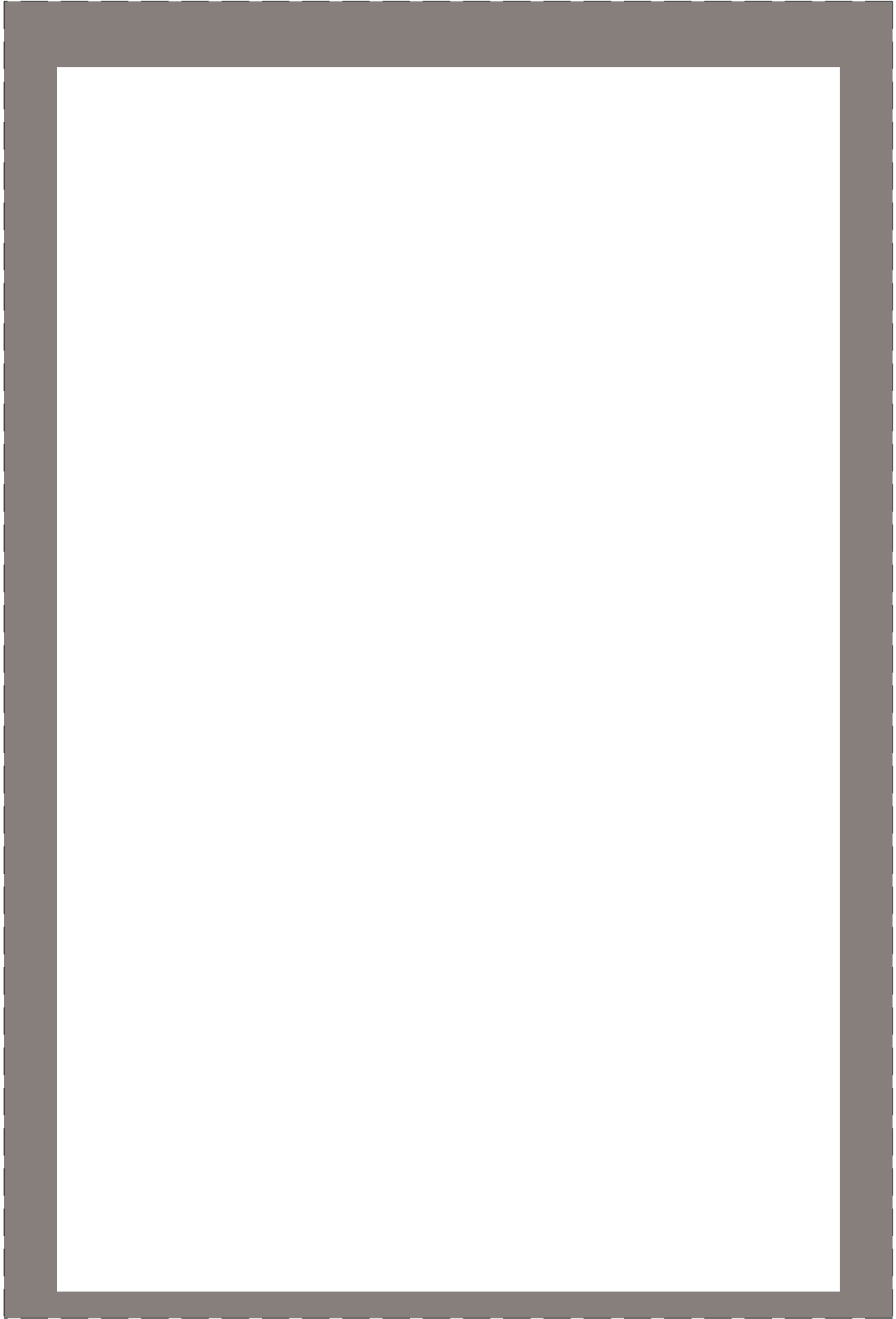
When compared to other nations that have also legalized same-sex marriage, Taiwan remains the outlier. The customary practices of other countries differ from Taiwan in that their marriage laws apply to all of their citizens, without discrimination as to their sexual orientation. However, Taiwan has the opportunity to right its wrong and turn to the cross-border marriage laws of other nations as a blueprint to follow. By amending its Choice of Law Act to ensure all of its citizens have an equal right to marry, Taiwan will meet its obligations under international law and continue to show the rest of the world that it is the leader of the East for human rights.

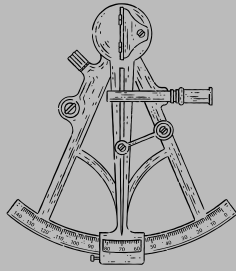
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<sup>124</sup> Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan’s Enactment of the Act to Implement the ICCPR and the ICESCR*, 22 IND. INT’L & COMP. L. REV. 159, 168 (2012).

<sup>125</sup> *Id.*







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**The Eat Pray Love Tour: Rethinking International Intellectual Property Rights in Global Tourism**

**Minahil Khan**

**Abstract.** Among developing economies, India has made a concerted effort to boost its international tourism by investing in niche tourism markets that provide immense economic opportunity. Given the pressure to create unforgettable “experiences,” niche tourism incentivizes the investment and development of aspects of a culture that are most easily commodified. Niche tourism exposes the intangible cultural heritage and traditional knowledge of Indian communities in an unprecedented way. Because niche tourism markets are built on experiences and services, rather than products, foreign tourists can exploit artisans and traditional knowledge providers who lack ownership over their products and services. The presence of this sort of “commodity culture” in niche tourism markets creates an inequitable dynamic between foreign tourists and local communities. To counterbalance these forces, this Article proposes that an “intellectual property as development” framework can be used to reconfigure the economic benefits and social costs of niche tourism markets.

**Author.** Georgetown University Law Center, J.D. 2021; State University of New York at Buffalo, B.A. 2016. This article is dedicated to the memory of my mother, Shahnaz Tahir. Her wanderlust and commitment to decolonization continue to inspire me. Many thanks to Madhavi Sunder for her guidance and support.

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## INTRODUCTION

“Ugh, it’s so hot. I don’t know if I can handle Indian food right now,” a woman with a thick American accent announced behind me.

“Let’s just go back to the hotel,” her equally exasperated travel companion chimed in.

I looked back at the crowded line at Haldiram’s, a famous Indian bakery chain, to find two tall, blonde women dressed in colorful patterned cotton culottes paired with white tank tops. It was early September in New Delhi, which meant that temperatures averaged around 100 degrees Fahrenheit. This particular Haldiram’s was located close to several tourist destinations. I stepped out of line and joined the women. Having recently moved from the U.S. to India myself, I was intrigued by these two American tourists.

“How are you liking India so far?” I asked.

“It’s okay, it’s really chaotic. We came here for our *Eat, Pray, Love* tour,”<sup>1</sup> one of the women proudly announced.

The women were young professionals who had traveled to Delhi from New York City the day before. The primary purpose of their trip was to attend a 10-day yoga retreat in Rishikesh, a northern Indian city located at the foothills of the Himalayas. They raved about the eco-village where the retreat was to be hosted and expressed their excitement for Ayurveda<sup>2</sup> meals, massages, and spa treatments. Their plans after returning to New Delhi involved taking a day trip to the city of Agra to see the Taj Mahal and a two-day castle tour in the city of Jaipur.<sup>3</sup> In between these activities, they planned to cross items off their expansive shopping list that included cashmere scarfs, a traditional sari, and “other cute handicrafts.”

I soon learned that for the Indian government, the *Eat, Pray, Love* tour was one of its bestselling products. We live in an increasingly global world where international travel is increasingly convenient and desired. Across the globe, the number of tourists arriving in a country from abroad rose from 25 million in 1950 to 1.2 billion in 2016.<sup>4</sup> By 2018, this figure rose to 1.4 billion.<sup>5</sup> The surge of international travel has increased competition among nations

<sup>1</sup> “*Eat, Pray, Love: One Woman’s Search for Everything Across Italy, India and Indonesia*” is a 2006 bestselling memoir by American author Elizabeth Gilbert. The memoir chronicles the author’s year-long trip after experiencing burn out and a divorce. For each leg of her journey, Gilbert has a specific purpose—Italy for pleasure of the senses, India for spiritual enlightenment, and Indonesia to restore balance in her life. *Eat, Pray, Love* was made into a feature film starring Julia Roberts in 2010. Rachel Cusk, *Eat, Pray, Love by Elizabeth Gilbert*, GUARDIAN (Sept. 24, 2010, 19:06 EDT), <https://www.theguardian.com/books/2010/sep/25/elizabeth-gilbert-rachel-cusk-rereading>.

<sup>2</sup> Ayurveda is an ancient healing science that emphasizes the natural healing of one’s body through a balanced lifestyle, diet, thought process, and herbal remedies. See Vasant Lad, *AYURVEDA: A BRIEF INTRODUCTION AND GUIDE*, THE AYURVEDIC INST. (2006), <https://www.ayurveda.com/resources/articles/ayurveda-a-brief-introduction-and-guide>.

<sup>3</sup> This is a common tourist circuit known as the “Golden Triangle.” *India Golden Triangle Packages*, INDIA GOLDEN TRIANGLE, <https://www.india-goldentriangle-tours.com/>.

<sup>4</sup> *Incredible India 2.0 India’s Billion Dollar Tourism Opportunity*, WORLD ECON. FORUM 4, 6 (Sept. 2017), [http://www3.weforum.org/docs/White\\_Paper\\_Incredible\\_India\\_2\\_0\\_final\\_.pdf](http://www3.weforum.org/docs/White_Paper_Incredible_India_2_0_final_.pdf) [hereinafter WEF White Paper].

<sup>5</sup> Press Release, United Nations World Tourism Organization [UNWTO], International Tourist Arrivals Reach 1.4 Billion Two Years Ahead of Forecasts (Jan. 21, 2019), <https://www.unwto.org/global/press-release/2019-01-21/international-tourist-arrivals-reach-14-billion-two-years-ahead-forecasts>.

for their share of tourists, especially among developing countries.<sup>6</sup> Data shows that international tourists, especially those from the West, crave unique cultural experiences.<sup>7</sup> This trend is particularly prevalent among millennials.<sup>8</sup> Though the COVID-19 pandemic has undoubtedly halted global tourism, all relevant metrics suggest that this decrease in international travel is not permanent.<sup>9</sup>

In today's tourism markets, the emphasis has shifted from major landmarks to immersive experiences focused on local culture. Global niche tourism is creating novel and innovative opportunities for cultural connections and exchanges directly between local populations and travelers. Although the advent of niche tourism has increased potential for economic growth amid local communities, it also poses unprecedented risks. American author bell hooks commented on this potential risk: "Within commodity culture, ethnicity becomes spice, seasoning that can liven up the dull dish that is mainstream white culture." This tourist-driven commodity culture can create a fetishization, appropriation, and exploitation of the host community, especially those found in the Global South. Thus, the law must seek to recognize and protect the innovations and contributions of local communities engaging in niche tourism.

This Article explores the emerging intersections of niche tourism markets, intellectual property (IP), and the "experience economy," using India as a case study. It argues that although experience-based niche tourism markets aimed at Western tourists promote economic development, these markets also promote racial capitalism and cultural appropriation by creating value in Indian culture exclusively defined by Western consumption.<sup>10</sup> To counterbalance these forces, the article demonstrates how an intellectual property as development framework can be used to reconfigure the economic benefits and social costs of niche tourism markets.

The argument proceeds as follows. Part I explains how the rise of the experience economy has altered the global tourism industry and then introduces India's prominent niche tourism markets. Part II examines the social and cultural costs of niche tourism experiences by employing a cultural appropriation framework to contextualize India's niche tourism markets. This section contends that foreign tourists' ability to access the local culture for their own benefit creates a power imbalance that disempowers local tourism communities and encourages the State to control the tourism narrative.

Part III advocates for an IP and development framework to regulate niche tourism markets. First, it draws upon existing scholarship focused on traditional knowledge, cultural

<sup>6</sup> WEF White Paper, *supra* note 4, at 6.

<sup>7</sup> *Id.* at 8. ("Since 2008, experiences are what people seek most—the number one Christmas gift in the United States in 2016 was a plane ticket.") This trend incentivizes destinations to brand themselves with "distinctive value proposition" to ensure that tourists choose them over other destinations. The goal is to have a large amount of "unique cultural experiences" that could not be found elsewhere. *Id.*

<sup>8</sup> Blake Morgan, *NOwnership, No Problem: An Updated Look at Why Millennials Value Experiences Over Owning Things*, FORBES (Jan. 2, 2019, 4:12 PM), <https://www.forbes.com/sites/blakemorgan/2019/01/02/no-ownership-no-problem-an-updated-look-at-whymillennials-value-experiences-over-owning-things/#7b1a67ae522f>.

<sup>9</sup> In 2020, international tourist arrivals increased by 58% in the three months ended September 30. Felix Richter, *This is How the COVID-19 Crisis Has Affected International Tourism*, WORLD ECONOMIC FORUM, (Dec. 2021), <https://www.weforum.org/agenda/2021/12/covid-crisis-drags-on-for-international-tourism/>.

<sup>10</sup> This is, of course, driven by the fact that developing world travelers have the money to spend on these experiences.

heritage, and agriculture to demonstrate how intellectual property rights (IPRs) can also benefit local communities engaging in niche tourism markets. Second, it argues that although Geographic Indicators (GIs) are best suited to regulate niche tourism markets—they were not written for an experience economy. This section therefore proposes an expansion of GIs to include branded niche tourism experiences. Finally, the article demonstrates how experience-based GIs can benefit local communities engaged in niche tourism by returning to India tourism markets.

## I. Niche Tourism in the Experience Economy

### A. Shift to the Experience Economy

The concept of the “experience economy” was first coined by Joseph Pine and James Gilmore in the *Harvard Business Review* in 1998.<sup>11</sup> Pine and Gilmore argue that the experience economy requires businesses to switch from emphasizing products or services to offering engaging experiences in order to remain competitive in today’s market.<sup>12</sup> For consumers, the product being sold is the memory of the *experience*.<sup>13</sup> Unlike industrial and service economies, which function when goods are made and services are delivered, the experience economy functions by monetizing experiences that are fully immersive and multi-sensory.<sup>14</sup> Economic offerings such as commodities, goods, and services are only external validation for consumers, whereas, the experience is inherently personal—existing only in the mind of the consumer.<sup>15</sup>

Pine and Gilmore argue that experiences exist within two intersecting dimensions.<sup>16</sup> The first dimension corresponds to a consumer’s participation—whether active or passive—in the experience. The second dimension considers a consumer’s connection with the environmental experience which ranges from absorption to immersion.<sup>17</sup> Both dimensions encompass the “Four Realms of an Experience”: entertainment, educational, esthetic, and

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<sup>11</sup> B. Joseph Pine II & James H. Gilmore, *Welcome to the Experience Economy*, 76 HARV. BUS. REV. 97 (July–Aug. 1998), <https://hbr.org/1998/07/welcome-to-the-experience-economy>. The advent of the experience economy has shifted how consumers interact with art, culture, fantasy, and imagination as it relates to merchandising and other intellectual property rights.

<sup>12</sup> *Id.*

<sup>13</sup> “An experience occurs when a company intentionally uses services as the stage, and goods as props, to engage individual customers in a way that creates a memorable event. Commodities are fungible, goods tangible, services intangible, and experiences memorable.” *Id.* at 98.

<sup>14</sup> *See id.* at 101–02.

<sup>15</sup> *Id.* at 99.

<sup>16</sup> *Id.* at 101.

<sup>17</sup> *Id.*

escapist.<sup>18</sup> The experiences that consumers find the most satisfying “encompass aspects of all four realms, forming a ‘sweet spot’ around the area where the spectra meet.”<sup>19</sup>

Immersive travel experiences are uniquely positioned to include all four realms.<sup>20</sup> The global tourism industry illustrates the immense value of the experience economy given its focus on movement and exchange.<sup>21</sup> Research indicates that “outer interactions such as environment, people, and product/service/experience and inner responses such as consciousness, needs, and creativity are complexly interrelated in tourist experiences.”<sup>22</sup> Tourism industry leaders encourage States to embrace the experience economy and invest in niche tourism markets that “create distinctive value propositions.”<sup>23</sup> These niche markets—ecotourism, medical tourism, yoga and wellness tourism, rural tourism, and cruise tourism—aim to offer tourists a fully immersive experience.<sup>24</sup> And tourists are “willing to pay more for the experiential values of community-based attractions such as local cultural trips.”<sup>25</sup> As the experience economy continues to grow, law and policy must evolve to address shifting societal patterns and norms.

Among developing economies, India has made one of the greatest concerted efforts to boost its international tourism<sup>26</sup> by investing in niche tourism markets that provide immense economic opportunities for the country at large.<sup>27</sup>

#### A. *Eat, Pray, Love* Niche Tourism in India

In order to brand itself as a competitive destination, India has developed its niche tourism markets over the last decade. The goal for each niche market is to create a distinctive value proposition that offers a unique glimpse into Indian culture in a manner that would not

<sup>18</sup> *Id.* at 102. (“The kinds of experiences most people think of as entertainment—watching television, attending a concert—tend to be those in which customers participate more passively than actively; their connection with the event is more likely one of absorption than of immersion. Educational events—attending a class, taking a ski lesson—tend to involve more active participation, but students (customers, if you will) are still more outside the event than immersed in the action. Escapist experiences can teach just as well as educational events can, or amuse just as well as entertainment, but they involve greater customer immersion. Acting in a play, playing in an orchestra, or descending the Grand Canyon involve both active participation and immersion in the experience. If you minimize the customers’ active participation, however, an escapist event becomes an experience of the fourth kind—the esthetic. Here customers or participants are immersed in an activity or environment, but they themselves have little or no effect on it—like a tourist who merely views the Grand Canyon from its rim or like a visitor to an art gallery.”).

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

<sup>20</sup> *Id.* (noting that going to Disney World or gambling in a Las Vegas casino hit all four realms).

<sup>21</sup> See generally Seohee Chang, *Experience Economy in the Hospitality and Tourism Context*, 27 TOURISM MGMT. PERSP. 83 (2018).

<sup>22</sup> *Id.* at 84.

<sup>23</sup> WEF White Paper, *supra* note 4, at 8.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> Chang, *supra* note 21, at 89.

<sup>26</sup> Between 2013 and 2016, India improved 15 spots on the World Economic Forum’s Travel & Competitiveness Report. By 2025, India’s international arrivals are expected to reach 15.3 million annually. Over the last five years, the Indian government has created tax incentives for tourist partners, relaxed international visa restrictions, and released a new destination brand, “Incredible India 2.0,” to tap into this market. WEF White Paper, *supra* note 4, at 8, 10.

<sup>27</sup> Economists predict that in “the near to medium term” the upside opportunity is \$19.9 billion, and this increased monetary intake could boost direct employment by creating jobs for approximately an additional one million people in the travel and tourism industry. WEF White Paper, *supra* note 4, at 7.

be possible under a “mass tourism” approach.<sup>28</sup> For Western tourists, these niche tourism experiences reflect their desire to experience cultural “authenticity,” rooted in their perceptions of Indian heritage and culture. This sub-section provides an overview of India’s most prominent niche tourism markets, which include yoga and wellness, and the recently emerging rural (and slum) tourism. Second, it outlines the Indian government’s branding efforts, which play a distinct role in presenting Indian culture as a commodity for Western consumption.

## **(1) India’s Most Prominent Niche Tourism Markets**

### **(i) Yoga and Wellness**

Yoga and wellness is arguably India’s most notable niche tourism market. Among Western tourists, yoga and wellness experiences have historically been connected with a broader perception of India as a spiritual location, dating back to at least the 1960s.<sup>29</sup> Today, many tourists share similar sentiments about traveling to India for yoga and other related wellness activities; many believe yoga and wellness experiences in India involve an inherent transformative or spiritual element that would be impossible to recreate in the West.<sup>30</sup>

Studies examining the motivation that Western tourists have for traveling to India to partake in yoga and wellness tourism<sup>31</sup> similarly reveal an element of escapism from

<sup>28</sup> “Mass tourism refers to the movement of a large number of organized tourists to popular holiday destinations for recreational purposes. It is a phenomenon which is characterized by the use of standardized package products and mass consumption. Conceptually, this type of tourism features standardized leisure products and experiences packaged for mass tourists.” Nikola Naumov & David Green, *Mass Tourism*, in *ENCYCLOPEDIA OF TOURISM* (Jafar Jafari & Honggen Xiao eds., 2016).

<sup>29</sup> This reputation was boosted by visits from celebrities like The Beatles and The Rolling Stones. After they returned from India, the Beatles and Rolling Stones were transformed and reconnected with themselves in a way that would not have been possible in the West. To an observer, “when they came out of their spiritual retreats draped in homespun, they glowed with vegetarian good health.” Richard Sharpley & Priya Sundaram, *Tourism: A Sacred Journey? The Case of Ashram Tourism, India*, 7 *INT’L J. TOURISM RES.* 161, 165 (2005).

<sup>30</sup> The Yoga Journal’s *Travel and Vacations in India* page lists “9 Indian Yoga Retreats that Will Change Your Life,” “The Western Yogi’s Guide to Traveling Through India,” and “How a Powerful Trip to India Changed Teacher Max Storm Forever.” Many of these articles have pictures of a Western yogi, usually a white woman, striking a pose in a quintessential Indian location such as the Taj Mahal or a busy alleyway street that features street vendors. See generally *India Yoga Travel*, *YOGA JOURNAL*, <https://www.yogajournal.com/lifestyle/travel/by-location/india> (last visited Oct. 9, 2019).

<sup>31</sup> Yoga tourists are commonly classified into three categories: (1) Yogalite, someone who is broadly interested about yoga in India; (2) The Yoga Traveler, a broad category including first-time visitors and returners whose purpose is to practice yoga in India; and (3) Going to the Source, dedicated yoga practitioners who practice daily. See generally Mimi Nichter, *The Social Life of Yoga: Exploring Transcultural Flows in India*, in *YOGA TRAVELING: BODILY PRACTICE IN TRANSCULTURAL PERSP.* 201–02 (Beatrix Hauser ed., 2013).



Western life or a desire for Eastern “authenticity” that the West lacks.<sup>32</sup> As one Western yogi who traveled to the southern Indian city of Mysore explained, “[c]oming to India removes me from my emotional pain. . . . Being in India let me put everything else aside and when I go back home I feel like I have been away a really long time.”<sup>33</sup> The search for authenticity or desire for escape seem to reflect broader notions of personal transformation that is prominent within yoga tourism.<sup>34</sup>

However, this transformation of yoga tourism is couched within a broader dynamic of “Western social forces working on Eastern movement forms.”<sup>35</sup> This desire to practice Eastern movement forms stems from a belief that the moves will facilitate reflection and self-discovery.<sup>36</sup> For Western tourists, yoga trips to India are not limited to learning about another culture but rather involve a “mode of self-inquiry and self-encounter that travel to spiritual centers like India can help facilitate.”<sup>37</sup>

It is important to note that the desire for transformation through the authenticity escapism does not extend to travel and stay accommodations. Western tourists generally require a level of comfort that reflects their own perception on life from their home country.<sup>38</sup> In a field-work study at Govardhan Eco Village (“GEV”) in New Delhi, GEV renovated the “quality of their accommodations” to better suit Western needs,<sup>39</sup> demonstrating Western tourists’ diverging preferences from authenticity to more luxurious living.<sup>40</sup>

<sup>32</sup> For some, the desire to escape positions India as a peaceful destination that “challenges the West in terms of modernization.” For others, India offers an authentic practice that facilitates a deeper connection and understanding of yoga for others. *See generally id.*; *see also* Ewelina Telej & Jordan R. Gamble, *Yoga Wellness Tourism: A Study of Marketing Strategies in India*, 36 J. CONSUMER MARKETING, 794 (2019); Hana Bowers & Joseph M. Cheer, *Yoga Tourism: Commodification and Western Embrace of Eastern Spiritual Practice*, 24 TOURISM MGMT. PERSP. 208 (2017).

<sup>33</sup> The yogi, a 40-year-old American man, was a participant in Nichter’s study, which examined Western tourists’ motivations to visit an Ashtanga yoga center in Mysore. He had been introduced to the Ashtanga yoga form through a week program in Goa and came to Mysore with the hope of healing his broken heart through yoga study. *See Nichter, supra* note 31, at 206. Another yogi, a 35-year-old German woman described Mysore’s authenticity. In her words, “If you want to know the sweetness of sugar, you have to taste it, and that’s it. Like that if you want to know what Ashtanga yoga is really about, you have to come to Mysore to experience it. I wanted to go beyond the intellectual. I’ve read so much about yoga, but I wanted to feel it more inside. I’ve started to feel [here].” *Id.* at 209.

<sup>34</sup> Yogis who travel develop heightened awareness, experience, and knowledge—and their “amplified consciousness and understanding is carried back to the home community.” Lauren M. Ponder & Patrick J. Holladay, *The Transformative Power of Yoga Tourism*, in TRANSFORMATIONAL TOURISM: TOURIST PERSP. 98,102 (Yvette Reisinger ed., 2013).

<sup>35</sup> Bowers & Cheer, *supra* note 32, at 211.

<sup>36</sup> Eastern movement form represents “the possibility of better understanding what kinds of transformational possibilities are being experienced through ‘doing’ [these movements.]” *Id.*

<sup>37</sup> *Id.* Anthropological studies reflect this Western perception about practicing yoga in India: “Yoga tourism is an exemplification of this East-West intersection where the yearning to satisfy as wellness or spiritual need drives visitation to destinations that enable the attainment of physical, psychological and well-being transformations.” *Id.*

<sup>38</sup> *Id.* at 214.

<sup>39</sup> *Id.* Additionally, to accommodate respondents, GEV added an ice cream shop and a wood-fired pizza cafe, while also adding new landscaping that replicated the aesthetic in Vrindavan, a sacred Hindu site. *Id.* at 214–15. The use of Hindu imagery reflects a broader Western perception that India and its spirituality are Hindu in nature. The consequences of this perception will be further developed in Part Two.

<sup>40</sup> These renovations included the ice cream shop and wood-fired pizza cafe. *Id.* at 214–15.

Similarly, the desire to attract Western yoga tourists has led to the creation of yoga and wellness-based packages.<sup>41</sup> This marketing approach generally includes “spa activities and gourmet food, accompanied by the promise of ‘royal treatment’ provided with western comforts.”<sup>42</sup> The top five yoga retreats featured on a popular yoga blog offered services such as spas, massages, Ayurvedic cuisine, and chanting workshops. Even absent the packages, yoga tourism is intrinsically linked to other Indian-based wellness services and products. Among the most common are: Indian philosophy, Ayurveda, and Reiki<sup>43</sup> treatments.<sup>44</sup> Tourism market specialists remark that these supplementary services suggest that yoga in India is a commodity “that [has been] tailored to respond to the expectations of its consumers.”<sup>45</sup> For Western tourists, yoga and wellness are aspects of a self-transformation journey.<sup>46</sup>

### (ii) Rural (and Slum) Tourism

India’s rural tourism market revolves around three broad categories: agri-tourism, cultural heritage tourism, and eco-tourism.<sup>47</sup> All three categories aim to facilitate connections between tourists and local communities. The appeal for rural tourism stems from tourists’ interests in experiencing a “genuine rural atmosphere” and “sharing intimacy” with the local community.<sup>48</sup> Tourists want to feel fully integrated into the lives of their host communities by “experiencing” all aspects of their life, including their cuisine, clothing, and traditional practices.

The Indian rural tourism market has recently gained more attention as over sixty-five percent of India’s population resides in villages.<sup>49</sup> In 2011, the Ministry of Tourism announced a “Rural Tourism Scheme,” aimed at promoting rural tourism in specific geographic regions. As part of the scheme, the Indian government invested in a region’s

<sup>41</sup> Telej & Gamble, *supra* note 32, at 796.

<sup>42</sup> *Id.*

<sup>43</sup> Reiki is a healing technique based on the principle that the therapist can channel energy into the patient by means of touch, in order to activate the natural healing processes of the patient’s body and restore physical and emotional wellbeing. Pallavi Bansal, *Here’s What You Should Know About Reiki*, TIMES OF INDIA (Aug. 21, 2019, 14:48 IST), <https://timesofindia.indiatimes.com/life-style/health-fitness/de-stress/Heres-what-you-should-know-about-Reiki/articleshow/51394060.cms>.

<sup>44</sup> Nichter, *supra* note 31, at 214-15.

<sup>45</sup> Telej & Gamble, *supra* note 32, at 796.

<sup>46</sup> The commodification of the entire yoga-based experience prompts questions surrounding inclusion and accessibility. Some critics argue that its “obvious commodification is [likely] adverse to [yoga’s] central tenants.” *Id.* For others, the criticism is rooted in reclaiming heritage. They argue that the Western yogi’s desire to “bring back” yoga practices in order to teach (commodify) has imperialistic undertones. See Rumya S. Putcha & Sangeeta Vallabhan, *Are You Traveling to India for the Right Reasons?*, YOGA JOURNAL (May 25, 2019), <https://www.yogajournal.com/lifestyle/travel/yoga-colonialism-and-india/>. These criticisms will be further explored in Part Two.

<sup>47</sup> Piali Haldar, *Rural Tourism—Challenges and Opportunities*, (International Conference on Marketing and Society, 2018), [https://www.researchgate.net/profile/Piali\\_Haldar3/publication/327645353\\_Rural\\_Tourism\\_Challenges\\_and\\_Opportunities/links/5b9b64cb299b13e602d5559/Rural-Tourism-Challenges-and-Opportunities](https://www.researchgate.net/profile/Piali_Haldar3/publication/327645353_Rural_Tourism_Challenges_and_Opportunities/links/5b9b64cb299b13e602d5559/Rural-Tourism-Challenges-and-Opportunities).

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

<sup>49</sup> Rural population (% of total population), WORLD BANK DATA (Graph) (2018) <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS>.

infrastructure in exchange for a commitment to developing rural tourism opportunities.<sup>50</sup> Now that borders are opening again after the COVID-19 pandemic, the central and state governments are once again devising and implementing tourism experiences with the goal of providing socio-economic benefits to the local community by investing in rural tourism.<sup>51</sup>

Rural tourism is widely seen as a solution to the migration seen from India's rural communities to large cities.<sup>52</sup> Tourism analysts contend that rural tourism is an untapped niche market. Rural tourism opportunities "create mutually enriching experiences benefiting local communities as well as tourists"<sup>53</sup> because each village "has its own story, heritage, and culture to share" with tourists.<sup>54</sup> Overall, the rural tourism model in India is projected to contribute "\$25 billion, catering to 15 million tourists, and in turn create 100,000 village-level entrepreneurs."<sup>55</sup>

A parallel market that has developed in India's largest cities is "slum tourism," a concept meant to offer foreign tourists a glimpse of the "real India."<sup>56</sup> As one tour guide explains, "[w]e normally go to the doctor's clinic, government offices, schools, playing areas, and a few houses. Most of the participants are foreigners."<sup>57</sup> Recently, the market has expanded beyond tours. A Dutch citizen working with a Mumbai non-governmental organization created the "Slum Homestay Mumbai," which allows tourists to stay in "a loft" in Mumbai's Khar Danda settlement.<sup>58</sup> The loft comes equipped with a flat screen television, a new mattress and air conditioning for 2,000 rupees.<sup>59</sup> The homestay's founder argues that staying within the community is a better alternative to a tour where the tourist leaves after snapping a few pictures.<sup>60</sup> To him, this initiative was meant to "create a connection between two groups who would usually not meet."<sup>61</sup> In 2019, Mumbai's Dhravi slum received TripAdvisor's Travelers' Choice Awards, beating out the Taj Mahal.<sup>62</sup> For Western tourists,

<sup>50</sup> Gov't of India, Ministry of Tourism, Rural Tourism Scheme for Infrastructure Development Scheme Guidelines (2011).

<sup>51</sup> See generally Sharma et. al., *Reviving Tourism Industry Post-COVID-19: A Resilience-Based Framework*, TOURISM MGMT PERSP. 37 (Dec. 2020).

<sup>52</sup> *Id.*

<sup>53</sup> WEF White Paper, *supra* note 4, at 8.

<sup>54</sup> *Id.*

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

<sup>56</sup> Express News Service, *Art Fest Brings Life to Delhi Slums*, NEW INDIAN EXPRESS, <http://www.newindianexpress.com/cities/delhi/2019/may/25/art-fest-brings-life-to-delhi-slums-1981593.html> (last updated May 25, 2019, 10:16 AM).

<sup>57</sup> *Id.*

<sup>58</sup> Amrit Dhillon, *Tourists Offered Night's Stay in Mumbai Slum*, GUARDIAN (Jan. 29, 2018, 9:02 EST), <https://www.theguardian.com/world/2018/jan/29/tourists-offered-a-nights-stay-in-a-mumbai-slum>; *News Desk, Mumbai Slum Hotel Provides Stay for Rs 2280 Per Night*, INDIA TV, (Oct. 2018), <https://www.indiatvnews.com/news/india-mumbai-slum-hotel-provides-stay-in-rs-2280-per-night-469142>.

<sup>59</sup> *Id.*

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

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

<sup>62</sup> Saptarshi Ray, *Indian Slum Tour Becomes Country's Most Popular Tourist Attraction*, TELEGRAPH (June 23, 2019, 4:00 PM GMT), <https://www.telegraph.co.uk/news/2019/06/23/indian-slum-tour-becomes-country-popular-tourist-attraction/>. The rural and "slum" tourism markets involve a similar debate as other niche tourism markets. Proponents argue that tourism opportunities are economic development initiatives that ultimately improve the lives of the community. Additionally, local communities have their own distinct culture, heritage, and

the yoga and wellness, and rural (and slum) tourism market present opportunities to experience “authentic” Indian heritage and culture in a manner that allows for personal rejuvenation.

## 2. Indian Government Niche Tourism Marketing

In 2002, the Indian government launched its first effort at creating a destination brand with the “Incredible India” campaign.<sup>63</sup> Designed by well-known British marketing agency Ogilvy and Mather, the multi-media campaign<sup>64</sup> aimed to “project India as a unique opportunity for physical invigoration, mental rejuvenation, cultural enrichment, and spiritual elevation.”<sup>65</sup> Additionally, the campaign focused on yoga and wellness tourism and encouraged visitors to “spend a few days at an Ayurveda spa and go back rejuvenated in mind and spirit.”<sup>66</sup>

Incredible India’s message made a notable thematic shift that was built “on the aspirations of a ‘rising India’ where its culture and civilizational fabric [became] a cornerstone of a powerful new identity in the twenty-first century.”<sup>67</sup> Aesthetically, the campaign used “striking visual images” with clever captions that presented an “optimistic and extroverted new India.”<sup>68</sup> The Indian government made a concerted effort to reach Western audiences, focusing on “major metropolitan centers and cultural hubs” in Europe and North America.<sup>69</sup>

From 2010 to 2016, the campaign narrowed its focus, although it continued to position India as a unique destination for Western tourists. Unlike previous marketing efforts, which highlighted cultural differences between Indian and Western culture, the new campaign featured India exclusively through the perspective of Western tourists. The

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tradition; and should therefore be afforded a chance to connect with foreign tourists. Critics argue that these tourism activities are exploitative of the local community due to the “police sanitization” practice that forces the poorest areas to evacuate prior to tours. *Id.* Additionally, they argue that the commodification has imperialistic undertones. See Express New Services, *supra* note 56.

<sup>63</sup> SIMON HUDSON, TOURISM AND HOSPITALITY MARKETING: A GLOBAL PERSPECTIVE 408 (2008).

<sup>64</sup> The campaign ads were featured on major television channels such as Discovery, Travel, BBC, and CNN between January and March 2002, covering Europe, Asia, the Middle East, and Africa. From August 2004 to August 2005, the online campaign expanded to digital brochures that were placed on major websites like Yahoo! as well as special interest magazines. The campaign occasionally hosted photo contests with the theme “uniquely Indian.” Sultan Singh & M. S. Turan, *Indian Tourism in the Paradigm of Incredible India Campaign*, 2 J. HOSPITALITY APPLICATION & RES. 82, 87–88 (2007). See generally David Geary, *Incredible India in a Global Age: The Cultural Politics of Image Branding in Tourism*, 13 TOURIST STUD. 36, 44 (2013).

<sup>65</sup> HUDSON, *supra* note 63, at 408.

<sup>66</sup> Singh & Turan, *supra* note 64, at 87.

<sup>67</sup> Geary, *supra* note 64, at 44–45.

<sup>68</sup> One advertisement featured the Royal Bengal Tiger with the caption “[n]ot all Indians are polite hospitable and vegetarian.” Another featured the Taj Mahal with “[a]nd to think these days, men get away with giving flowers and chocolates to their wives.” *Id.* at 45–46.

<sup>69</sup> As a partner country at the International Tourism Board, India launched the campaign to a world-wide audience. At the event, India hosted a pre-launch party featuring 75 folk artists representing traditional movements from across the country and a 29-course meal catered by 45 chefs. These efforts were accompanied by print media all over Berlin with some billboards offering “tongue-in-cheek messages and headlines” in the subtext that “playfully highlighted the dramatic contrast between Indian and European culture. *Id.* at 47–48.

campaign ad featuring white actors revived the message of spirituality with an emphasis on “personal growth” and transformation.<sup>70</sup>

### i. Incredible India 2.0

“In India, I discovered that true luxury isn’t something you buy off a shelf.” The aptly titled ad, “The Maharani of Manhattan,” begins with a middle-aged white woman gazing out from the floor-to-ceiling window in her high-rise office<sup>71</sup> and is one of five signature advertisements from the “Incredible India 2.0” campaign.<sup>72</sup> The others— Masala Master Chef, The Reincarnation of Mr. and Mrs. Jones, The Yogi of the Racetrack and Sanctuary in Paris—follow a parallel structure. All of the ads begin with a Western tourist answering a question that prompts them to reminisce about their trip to India. For each narrator, their time in India transformed them. India provided an escape from the endless 70-hour work-week schedule. Whether it was practicing yoga on a rock nestled within a Himalayan stream, eating langar at the Golden Temple, or learning about traditional Ayurveda practices, India provided each of them with an opportunity to re-energize and revitalize so they returned home a new person.<sup>73</sup>

In addition to being broadcast on television, these ads also played on social media using CNN’s AIM (audience, insights, and measurement) to reach specific audiences.<sup>74</sup> To complement the video series, the campaign is investing in various digital efforts including promotion through influencers and bloggers. For example, “The Great India Blog Train” trip took sixty international bloggers from twenty-three countries on a week-long luxury train ride across India in 2018.<sup>75</sup> Additionally, the campaign hopes to leverage successful Bollywood stars for a state-focused campaign.<sup>76</sup>

<sup>70</sup> See generally Geary, *supra* note 64; Singh & Turan, *supra* note 64.

<sup>71</sup> For the next minute, viewers follow the woman’s journey through India where she designs her own fully embroidered jacket. She begins her trip on the Maharajas’ Express, sipping a gold encrusted teacup. She arrives at the City Palace in Jaipur, finding inspiration from Peacock Gate. She continues to narrate, “true luxury is a feeling that you are the Maharani (queen) of the world, and it can be all designed around you,” as she meets with a tailor to discuss her clothing options. Traditional Indian music begins to play in the background as the ad cuts through clips of her walking through castles, walking into hidden art shops in hidden alleyways, horseback riding through Rajasthani hills with a traditionally dressed man guiding the horse along her side. She continues, “all the beauty is yours; all the music is yours and all the luxury is yours” as she joins a group of women performing a traditional Indian dance. In between these clips, viewers see the tailor embroidering the woman’s jacket by hand. As she finishes dancing, the tailor brings her a decorative gift box enclosed with the jacket. She finishes, “India showed me that luxury doesn’t follow designers and brands. True luxury follows its own heart,” back in her high-rise office modeling her jacket for a group of photographers. Incredible India, *The Maharani of Manhattan*, YOUTUBE (June 30, 2018), [https://www.youtube.com/watch?v=djil\\_6n4ef0](https://www.youtube.com/watch?v=djil_6n4ef0).

<sup>72</sup> See generally *id.*

<sup>73</sup> See generally *Incredible India Campaign Wins Pata Gold Award 2019*, KRC TIMES (June 7, 2019), <https://www.krctimes.com/news/incredible-india-campaign-wins-pata-gold-award-2019/>.

<sup>74</sup> Saumya Tewari, *Will Incredible India 2.0 Campaign Be Able to Woo Foreign Travellers?*, MINT (Oct. 18, 2017, 1:15 PM), <https://www.livemint.com/Consumer/zoqH0hafwOb2ANGo5tUE6N/Will-Incredible-India-20-campaign-n-be-able-to-woo-foreign-tr.html>.

<sup>75</sup> Press Information Bureau, *M/O Tourism’s Social Media Key Influencers Campaign “The Great India Blog Train” Launched*, (Feb. 2018), <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1519550>.

<sup>76</sup> Tasmyee Laha Roy, *United Colours of Incredible India*, ECON. TIMES, <https://economictimes.indiatimes.com/news/politics-and-nation/united-colours-of-incredibleindia/articleshow/57089562.cms> (last updated Feb. 11, 2017, 1:01 AM).

Although Incredible India 2.0's "Find the Incredible You" campaign builds on its message that India is a "must experience destination amongst overseas travelers," this campaign marks an intentional shift from "present generic promotions being undertaken across the world" to a more "market specific and focused promotional plan and product specific content creation."<sup>77</sup> The goal is for tourists to feel like there is an experience in India specifically curated for their personal growth.<sup>78</sup> Through this campaign, the Indian government hopes to promote specific niche tourism products including, "spirituality, medical, and wellness."<sup>79</sup>

It is too soon to understand Incredible India 2.0's impact. However, the campaign has generated considerable attention. This series of ads have received over 153 million views on social media. In 2019, the campaign received first place at the International Golden City Gate Tourism Awards in Berlin and Pacific Asian Travel Association Gold Award in the "Marketing – Primary Government Destination" category.<sup>80</sup> With the Incredible India 2.0 campaign, foreign tourists can create their own individualized *Eat, Pray, Love* Tour.

### III. Niche Tourism as Cultural Appropriation

Amid the dense forest of the Melghat tiger reserve lies the small village of Harisal, nestled between the Spina River on one side and the hills of the Madhya Pradesh on the other. Belonging to the Korku tribe, Harisal is often described as an "immeasurable beauty" and is home to 400 tribal families totaling up to 1,200 people.<sup>81</sup> In 2019, Harisal entered the rural tourism market with homestays that allow tourists to experience "rustic rural life" by working with farmers, eating local cuisine, and participating in native music and folk dancing.<sup>82</sup> The decision to enter the rural tourism space was not made by the Korku tribe, but by Microsoft employee and India Institute of Technology graduate Prakash Gupta.<sup>83</sup> Gupta discovered Harisal through Microsoft's Digital Village Program.<sup>84</sup> He knew that villages like Harisal could become an immersive and experiential travel spot because tourists want a "proper village stay experience in traditional tribal houses."<sup>85</sup>

Six-hundred kilometers south of Harisal lies Mumbai's Dharavi slum. It is home to one million people, is approximately half the size of Central Park, and was the inspiration for the blockbuster films *Slumdog Millionaire* and *Gully Boy*.<sup>86</sup> Fifteen-thousand Western

<sup>77</sup> Press Release, Press Information Bureau Delhi, Government of India, Incredible India 2.0 Campaign (Jan. 3, 2018, 5:58 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1515336>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Moreover, the Indian government is invested in promoting one central message with Incredible India 2.0. Recently the Ministry of Tourism shared that the central government will be coordinating between the different state governments. In order to provide a cohesive message, the central Indian government aims to converge state-led tourism efforts into one brand. In the past, states were able to lead with their own efforts with varying degrees of oversight. Roy, *supra* note 60.

<sup>80</sup> KRC TIMES, *supra* note 73.

<sup>81</sup> Shruti Kedia, *This IIT Alumnus Is Making Rural Tourism Accessible with a Taste of Adivasi Culture*, SOCIALSTORY (Apr. 22, 2019), <https://yourstory.com/socialstory/2019/04/iit-guwahati-rural-tourism-amravati>.

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

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Melissa Nisbett, *Empowering the Empowered? Slum Tourism and the Depoliticization of Poverty*, 85 GEOFORUM 37, 39 (2017).



tourists visit Dharavi annually because of its perception as an “eye-opening” and “mind-blowing” experience that offers an “alternative perspective on poverty.” Yet, these tours are highly curated with trained tour guides, calculated routes, and offer no interaction with Dharavi residents.<sup>87</sup>

The Harisal and Dharavi niche tourism markets raise critical questions about foreign tourists’ perceptions, interactions, and impacts—despite tourism’s economic benefits.<sup>88</sup> This section examines the social costs<sup>89</sup> of commodifying culture through niche tourism markets aimed at Western tourists and uses a cultural appropriation framework to reify the harm inflicted upon local communities by niche tourism markets. First, it defines and applies a cultural appropriation framework for niche tourism markets in India. It explains how foreign tourists’ ability to access local heritage and culture for their own benefit creates a power imbalance. Then, it traces this imbalance to a colonial and imperialistic foundation: India exists to serve white Westerners. Finally, this section argues that this imperialist dynamic enables state government actors to become self-appointed cultural guardians who enforce rigid cultural identity to serve themselves.

Although some international and IP law scholars recognize that the law has a role in addressing cultural appropriation,<sup>90</sup> the intersection between cultural appropriation and law is still subject to controversy.<sup>91</sup> Critics argue that legal protection against cultural appropriation deters innovation and restricts public accessibility to ideas.<sup>92</sup> Additionally, critics contend that cultural appropriation claims present issues of legal uncertainty, making it difficult to form generally applicable rules and discern limits.<sup>93</sup> These concerns have some merit. Overly broad legal protections risk engrossing the public domain, and culture is a dynamic process that can at times be too broad to adjudicate in a principled manner.<sup>94</sup> However, these justifications improperly presume that any attempt to regulate culture will be indeterminate. That is why concerns for legal uncertainty ought to be balanced against an individual and societal interest in recognizing and protecting peoples’ creative contributions. Both considerations can be balanced in a reasonable and principled manner.

<sup>87</sup> *Id.* at 42.

<sup>88</sup> WEF White Paper, *supra* note 4.

<sup>89</sup> Although this paper focuses exclusively on social and cultural consequences, it does not purport those to be the only “costs” posed by niche tourism markets. For example, there are serious labor and environmental concerns. According to Indian official statistics, about 13 million children are engaged in the tourism industry but unofficial estimates vary between 60-100 million. There are three major issues which affect the future of children directly or indirectly. These are poverty, illiteracy and unemployment or underemployment by parents. A. Sharma et al., *Impact of Labour Laws on Child Labour: A Case of Tourism Industry*, 1 INT’L J. ADVANCES IN MGMT. & ECON. 47, 49 (2012). However, this paper focuses its discussion on the consequences mostly aligned with the proposed solution in Part Three.

<sup>90</sup> Mathias Siems, *The Law and Ethics of ‘Cultural Appropriation,’* 15 INT’L J. L. CONTEXT 408, 409–10 (2019) (defining cultural appropriation as the taking of “intellectual property, cultural expressions or artefacts, history, and ways of knowledge”); Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, WIPO MAG. (Aug. 2019), [https://www.wipo.int/wipo\\_magazine/en/2019/04/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html) (“While the term “cultural appropriation” is shrouded in uncertainty, there is undoubtedly a role for intellectual property (IP) in curbing this harmful practice.”).

<sup>91</sup> Siems, *supra* note 87, at 408.

<sup>92</sup> *Id.* at 413.

<sup>93</sup> *Id.* at 420.

<sup>94</sup> *Id.*

### A. Cultural Appropriation in a Niche Tourism Context

Cultural appropriation is defined as “the adoption or exploitation of another culture by a more dominant culture.”<sup>95</sup> It is rooted in and perpetuates a power imbalance between the two cultures, ignoring the reality that all cultures are not equally desired or respected in society.<sup>96</sup> Cultural appropriation occurs when the dominant culture “siphon[s] any material or financial benefit” from the culture or cultural heritage of a marginalized group.<sup>97</sup> While the dominant group is empowered to utilize culture that is not their own, the marginalized group is “still persecuted for living in that [same] culture.”<sup>98</sup> The inherent power balance between the two groups allows the “culture being appropriated to be distorted and redefined by the dominant culture.”<sup>99</sup> In this process, even well-intentioned culturally appropriative acts by the dominant group fail to “understand and respect the past and present power dynamics defining the [marginalized] culture’s interaction with the dominant culture.”<sup>100</sup>

Niche tourism markets feature this imbalanced power dynamic. Western travelers have access to and benefit from the culture of the host communities in the Global South, whereas economic pressures force those communities to commodify their culture based on a tourist’s willingness to pay for it. Commodification occurs when a community’s culture becomes converted into objects of exchange valued for tourist consumption.<sup>101</sup> Niche tourism development transforms cultural heritage resources into commodities for exchange and likely exploitation. Tourism commodifies culture by converting a community’s local heritage that has been developed over years and perhaps centuries through “ordinary spontaneous evolution,” informed by the community’s social fabric and everyday essence of life into objects of exchange for tourist consumption.<sup>102</sup>

Subsequently, the culture gets transformed and reconstructed into a completely different entity, and a consumer value system supersedes the longstanding community value system.<sup>103</sup> This consumer value system often distorts the original culture (through inaccurate marketing narratives, inauthentic tourism activities and inappropriate use of cultural resources) over which a community has little or no control.<sup>104</sup> In many smaller rural communities and indigenous communities that adopt tourism, this dilemma becomes very real and controversial, leading to tensions and conflicts between residents and others.<sup>105</sup> Groups such as entrepreneurs, governments, marketers, film-makers, photographers, tour operators, and artists, see rural cultural heritage manifestations as novel product opportunities and are increasingly appropriating and exploiting local intangible cultures and heritages for their own commercial purposes and profit.<sup>106</sup>

<sup>95</sup> JEOMA OLUO, SO YOU WANT TO TALK ABOUT RACE 146 (2018).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 147.

<sup>98</sup> *Id.*

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

<sup>100</sup> *Id.*

<sup>101</sup> E. Wanda George, *Intangible Cultural Heritage, Ownership, Copyrights, and Tourism*, 4 INT’L J. CULTURE, TOURISM & HOSPITALITY RES. 376 (2010).

<sup>102</sup> *Id.* at 381.

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

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 382.

<sup>106</sup> *Id.* at 381.



This pattern can be seen in India's wellness tourism market, where local communities' culture is commodified in the forms of various traditional knowledge treatments. Tourist interest in these traditional knowledge treatments results in modification to the underlying knowledge because providers are continuously considering the needs of foreign tourists.<sup>107</sup> Jean Langford discusses the concept of mimesis in analyzing the role of Western consumers, arguing that "the effect of the back-and-forth between Indian Ayurveda healers and westerners has resulted in new interpretations of practice."<sup>108</sup> These interpretations consider the foreign consumers' notions of health, medical legitimacy, and understandings of the body. As a result, modern assemblages of Ayurveda knowledge and the institutions that manage this knowledge, such as hospitals and professional communities, reflect these influences.<sup>109</sup> This process forces local communities engaging with tourists to modify their cultural heritage practices according to the consumption of Western tourists, thereby erasing other cultural traditions of that community.<sup>110</sup>

### B. Imperialistic Effect of Cultural Appropriation

The loss and modification of certain practices—that ultimately lead to cultural distortion—occur from an imperialistic dynamic that cannot be separated from the colonial history that grounds it. Although individual tourists may not be intentionally contributing to this problematic dynamic, Western media, which inherently affects tourist perceptions, has an Orientalist portrayal of Indian culture.

Feminist theorist Shefali Chandra draws upon three post-9/11 widely circulated memoirs—*Eat, Pray, Love*; *Sita Sings the Blues*; and *Dreaming in Hindi*—to contextualize Western perceptions of India.<sup>111</sup> All three of these works feature white female protagonists who travel with "the conviction that India, and Indian women, will heal [their] mind and body."<sup>112</sup> Shefali explains that these works perpetuate a colonial dynamic and contribute to the marginalization of minorities in India.<sup>113</sup>

The relationship between Western white women and Indian women has historically been an exploitative one. During British colonialism, white women used literary images of "the barbarous treatment and even inherent backwardness of non-Western women" in order to portray themselves as refined and civilized.<sup>114</sup> British suffragists deployed images of suffering Indian women to advocate for their parity in Victorian and Edwardian Britain. This time period also marked the emergence of "sisterhood through saviorism."<sup>115</sup> White women supported imperial expansion in order to support the plight of Indian women, claiming the role of "saviors, agentic, and liberated."<sup>116</sup> This saviorism-based activism can be traced

<sup>107</sup> See generally Allison Fish, *The Commodification and Exchange of Knowledge in the Case of Transnational Commercial Yoga*, INT'L J. CULTURAL PROP. 189 (2006).

<sup>108</sup> *Id.* at 201.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Shefali Chandra, "India Will Change You Forever": *Hinduism, Islam, and Whiteness in the American Empire*, 40 J. WOMEN CULTURE SOC'Y., 487, 488 (2015).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 490.

<sup>115</sup> *Id.*

<sup>116</sup> Shefali Chandra, "India Will Change You Forever": *Hinduism, Islam, and Whiteness in the American Empire*, 40 J. WOMEN CULTURE SOC'Y., 487, 488 (2015).

through twentieth century female American writers with “benevolent and philanthropic” intent to uplift and support Indian women. Today, a new global feminist orientalism echoes the history of “sisterhood of saviorism” by discussing women from the global south as “burned brides, sex slaves, mutilated genitals, bound feet, or veiled faces.”<sup>117</sup>

Shefali demonstrates that these recent memoirs represent an “important twist on US orientalist accounts of India,” that she argues have turned “the politics of rescue that animates most imperial female projects on its head.”<sup>118</sup> The American women in works like *Eat, Pray, Love* “cast themselves as once innocent, now wounded and insecure, hence paralleling the contemporary American self-portrayal.”<sup>119</sup> The women consider themselves to be removed from both the imperial history and its current manifestation despite their presence in the Indian sub-continent in the middle of the War on Terror.<sup>120</sup> Amidst it all—their focus is on themselves. Shefali explains:

TAs with the American nation, their priority is to heal themselves by any means necessary. Their pain takes them to India, where the experience of immersion, the torturous physicality, and the recovery of self are looped through the evacuation of Islam and an embodiment of the disciplinary regimes of Indian culture. For all three, the affinity for India exists at an idealistic, intellectual, and theoretical level, yet India heals them through praxis: the regulating practices of yoga, Hindi, Hinduism.<sup>121</sup>

For these American women, India exists solely to serve their self-discovery journey. Hindu women serve a crucial role in each transformative journey for all three American women, who continue to conform to Oriental perceptions. Early in *Eat, Pray, Love*, the protagonist discovers “her newfound spirituality, her attraction to the ‘radiantly beautiful Indian woman’ that she first spied in a photograph whose ‘words gave [her] chill bumps over [her] whole body ... and when [she] heard she had an Ashram in India, [she] knew [she] must take [her]self there as quickly as possible.’”<sup>122</sup> Later in the story, the protagonist describes Tulsi, a seventeen-year old Hindu woman who “speaks a delightful, lilting English—the kind of English you can find only in India—which includes such colonial words as ‘splendid!’ and ‘nonsense!’” Shefali explains that through these thinly veiled references of Indo-British history, the memoirs simultaneously signal amusement and distance from British colonialism.<sup>123</sup>

This recent American interest in India must be contextualized in the geo-political environment of the September 11th aftermath.<sup>124</sup> American interest in India is built on a colonial British Oriental understanding of Hinduism, which is based on the “supposed

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 491.

<sup>119</sup> *See id.*

<sup>120</sup> *Id.* at 500-501.

<sup>121</sup> Shefali Chandra, “*India Will Change You Forever*”: *Hinduism, Islam, and Whiteness in the American Empire*, 40 *J. WOMEN CULTURE SOC’Y.*, 487, 488 (2015).

<sup>122</sup> *Id.* at 502.

<sup>123</sup> *Id.* at 503.

<sup>124</sup> *Id.*

Aryan” commonalities between Indian and European cultures, and ignores issues like caste and race.<sup>125</sup> Nineteenth century American authors like Ralph Waldo Emerson and Henry David Thoreau relied on binaries between Western materialism and Eastern spiritualism in crafting transcendentalist philosophy and cited upper-caste Hindu Vedas for understanding and expression.<sup>126</sup> This interest in upper-caste Hinduism has shaped forms of American anti-colonial and anti-capitalist sentiments and has been generalized into a spiritual draw to India through “an idealization of Gandhian nonviolence and, finally, yoga.”<sup>127</sup> Unlike the European colonial orientalism towards India, which reflected a derisive relationship with Islam, America’s history with India has been a Hindu-centric one.<sup>128</sup> Through American and European triangulation of whiteness, the relationship between Hinduism and Islam was further complicated by September 11th, which promoted an alliance between the West and Hindu India, creating xenophobic and Islamophobic sentiments towards Muslims in India (and across South Asia).

For the white women protagonists, interest and reference to upper-caste Hinduism was “overtly or implicitly positioned in a triangulated relationship between Islam and an amorphous notion of Western individualism.”<sup>129</sup> Shefali outlines how for the protagonist in *Eat, Pray, Love*, “Islam is systematically eradicated as she gathers the signifiers that map her voyage toward personal healing. And when she moves on from India to Indonesia, her interest remains with Hinduism.”<sup>130</sup> In *Dreaming in Hindi*, when the leading character’s teachers establish “Islamophobia as authoritative knowledge,” she dismisses the Hindu xenophobia as “ghosts of partition.”<sup>131</sup> Shefali argues that “this misrecognition is striking; she cannot connect contemporary India’s violence with US-centered globalization. Hence, she will not situate her own presence through the history of colonialism, nor of neo-imperialism.”<sup>132</sup> Rather than encouraging a dialogue with Indians or prompting reflection about the difficult history of “sisterhood through saviorism,” these popular literary works legitimize a self-centered transformative journey through India. As Shefali explains:

The relationship proliferates endlessly: India is produced through the desires of the white woman, who is then regenerated by India and made well once more. Hindu India releases her from an acknowledgement of her whiteness, or her imperialism. And with her hard-earned rejuvenation, she

<sup>125</sup> *Id.* at 492.

<sup>126</sup> Similar to the tourist motivations discussed in Part One, Western perception of India’s spirituality and transformative powers is understood to be Hindu in nature. By exclusively focusing on Hindi spirituality, these perceptions deny the contributions of Islamic and Sufi spiritual leaders who have been present throughout Indian history. Shefali Chandra, “*India Will Change You Forever*”: *Hinduism, Islam, and Whiteness in the American Empire*, 40 J. WOMEN CULTURE SOC’Y., 487, 488 (2015).

<sup>127</sup> *Id.* at 493.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 495.

<sup>130</sup> *Id.* at 495.

<sup>131</sup> *Id.* at 505.

<sup>132</sup> Shefali Chandra, “*India Will Change You Forever*”: *Hinduism, Islam, and Whiteness in the American Empire*, 40 J. WOMEN CULTURE SOC’Y., 487, 488 (2015).

can take her knowledge and progress homeward, through the empire of sentiment.<sup>133</sup>

Popular memoirs like *Eat, Pray, Love*, portray Islamophobic sentiments and orientalist representations of Hindu India as a transformative location for white women, which creates dangerous perceptions for Western tourists.

The harm of Western-centric saviorism is also present at Mumbai's Dharavi slum. In 1882, the British colonial government's decision to take control over Mumbai city center and construct residential developments along the coast for wealthy Indians and Brits displaced existing residents on "a patch of land between Mumbai's two main suburban railway lines, establishing Dharavi."<sup>134</sup> Western interest in visiting slums as a form of entertainment can be traced back to nineteenth century British writers like Charles Dickens through Danny Boyle's *Slumdog Millionaire*.<sup>135</sup> These media representations subsequently motivated companies like Realty Tours to offer organized tours of Dharavi.<sup>136</sup>

The purpose of the Dharavi tours is to provide Western tourists with an alternative perspective of life in an Indian slum.<sup>137</sup> The carefully curated tours portray the slum as a manufacturing hub that generates a total of \$665 million through its hutment industries. Tourists walk through plastic and aluminum recycling huts and factories ranging from leather products to hospitality industry services (such as laundry and soap-making).<sup>138</sup> All products remain unbranded because an association with the slum would render them unusable.<sup>139</sup> Western tourists can dismiss the poor sanitation, lack of clean water, and unsafe conditions and instead romanticize Dharavi "as a model of contentment and neighborliness[,] with Western visitors "...transformed by 'life-changing', 'eye-opening' and 'mind-blowing' experiences."<sup>140</sup> Like the protagonist in *Eat, Pray, Love*, the tours are not rooted in a cultural exchange between the community and tourists. Rather, tourists have an opportunity to once again be saved by "authentic India" through these "eye-opening" tours that have shown them an "alternative perspective" to poverty.

The residents of Dharavi tell a different story. Its one million residents live without any ownership rights to their homes or the underlying land and have no recourse if the government decides to demolish their businesses or dwellings. Ten families generally share one tap and only have access to water for less than three hours a day.<sup>141</sup> The tenacity and grit of Dharavi residents is rooted in necessity, a point that is largely dismissed in the voyeuristic motivations behind slum tours and movies like *Slumdog Millionaire*.

Dharavi has continuously struggled to take control of its own narrative. As one of the birth places of the Desi (South Asian) rap culture, community leaders rely on rap as a

<sup>133</sup> *Id.* at 509.

<sup>134</sup> PIB Delhi, *Ministry of Tourism, Incredible India 2.0 Campaign*, PRESS INFO. BUREAU, GOV'T OF INDIA (Jan. 3, 2018, 5:58 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1515336>, at 38.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 39.

<sup>138</sup> PIB Delhi, *Ministry of Tourism, Incredible India 2.0 Campaign*, PRESS INFO. BUREAU, GOV'T OF INDIA (Jan. 3, 2018, 5:58 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1515336>, at 38.

<sup>139</sup> *Id.* at 40.

<sup>140</sup> *Id.* at 42.

<sup>141</sup> *Id.* at 43.

method to rebel against social discrimination.<sup>142</sup> Divine and Naezy are two artists leading the charge through their songs about “corruption, injustice, and poverty.”<sup>143</sup> The rise of Divine and Naezy caught the eyes of NYU-educated director Zoya Akhtar, who shared a fictional story of a Dharavi-based rapper in *Gully Boy*—an award-winning Bollywood movie with notable reach in Western audiences.<sup>144</sup> Ranveer Singh who plays Murad—the film’s hero—commented that the movie was apolitical and that he has not personally engaged with the soundtrack which features lyrics focused on freedom and political identity—for him, “it’s just catchy.”<sup>145</sup>

Movies like *Gully Boy* and *Slumdog Millionaire* shape the perception of Indian slums for Western tourists. They simplify and de-politicize the complicated identity of slums and romanticize the struggles of Indian slum-dwellers. Slum tourism companies, often owned by Western men, capitalize on this romanticized portrayal and market slums as fully immersive “authentic” Indian experiences that are transformative. These curated tours offer a limited perspective that show slum residents as hard-working positive spirits and ignore the reality that slums exist as a result of marginalizing and discriminatory policies.<sup>146</sup> In the process, the stories of actual Indians are silenced and dismissed and the subjects of these representations receive little to no benefit from having their stories appropriated. Thus, it is impossible for niche tourism experiences to provide a mutually beneficial exchange between Western tourists and local communities without addressing the imperialistic foundations.

### C. Consequences of an Imperialistic Dynamic

Niche tourism glamorizes the problematic relationship between Western tourists and India (and the Global South broadly) and risks incentivizing national governments to capitalize on this tourism boom. Like other Southeast Asian countries,<sup>147</sup> films such as *Eat, Pray, Love* and *Slumdog Millionaire* influence and encourage the Indian government to position India as the safe haven for wounded, tired, and pained Western tourists.<sup>148</sup> Western media portrayals of India and its transformational power interact with the Indian government’s desire to present India as a Hindu nation (and increase Western tourism) to create a self-perpetuating cycle that presents an increasingly monolithic and inaccurate perception of India.

The Indian government is well positioned to take advantage of a homogeneous and rigid representation of India because it serves its political and social interests. By shaping the narrative of “authentic India,” powerful government and media actors can become self-

<sup>142</sup> Bhaskar Chawla, *No, ‘Gully Boy’ is Not a Great Film. Here’s Why*, DAILY O (Feb. 17, 2019), <https://www.dailyo.in/arts/gully-boy-bollywood-cultural-appropriation-zoya-akhtar-ranveer-singh-alia-bhatt-rapper-divine/story/1/29515.html>.

<sup>143</sup> *The Real Life Story of Naezy, the Rapper Who Inspired Ranveer Singh’s Gully Boy*, GQ INDIA (Feb. 14, 2019), <https://www.gqindia.com/content/real-story-of-gully-boy-movie-ranveer-singhs-gully-boy-inspired-by-the-life-of-naezy-rapper-true-story-of-naezy-naved-shaikh-behind-the-mumbai-hip-hop-scene>.

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

<sup>145</sup> Chawla, *supra* note 142.

<sup>146</sup> See generally PIB Delhi, *Ministry of Tourism, Incredible India 2.0 Campaign*, PRESS INFO. BUREAU, GOV’T OF INDIA (Jan. 3, 2018, 5:58 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1515336>.

<sup>147</sup> See Hillary Brenhouse, *Bali’s Travel Boom: Eat, Pray, Love Tourism*, TIME MAGAZINE (2010), <http://content.time.com/time/magazine/article/0,9171,2011931,00.html> (last visited Nov. 10, 2019).

<sup>148</sup> As covered in Part I, over time the *Incredible India* campaign has narrowed its focus to demonstrating how Western tourists can utilize the power of Indian traditional knowledge and spiritual practice for their benefit.

appointed cultural guardians who tend to offer narrow portrayals of Indian culture.<sup>149</sup> One example is the Modi administration's use of Incredible India 2.0 to potentially erase India's rich Islamic history.<sup>150</sup> Although earlier tourism campaigns prominently featured paramount Mughal architecture like the Taj Mahal and Humayun's Tomb, Incredible India 2.0 does not include any tour sites with an Islamic or Sikh background. The Uttar Pradesh state government recently released a tourism booklet that intentionally excluded the Taj Mahal (Indo-Islamic architecture) because the monument "d[oes] not reflect Indian culture," according to chief minister Yogi Adityanath.<sup>151</sup> The following month, the Archaeological Survey of India banned Muslims from offering namaz (daily prayers) at the mosque located on the Taj Mahal premises, a popular activity among Muslim tourists.<sup>152</sup> The Indian government's commitment to portraying itself as a spiritual Hindu nation to Western tourists also risks denying Muslim communities representation of their cultural heritage<sup>153</sup>

Western tourists' perceptions are often informed by Western media that overlooks the inequitable dynamic between tourists and local communities engaged in tourism. Therefore, Westerners may lack awareness of how British colonialism in India informed the exploitative and appropriative dynamics represented in popular works like *Eat, Pray, Love*. So, Western travelers mimic and thus perpetuate the same imbalanced dynamic. Western preferences therefore dictate niche tourism, overtime modifying Indian culture and disempowering communities to control the narrative. Through this process, powerful gatekeepers of culture—here the Hindu Nationalist BJP political party—capitalize by further perpetuating a limited and self-serving portrayal of the culture.

Western tourists' desire to engage in fully immersive, culturally authentic experiences can be completely well intentioned. However, these intentions often ignore past and present power dynamics between the West and developing countries. As a result, market pressures stiff-arm local communities engaged in tourism to relinquish control over their narrative and conform to Western tourist preferences with no legal protection.

#### IV. Exploring Legal Solutions in the Global Tourism Industry

Niche tourism markets are built on experiences that are unique and irreplaceable, posing unique challenges relating to trade, culture, and ownership. Despite its cross-sectoral and dynamic nature, the niche tourism industry operates outside the realm of legal

<sup>149</sup> See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 504 (2001).

<sup>150</sup> I do not mean to suggest that the Indian government's Islamophobic actions are motivated by Western tourism. Indian treatment of Muslims presents a much larger social and political problem that falls outside the realm of intellectual property law. Rather, this Section highlights how niche tourism led by the central government can serve as another opportunity to overlook Islamic culture in India.

<sup>151</sup> Chris Bell, *Taj Mahal Left Out of an Indian Tourism Booklet*, BBC News (Sept. 2017), <https://www.bbc.com/news/blogs-trending-41482311> (last visited Nov. 10, 2019).

<sup>152</sup> *ASI Order Bars Muslims from Offering Namaz at Taj Mahal Except on Fridays*, WIRE INDIA (Nov. 2018), <https://thewire.in/religion/asi-namaz-taj-mahal-fridays> (last visited Nov. 10, 2019).

<sup>153</sup> I do not mean to suggest that Indian tourists are responsible for the government's marginalization of Muslims. Rather, I seek to draw the connection between Western media's exclusion of Indian-Muslim identity and the government's desire to exclude Muslims from Indian society. Media representations that focus on Indian religious and ethnic diversity will in turn more accurately inform tourist perceptions. Part Three will focus on how Geographic Indicators can be used to give more control to local communities, including Muslim communities, as opposed to the central government.



frameworks.<sup>154</sup> This governance gap prevents the consideration of non-economic values in global tourism and disproportionately harms local tourism communities in developing countries. Thus, this section—through an intellectual property (IP) and development framework<sup>155</sup>—argues for the use of international intellectual property rights (IPRs) to regulate niche tourism markets.

First, this section outlines the current academic debate around IPRs as a development tool; and demonstrates how previous scholarship in the fields of traditional knowledge, cultural heritage, and agriculture is applicable to the global tourism industry. Second, it argues that—although geographic indicators (GIs) are best suited to regulate niche tourism markets—GIs were not written for today’s experience economy. This subsection also proposes an expansion of GIs to include branded niche tourism experiences. Third, it returns to the Indian tourism case study to demonstrate how experience-based GIs can benefit local communities engaged in niche tourism.

#### A. Niche Tourism within International Intellectual Property

The TRIPS Agreement (TRIPS), enacted in 1995, is the first and most comprehensive multilateral agreement on IP.<sup>156</sup> TRIPS covers a broad range of IP—copyright, trademarks, industrial designs, and patents—and aims to create a minimum standard of protection to be provided by each member.<sup>157</sup> The World Intellectual Property Organization (WIPO) encourages governments to utilize TRIPS as a tool to create wealth and encourage “inventive, creative, and innovative activities as well as stimulat[e] the transfer and acquisition of technologies.”<sup>158</sup> Although critics of TRIPS and WIPO argue that IPRS have been drafted for the benefit and protection of the West, the academic and policy debate has shifted towards IPRS protection in developing countries for economic and non-economic purposes.<sup>159</sup>

IP and development, a widely recognized framework, indicates that IPRs can generate impactful economic, social, and cultural benefits when strategically used in the Global South.<sup>160</sup> IP and development advocates emphasize that the relationship between

<sup>154</sup> Although the United Nations World Tourism Organization has a global code of ethics, the code qualifies as soft non-binding international law. See Michael G. Faure & I Made Budi Arsika, *Settling Disputes in the Tourism Industry: The Global Code of Ethics for Tourism and the World Committee on Tourism Ethics*, 13 SANTA CLARA J. INT’L L. 375, 391 (2015). Additionally, the World Committee on Tourism Ethics does not have a dispute resolution mechanism. *Id.* at 415. (“[T]here will no longer be an independent professional body under the UNWTO system that one can turn to for dispute resolution between tourism industry stakeholders.”).

<sup>155</sup> That is, the idea that IP is a powerful tool for development. See, e.g. World Intellectual Property Organization, *Using IP for Development: Success Stories from Around the World*, 3 (2017) [hereinafter WIPO Publication].

<sup>156</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). [hereinafter TRIPS agreement]

<sup>157</sup> *Id.*

<sup>158</sup> GETACHEW MEGISTIE, *INTELLECTUAL PROPERTY AS A POLICY TOOL: THE ETHIOPIAN FINE COFFEE DESIGNATIONS TRADE MARKING & LICENSING INITIATIVE EXPERIENCE*, 7 (2011).

<sup>159</sup> See, e.g., *id.*; CERKIA BRAMLEY, *A REVIEW OF THE SOCIO-ECONOMIC IMPACT OF GEOGRAPHICAL INDICATIONS: CONSIDERATIONS FOR THE DEVELOPING WORLD* (2011).

<sup>160</sup> WIPO Publication, *supra* note 155, at 3–4.



IPRs and development goes beyond GDP,<sup>161</sup> advocating for holistic IPRs regulation that recognizes the creativity and contributions of all people.<sup>162</sup> In other words, IPRs protection should be accessible to all innovators and inventors—wealthy, low-income, Western, non-Western—in an equitable manner. IP and development proponents have gained notable momentum over the last decade.

A prominent advocate for IP and development, Madhavi Sunder argued that “culture and commerce are not necessarily at odds.”<sup>163</sup> Sunder—and other scholars such as Rosemary Coombe, Nicole Alywin, Ali Malik—have advocated for culturally and socially conscious IP regulation in arenas of traditional knowledge, cultural heritage, and agriculture.<sup>164</sup> This article draws upon this existing scholarship to demonstrate how IPRs can also benefit local communities engaged in niche tourism markets by recognizing their cultivations as part of a dynamic, shifting identity.<sup>165</sup>

### 1. Local Communities Are Cultural Cultivators

Without IP protection, indigenous communities that possess traditional knowledge are usually limited to the benefit-sharing mechanisms from traditional knowledge treaties.<sup>166</sup> Under these treaties, if an indigenous community cultivates a plant with healing properties that is later used by a multinational pharmaceutical company to develop a drug, the community’s agricultural process and traditional knowledge may not receive any legal protections. The treaties’ benefit-sharing mechanisms instead allow the community to share a portion of the proceeds from the drug. The rationale here is that benefit-sharing provides adequate compensation to local communities because traditional knowledge and harvested plants are simply part of nature. Although this approach recognizes the community’s contributions to preserve the cultural environment which were not acknowledged previously, a more robust IP-based framework can provide communities with more legal protection and allow for a more productive collaboration between multinational companies and communities possessing traditional knowledge.<sup>167</sup>

As Sunder notes, traditional knowledge treaties often fail to recognize the value of a community’s cultivation of raw material and the accompanying traditional knowledge — the key components from which the IP was derived.<sup>168</sup> Indian eco-feminist Vandana Shiva further explains that bio-diversity is not analogous with nature; rather, indigenous

<sup>161</sup> MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: CAN INTELLECTUAL PROPERTY HELP THE POOR? (2012)

<sup>162</sup> See, e.g., Nicole Alywin & Rosemary J. Coombe, *Marks Indicating Conditions of Origin in Rights-Based Sustainable Development*, 47 U.C.D. L. REV. 753, 758 (2014).

<sup>163</sup> SUNDER, *supra* note 165, at 139.

<sup>164</sup> See *id.*; Alywin & Coombe, *supra* note 162.

<sup>165</sup> However, there is virtually no critical scholarship that covers the intersection between IP and niche tourism markets. This Article aims to start a dialogue about IP regulation for local communities within the global niche tourism market.

<sup>166</sup> The Secretariat of the Convention on Biological Diversity, *About the Nagoya Protocol*, CONVENTION OF BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/about/default.shtml/> (explaining the benefit-sharing mechanisms of the Nagoya protocol).

<sup>167</sup> SUNDER, *supra* note 165, at 133–34.

<sup>168</sup> *Id.* at 137. (“In some cases, when the poor’s innovation is overlooked, benefit sharing may be “the equivalent of stealing a loaf of bread and then sharing the crumbs.”).

communities have “shaped, managed, utilized” these collective resources. And patents can help recognize and protect biodiversity and indigenous knowledge that are “based on the innovations, creativity and genius of the people of the Third World.”<sup>169</sup> IP protections are therefore essential in recognizing indigenous communities as cultivators of traditional knowledge, not merely wardens.<sup>170</sup>

Likewise, IPRs are necessary to recognize the innovation and contributions of local communities engaging in niche tourism. The village of Harisal, featured in Part Two, offers a rural tourism initiative that is led by Microsoft but facilitated by the Korku tribe.<sup>171</sup> This tourism partnership presents similar dynamics to the pharmaceutical company and indigenous community. Although the Korku tribe receives monetary proceeds, their collective efforts to build and develop an “immensely beautiful village” are seen as a public commodity that is easily accessible to Microsoft. Much like indigenous communities that cultivate healing plants, the Korku tribe’s artistic and culinary traditions create value in the tourism experience. Thus, the Korku tribe also deserve recognition as cultivators, not merely as guardians of their village.

## 2. Local Communities Have Dynamic Identities

Advocates for IPR recognition of traditional knowledge and cultural heritage point to its dynamic and multifaceted nature.<sup>172</sup> Traditional knowledge and cultural expressions were historically viewed as abstract concepts that were handed down from one generation to the next.<sup>173</sup> As Sunder notes, this mischaracterization muddles the debate<sup>174</sup> because “much less attention is given to how law can tap the innovation and productive knowledge capacities of the poor.”<sup>175</sup> IP practitioners, indigenous communities, and governments from developing countries successfully lobbied WIPO to acknowledge that traditional knowledge is continuously evolving.<sup>176</sup> WIPO now defines traditional knowledge as: “a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity”<sup>177</sup> and that “values and

<sup>169</sup> VANDANA SHIVA, PROTECT OR PLUNDER? UNDERSTANDING INTELLECTUAL PROPERTY RIGHTS 47 (2001).

<sup>170</sup> SUNDER, *supra* note 161, at 133–34.

<sup>171</sup> See Kedia, *supra* note 81.

<sup>172</sup> See J. Michael Finger, *Introduction in* ENCYCLOPEDIA: POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 30 (Philip Schuler ed., 2004).

<sup>173</sup> *Id.* (“One characteristic is that such knowledge is handed down from generation to generation, usually as part of an oral tradition.”).

<sup>174</sup> *Id.* Finger warns against overdrawing the distinction between it and modern knowledge because “traditional versus modern is better thought of as opposite ends of a scale rather than as a clean sorting” and “[e]ach community fits somewhere along the scale, in some combination of modern and traditional.”

<sup>175</sup> SUNDER, *supra* note 161, at 138.

<sup>176</sup> World Intellectual Property Organization, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions 10 (2015), [https://www.wipo.int/edocs/pubdocs/en/tk/933/wipo\\_pub\\_933.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf) (“In recent years, indigenous peoples, local communities, and governments—mainly in developing countries—have demanded IP protection for traditional forms of creativity and innovation.”).

<sup>177</sup> World Intellectual Property Organization, No. 1: Traditional Knowledge and Intellectual Property 1 (2015), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_1.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf).

principles embedded in IP law [can] be adapted for [traditional knowledge and cultural expression.]”<sup>178</sup>

This justification applies to local communities engaging in niche tourism markets in parallel. The identity of Mumbai’s Dharavi slum, introduced in Part Two, exemplifies the dynamic nature of cultural expressions. Dharavi is a co-dependent community—dating back to 1882—that houses one million residents<sup>179</sup> and 20,000 small-scale manufacturing industries.<sup>180</sup> Dharavi producers recycle 80% of Mumbai’s plastic waste; export luxury leather goods to Western companies, create traditional Indian pottery, and bake snacks for some of Mumbai’s finest confectionaries.<sup>181</sup> Its industrialist identity is shaped by the contributions and innovations of its producers—the Kumbhars, generational potters who migrated from India’s northwest in the 19th century,<sup>182</sup> are second-generation leather manufacturers that fuse traditional leather-making techniques with new technology.<sup>183</sup> However, Dharavi-made products remain unbranded because distributors believe that “any association with [Dharavi] would render them unsaleable.”<sup>184</sup> Furthermore, Dharavi residents are forced to live in dangerous and unsanitary environments.<sup>185</sup>

Slum tourism ignores this dynamic identity. Reality Tours, co-founded by a British man, is the largest commercial slum tour company in India—catering to 15,000 tourists annually.<sup>186</sup> The website describes Dharavi as an “economic powerhouse in the middle of Mumbai” and aims to “break down negative stereotypes associated with slums.”<sup>187</sup> It presents the slum as a static manufacturing hub and ignores the complicated and difficult reality of Dharavi residents. This simplification fails to capture the innovations and contributions that have been cultivated by centuries of Dharavi residents. Thus, tourism in the Dharavi community poses identical considerations to those in traditional knowledge.

#### **B. Use of Geographic Indicators in Niche Tourism**

TRIPS Article 22 governs the use of Geographical Indicators (GIs).<sup>188</sup> Article 22 places two obligations on TRIPS Members. First, Members must provide the legal means for interested parties to register goods and protect against goods that “originate in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.”<sup>189</sup> Second, Members are required to prevent any use of Geographical Indicators to constitute “an act of unfair competition within the meaning of

<sup>178</sup> *Id.*

<sup>179</sup> Nisbett, *supra* note 86, at 38.

<sup>180</sup> Raina Assainar, *At the Heart of Dharavi Are 20,000 Mini-Factories*, THE GUARDIAN (Nov. 25, 2014, 2:55 PM) <https://www.theguardian.com/cities/2014/nov/25/dharavi-mumbai-mini-factories-slum>.

<sup>181</sup> Jim Yardley, *India’s Way: In One Slum, Misery, Work, Politics and Hope*, N.Y. TIMES (Dec. 28, 2011), <https://www.nytimes.com/2011/12/29/world/asia/in-indian-slum-misery-work-politics-and-hope.html>.

<sup>182</sup> *Id.*

<sup>183</sup> *See* Assainar, *supra* note 180.

<sup>184</sup> Nisbett, *supra* note 86, at 40.

<sup>185</sup> Nisbett, *supra* note 86, at 38.

<sup>186</sup> Shweta Vitta, *How Reality Tours Is Changing the Perception of Asia’s Second Largest Slum*, YOURSTORY (May 18, 2016), <https://yourstory.com/2016/05/reality-tours>.

<sup>187</sup> Reality Tours & Travel, *Dharavi Slum Tours* (2020), <https://realitytoursandtravel.com/dharavi-slum-tours/>.

<sup>188</sup> *See* TRIPS Agreement, *supra* note 156, art 22.

<sup>189</sup> *Id.* at art. 22(2)(a).

Article 10b of the Paris Convention (1967).”<sup>190</sup> Among the IPRs covered in TRIPS, GIs are the best suited to regulate niche tourism. However, as written, GIs fail to acknowledge the most valuable aspect of niche tourism markets: experiences. Therefore, this subsection proposes an expansion to GIs.

### 1. Authenticity and Geographical Origins in Niche Tourism Markets

The underlying rationale for GI’s quite neatly aligns with needs of the current global niche tourism markets. First, tourists and host communities are concerned about authenticity in niche tourism markets.<sup>191</sup> A GI mark protects products that possess distinctive qualities or characteristics from imitative products.<sup>192</sup> Consequently, the mark signals sincerity and authenticity to consumers. As the niche tourism overview in Part One demonstrates, cultural authenticity is a core concern for tourists. Similarly, local communities that interact with tourists want protection against exploitation from usurpation by mass-produced substitutes. Thus, GIs in niche tourism can protect tourists and local communities from counterfeits.

Second, tourism is intrinsically linked to its physical environment. Geographic indicators offer protections for products that can only be made in a particular physical location.<sup>193</sup> Niche tourism experiences are similarly limited in manner and scope to the specific region, city, or village where they exist. A ten-day trekking trip across the Himalayas cannot be offered in Mumbai, no more than a tour of a Mumbai Slum can be offered in the mountains. Moreover, the physical environment of a community shapes its cultural traditions and practices. Thus, GI’s concerns with the physical environment are inherently implicated in niche tourism.

Third, GIs protect the rights of collectives and communities unlike other IPRs. Like indigenous and agriculture communities, niche tourism markets are usually collectively led by families or entire communities. The collective ownership of a GI serves a dual purpose. It recognizes every member’s right to IP title, but also prevents autocratic leadership within the group. GIs encourage IP management, implementation, and facilitation decisions to be made at a community-level. This collective decision-making process requires at least some consensus for communities to enter or remain in the tourism industry.

Additionally, GIs encourage a holistic approach that consider social and cultural factors beyond an economic cost benefit analysis. GIs will allow the community to have control over the commodification of their cultural heritage and/or creative innovations for tourists. To this end, GIs incentivize mutually beneficial partnerships for host communities. A collaboration between a rural village and a technology company or a Mumbai slum rapper and Bollywood may be desirable and advantageous for both parties. However, without GIs, there is no guarantee that the cultural contributions of the community will be recognized and remunerated. In short, GIs are an effective regulation tool for niche tourism markets due to common considerations of authenticity, geographic origins, and collective ownership.

<sup>190</sup> *Id.* at art. 22(2)(b).

<sup>191</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, GEOGRAPHICAL INDICATIONS: AN INTRODUCTION 7 (2017), [https://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo\\_pub\\_952.pdf](https://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf). (“Geographical indications are distinctive signs used to differentiate competing goods.”)

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

<sup>193</sup> *See generally* TRIPS Agreement, *supra* note 156.



The prior calls for an IP and development framework expansion were fueled by arguments that challenged Western biases and notions of intellectual property. Proponents advocated that GIs should also protect the contributions of low-income and marginalized communities. Sunder championed GIs because they “recogniz[e] the innovation of collectives, preserv[e] geographic diversity and stimulat[e] some redistribution of wealth.”<sup>194</sup> However, the lessons that ensued from the near decade-long expansion of the IP in the Global South demonstrates the need for a more nuanced approach to GIs and development.

First, GI governance must actively consider and address the social and cultural values of the IP and development framework in developing countries. Acknowledging Sunder’s work, Nicole Aylwin and Rosemary Coombe argue that the expansion of GI in developing countries cannot be “dismissed merely as another instance of IP expansionism.”<sup>195</sup> They contend that this expansion needs to be evaluated in terms of the “qualities of empowerment, governance, and the sustainability of local livelihood that GI initiatives enable.” The failure to do so will give rise to new forms of local inequity, undesirable transformations of social relations, and even further social disintegration.<sup>196</sup>

The Indian government’s tourism marketing and management reify Alywin’s and Coombe’s warning.<sup>197</sup> The government—as covered in Parts One and Two<sup>198</sup>—has reinforced the notion that India’s niche tourism exists for Western consumption on their terms. Furthermore, by falsely portraying India as a Hindu nation, the central government has dismissed the cultural contributions of Muslims to India’s tourism. These state actions risk furthering new forms of local inequity and undesirable social relations because of inadequate focus on empowering and protecting niche tourism host communities. Thus, effective use of GIs in niche tourism requires holistic governance as highlighted by Coombe and Alywin.

Second, the initial IP and development framework did not sufficiently recognize the labor of individual producers of a GI registered product. Sunder’s analysis focused on innovations and inventions of traditional knowledge as a collective. However, more recent data analyzed by Coombe and Ali Malik demonstrates that GIs have failed to provide any benefit to base-level producers.<sup>199</sup> Despite this, Coombe & Malik have not lost all hope for GIs. They note that new social movements and certifications “attempt to link place-based values, productive activists and consumer priorities in new networks of commitment to

<sup>194</sup> SUNDER, *supra* note 161, at 138.

<sup>195</sup> Alywin & Coombe, *supra* note 162, at 757.

<sup>196</sup> *Id.*

<sup>197</sup> The overview of niche tourism’s markets in Part One demonstrates Western dual desires to romanticize India’s spirituality and poverty from Western monotony. The cultural appropriation discussion in Part Two outlines how this tourism dynamic has problematic colonial underpinnings and the way in which Western media continues to perpetuate this dynamic.

<sup>198</sup> See the discussion of Incredible India 2.0 in Part One and Consequences of Niche Tourism in Part Two.

<sup>199</sup> Rosemary J. Coombe & S. Ali Malik, *Transforming the Work of Geographical Indications to Decolonize Racialized Labor and Support Agroecology*, 8 UC IRVINE L. REV. 363, 371 (2018). (“[T]here is little evidence that state governments are interested in using GIs for redistributing power among stakeholders or empowering local communities. Rather more evidence suggests that GI institutions tend to be dominated by powerful industry groups interested in maintaining their own positions of privilege.”)

agriculture, economic, and environmental and social change.”<sup>200</sup> This emerging data demonstrates that GI registration and implementation must emphasize equity and fairness in labor standards.

In India, and other TRIPS Member states, GIs can promote more equitable recognition of labor by incorporating re-distribution mechanisms into law. Indian scholars K.D. Raju and Shivangi Tiwari argue that “benefit sharing” measures ensure that benefits reach grassroots labor and the reputation and quality of GI registered products remains intact.<sup>201</sup> They propose numerous measures that can be adopted within the existing framework such as increasing state-level participation in the registration process, including producer representation on the Register, and formation of grassroots societies.<sup>202</sup> GI expansion must include provisions that protect individual producers in order to remain consistent with an IP and development framework.

Sunder’s push for GI protection for innovations in developing countries, in part, catalyzed the IP and development framework. However, the subsequent academic contributions and GI implementation in the Global South reveals that new GI expansion should not be a straightforward application of her argument. Thus, GI use in niche tourism is more likely to be effective if it is implemented in an empowering and equitable manner with benefit-sharing mechanisms for all producers.

## 2. GIs for Today’s Experience Economy

The scope of GIs is currently limited to “products or processes” under TRIPS—and the domestic law—of most Members.<sup>203</sup> However, a literal interpretation of “products or processes” fails to recognize the full extent of creative contribution made by host communities: the curated, branded niche tourism experience. Additionally, a narrow interpretation is antithetical to an IP and development framework. Therefore, GIs protection of “products or processes” should include branded niche tourism experiences.

As discussed in Part One, the global niche tourism market is centered around the “experience economy.” World Economic Forum (WEF) data, dating back to 2008, indicates that people seek experiences more than anything else.<sup>204</sup> In 2016, the number one Christmas gift in the United States was a plane ticket.<sup>205</sup> For today’s tourists, the goal is to have a large amount of “unique cultural experiences” that could not be found elsewhere.<sup>206</sup> This movement towards niche tourism is seen across social strata.<sup>207</sup> For example, even high-end travel companies such as Belmond have rebranded traditional luxury travel from opulent

<sup>200</sup> *Id.* at 411.

<sup>201</sup> See K.D. Raju & Shivangi Tiwari, *The Management of Geographical Indications: Post Registration Challenges and Opportunities*, 42 DECISION 293 (2015).

<sup>202</sup> *Id.*

<sup>203</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>204</sup> WORLD ECON. FORUM, *Incredible India 2.0 India’s Billion Dollar Tourism Opportunity* (Sept. 2017), [http://www3.weforum.org/docs/White\\_Paper\\_Incredible\\_India\\_2\\_0\\_final\\_.pdf](http://www3.weforum.org/docs/White_Paper_Incredible_India_2_0_final_.pdf).

<sup>205</sup> *Id.*

<sup>206</sup> Morgan, *supra* note 8.

<sup>207</sup> *Id.* (noting that “Boomers” are also down-sizing).



hotels to one-of-a-kind experiences such as re-modeled sleeper trains or isolated safari bungalows.<sup>208</sup>

However, unique, local experiences are most sought after by millennials who value “experiences and relationships” as the most important things in life.<sup>209</sup> This craving for authentic, local experiences has shifted who participates in the industry. Now with platforms like Airbnb Experiences, “people around the globe can sign up to lead groups and individuals through experiences to immerse travelers into their world.”<sup>210</sup> Airbnb users are not interested in tourist traps. Today’s travelers want to see things from a local’s point of view.<sup>211</sup> The goal is for guests to experience things they wouldn’t be able to otherwise and to build a community of travelers. Tourists care more about creating an Instagram-worthy memory than purchasing new souvenirs.<sup>212</sup>

The emergence of experience-based travel incentivizes destinations to brand themselves with a “distinctive value proposition” to ensure that tourists choose them over other destinations.<sup>213</sup> The Incredible India 2.0 travel campaign exhibits India’s effort to articulate five distinctive value propositions that appeal to a range of demographics. An isolated yoga retreat will offer the adventurous millennial motorcyclist an opportunity to discover the power of his body and mind—providing him a competitive edge in motorcycling.<sup>214</sup> An art tour through Rajasthan will inspire the wealthy fashion-industry professional to collaborate with a local tailor to create a distinctive hand-embroidered jacket—sharpening her creative judgement.<sup>215</sup> The tourist vividly remembers her wholly immersive trip where the local community imparted local Indian culture, traditions and knowledge upon her. The campaign advertisements highlight how India will provide a remarkable, striking experience that delivers enduring value well beyond the physical trip.

The Incredible India 2.0 campaign is selling, and tourists are purchasing niche tourism experiences. Yet, this commodification may not adequately recognize the innovative and creative contributions of the people creating value in those depicted experiences. For host communities, value recognition cannot be limited to monetary compensation alone. An IP and development framework acknowledges that all people—rich and poor alike—deserve and desire recognition for their creative contributions.<sup>216</sup> This pursuit for “innovation, work, and cultural sharing is part of what makes us human.”<sup>217</sup> Thus, an IP and development framework necessitates including authentic branded niche tourism experiences within the scope of TRIPS.

<sup>208</sup> Belmond, *Home Page: Dreaming of Future Tomorrow* (May 2020), <https://www.belmond.com/>.

<sup>209</sup> Currently, 65% of millennials are saving money to travel—more than the average for other generations. Morgan, *supra* note 8.

<sup>210</sup> Morgan, *supra* note 8.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> WEF WHITE PAPER, *supra* note 4.

<sup>214</sup> Incredible India, *The Yogi of the Racetrack*, YOUTUBE (June 30, 2018), <https://youtu.be/11mEuuthHY9A>.

<sup>215</sup> Incredible India, *The Maharani of Manhattan*, YOUTUBE (June 30, 2018), [https://www.youtube.com/watch?v=djil\\_6n4ef0](https://www.youtube.com/watch?v=djil_6n4ef0).

<sup>216</sup> SUNDER, *supra* note 161, at 140.

<sup>217</sup> *Id.*



I concede that for many TRIPs members, broadening the scope of GIs to include niche tourism experiences will include logistical challenges. Policy makers will have to delineate what constitutes a “branded niche tourism experience.” This process will inevitably raise a series of difficult questions: what level of exposure to cultural processes or knowledge mandates GI protection? What are the penalties incurred for infringing upon experience-based GIs? However, all IPRs raise some demarcation concerns. Furthermore, local communities engaging in niche tourism markets will likely present a wide range of GI applications that cannot be rubber-stamped by bureaucrats. I do not claim that government officials are unable to discern the contours of legally recognized innovation. Rather, I call on legal decision-makers to ethically and reasonably consider how niche tourism experiences create and/or add value to the IPR and implement GIs in a socially and culturally conscious manner.

Nearly a decade ago, intellectual property practitioners, scholars, lawyers, and activists came to a consensus that a community’s cultural practices, traditions, and knowledge were innovative contributions which had value and should thus be eligible for GI registration.<sup>218</sup> The IP community recognized that: (1) local communities cultivated products or processes that had a respected reputation; (2) consumers sought authentic commodities; and (3) without adequate legal protection—free riding competitors threatened their innovation.<sup>219</sup> GIs allow a local community to create a protected brand that elevates its position from mass produced substitutes.<sup>220</sup>

This Article argues that experience-centered niche tourism presents identical considerations in the experience economy. Today, tourists seek memorable authentic experiences—not products. Local tourism-based communities have responded to this market shift by offering curated opportunities that provide a unique glimpse of their culture and traditions. However, there is inadequate legal protection over these experiences, exposing local communities to exploitation and appropriation. The inclusion of branded niche tourism experience restores a more equitable dynamic that provides local communities with recognition of—and agency over—a collective decision to commodify cultural contributions through an immersive experience.

### C. Case Study: GIs and India’s Niche Tourism Market

India enacted the Geographical Indication of Goods (Registration and Protection) in 2003 to fulfill its TRIPs obligations.<sup>221</sup> The act defines Geographical Indicators as “Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>222</sup> Under Indian law, owners of a GI have the exclusive right to place indications on their goods for a period of ten years under the Registration and

<sup>218</sup> See Finger, *supra* note 172, at 1-67.

<sup>219</sup> *Id.* at 140; WIPO PUBLICATION, *supra* note 155, at 10.

<sup>220</sup> SUNDER, *supra* note 161, at 143.

<sup>221</sup> Geographical Indications of Goods (Registration and Protection) Act, 1999, No. 48, Acts of Parliament, 1999 (India).

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

Protection Act.<sup>223</sup> An owner may not transfer, mortgage, assign, or license his GI with the exception of inheritance of the mark upon death of an authorized user. In case of misuse of a GI by another individual, the Act grants GI owners the right of suit against infringement and recovery of damages.<sup>224</sup>

In India, GI's have been used to protect a range of products including Basmati Rice, Darjeeling Tea, Kangra Tea, Feni, Alphonso Mango, Alleppey Green Cardamom, Coorg Cardamom, Kanchipuram Silk Saree, Kohlapuri Chappal, Rasgulla and more.<sup>225</sup> Overall, more than 617 GIs have been registered in five categories: handicrafts, agricultural, textile, manufactured and food stuff.<sup>226</sup> GI registration is facilitated by the central government through the Geographical Indications Registry under the Ministry of Commerce and Industry. The Registry evaluates: special characteristics of the product and its production process or cultivation methods, the regional source, and the uniqueness of the product.<sup>227</sup> In a tourism context, GIs in India can serve a critical role to protect local communities beyond product production.

### 1. Aranmula Is More Than Mirrors

Recognized as a GI, the “Aranmula Kannadi,”<sup>228</sup> is a mirror made in Aranmula, a small town in Pathanamthitta, Kerala, India.<sup>229</sup> The mirror has a distinct brand recognition and its exact metal compositions are still maintained as a Vishwakarma family secret.<sup>230</sup> The Kerala state government websites features Aranmula as an “exotic village” with an “ancient vibe” where Western tourists can stay for an “extended period and observe the ancient crafts” such as the Aranmula Kannadi mirror “being passed on diligently to the next generation.”<sup>231</sup> Beyond the mirrors, tourists are attracted to Aranmula to learn Kathakali—a traditional story—telling art form or Kalaripayattu—the oldest surviving martial art in India; or perhaps to celebrate Vallasadya—a ritualistic festival and one of the largest vegetarian feasts in India.<sup>232</sup>

For the indigenous community of Aranmula, the sole GI for the Aranmula Kannadi provides insufficient protection and recognition. From a niche tourism perspective, the value derives from the underlying “experience” of observing a tribal Indian community’s local heritage and customs. However, without adequate legal protection, the interest from tourists

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

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

<sup>225</sup> *Registered Geographical Indications*, GOV'T OF INDIA, [http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI\\_Application\\_Register\\_10-09-2019.pdf](http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf) (last visited Nov. 10, 2019).

<sup>226</sup> *Id.*

<sup>227</sup> Raju & Tiwari, *supra* note 201, at 295-96.

<sup>228</sup> Translated it means the Aranmula mirror. It is a handmade metal-alloy mirror that eliminates secondary reflections and aberrations typical of back surface mirrors, unlike the normal “silvered” glass mirrors.

<sup>229</sup> Savera John & Susan Paul, *See Yourself as You Truly Are in This Mysterious Metal Mirror*, ATLAS OBSCURA (Apr. 16, 2018), <https://www.atlasobscura.com/articles/metal-mirror-kerala-aranmula-kannadi>.

<sup>230</sup> *Id.*

<sup>231</sup> Kerala Ministry of Tourism, *Aranmula—The Heritage Village in Pathanamthitta*, KERALA TOURISM, <https://www.keralatourism.org/destination/aranmula-heritage-village/48>.

<sup>232</sup> *Id.*

creates vulnerability and risk exploitation of the community's cultural processes and art forms. In Aranmula, an experience-based GI would bolster the existing GIs protection and recognize the community's efforts in cultivating experiences that are linked to a geographically isolated environment. Additionally, a more expansive GI can signal authenticity if a corporation attempts to mimic the Aranmula village experience with better resourced accommodations.

## 2. Darjeeling—Come for the Tea-Plucking, Stay for the Tea

In 2004, Darjeeling Tea became the first Indian GI registered product<sup>233</sup> and has notably grown its brand value overtime. Today, tourists are not satisfied with the purchase of a few tea bags; rather they are likely to opt for a tour or stay at Glenburn Tea Estates—a tea plantation turned tourism experience.<sup>234</sup> At Glenburn, visitors purchase “The Tea Experience,” a guided tour where tourists can “walk or drive through the tea fields with one of our guides, who will give you an insight into how the tea bush is grown and looked after” and interact with the Glenburn tea picker ladies and learn how to pluck the ‘two leaves and a bud’ that is later manufactured into the tea that ends up in your teacup.”<sup>235</sup>

Unfortunately, for the pickers who are forced to accommodate tourists with a smile—the experience is not nearly as pleasant. Coombe and Malik describe this interaction:

The Working under huge billboards that feature their angelic doppelgangers, which are plastered across the countryside...many tourists dress up as smiling tea-pickers, mimicking the GI advertisements, while the workers have new jobs to add to their toil—posing for pictures and singing for visitors. They complain that [tourists have] “turned the plantation into a zoo” in which they are the captive animals.<sup>236</sup>

The Glenburn example demonstrates how the Darjeeling Tea GI currently fails to adequately protect the contributions of the marginalized tea plucker community. For tea pluckers, the emergence into tea tourism creates additional work that is unrecognized and exploited by Glenburn management and tourists. Here, an experience-based GI would legally recognize the tea pluckers' knowledge and labor as authentic to Darjeeling. Additionally, an independent experience-based GI possesses value even without the tea. This recognition will enhance the tea pluckers' opportunity to bargain with management and, potentially organize with counterparts at other tea estates as authentic Darjeeling tea pluckers, raising awareness about their contributions to the tea production.

In its current form, GIs do not offer adequate protection of the intangible cultural heritage and traditional knowledge that are only exposed through “experiences” in niche

<sup>233</sup> See Raju & Tiwari, *supra* note 201, at 300.

<sup>234</sup> *The Tea Experience*, GLENBURN TEA EST. <http://www.glenburnteaestate.com/the-tea-experience.php>. (The “tea estate” experience was inspired by the vineyards of Europe and other parts of the world, where visitors observe the wine-making process, taste the wine and shop for wine, local crafts and produce. We found the whole experience educational and very interesting, and were inspired to open our own tea estate for tourists who may be interested in knowing about how a tea leaf makes it to their teacup.)

<sup>235</sup> *Id.*

<sup>236</sup> Coombe & Malik, *supra* note 199, at 381.

tourism markets. The expansion of GIs to include comprehensive experiences is a way to adapt the law for the experience economy and give local communities ownership over the process.<sup>237</sup>

## CONCLUSION

The emergence of the experience economy has notably altered the dynamics of the global niche tourism industry. Travelers want authentic and immersive experiences that cannot be replicated. Niche tourism markets offer travelers opportunities to directly engage with local communities across the globe. The shift towards localized host-tourism communities risks exploitation and appropriation of culture in an unprecedented way because there is an imbalanced dynamic between Western tourists and local communities.

A cultural appropriation framework exposes how Westerner's consumption dictates value creation within niche tourism markets. The preferences of foreign travelers modify the cultural heritage and traditional knowledge of communities over time. Western tourists consciously or subconsciously expect their tourism experiences in developing countries to be personally transformative and provide an escape from Western life. These notions are informed by orientalist media portrayals that paint the Global South as a safe haven that exists for Western consumption—imitating a colonial and imperialist dynamic. Thereby, this automatic process denies local communities' control over their narrative and allows self-appointed State guardians to control the identity of the community for their own interests.

The expansion of International IPRs may be a solution to some of these concerns. An IP and development framework advocates for IP regulation that promotes impactful economic, social, and cultural benefits in developing countries. Previous scholarship in the arenas of traditional knowledge, cultural heritage, and agriculture highlights how niche tourism markets could benefit from IPR protection. In particular, GIs—which are goods “originating in the territory of a Member, or a region or locality in that territory”—are particularly suitable because of their overlapping purpose in promoting authenticity and geographic origins.<sup>238</sup> However, GIs should be interpreted to include branded-tourism experiences because experiences create value in niche tourism markets, not products. Furthermore, these GI experiences must be implemented in a socially and culturally conscious manner to effectively acknowledge the contributions of individual producers.

GIs can be used to prevent exploitation, alleviate authenticity concerns, and promote a more mutually beneficial economic and cultural exchange between tourists and the local population. It may be important to think of GIs as a part of a larger framework that refines how IP can be used strategically to protect the creative contributions of low-income and marginalized communities.

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<sup>237</sup> Additionally, the physical process of creating an application for GI registration empowers local communities to define their traditional knowledge themselves and collaborate to create branded tourist experience on their own terms.

<sup>238</sup> See TRIPS Agreement, *supra* note 156, at art. 22.