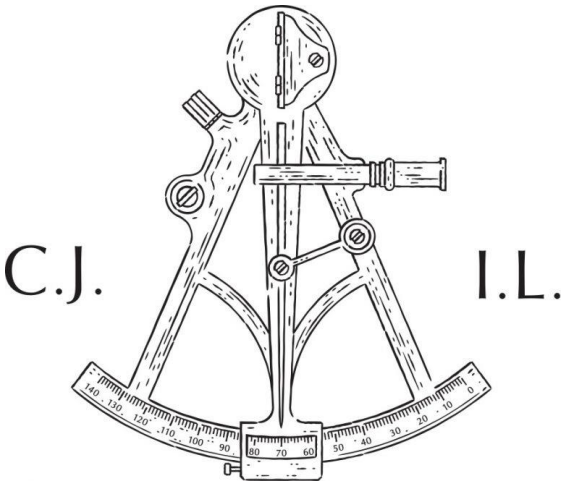

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INDIA'S PHANTOM FEDERALISM: PROTECTING STATES FROM EMERGENCY ABUSES AND LEGISLATIVE ENCROACHMENT

Anand Balaji[*]

ABSTRACT

The Indian Constitution is the largest written constitution in the world and contains extensive detail regarding the relationships between states and the center. However, debates persist regarding whether India is a federal democracy at all and whether the states require protection from encroachment by the federal government. In the seminal 1994 case S.R. Bommai v. Union of India*, the Indian Supreme Court held that federalism was part of the "Basic Structure" of the Constitution. However, the Indian Supreme Court has been an inconsistent guardian of federalism over time. The Supreme Court is uniquely poised to enforce federalism guardrails because of its expansive jurisdiction, strong independence, and because other bodies like the Rajya Sabha and Inter-State Council are not up to the task. The Court must do more to protect state interests given the critical role of federalism in fostering a vibrant democracy in post-Independence India, with state lines reflecting distinct ethnic, linguistic, and religious traditions. This article argues for a more robust focus on state interests in two of the most important areas of federalism jurisprudence: invocations of regional emergencies and disputes over legislative competencies. First, per Article 356 of the Constitution, the federal government can dissolve a state legislature through a process known as "President's Rule". Coupled with the legislature's plenary power to add and subtract states per Article 3, an expansive use of regional emergencies is a grave threat to Indian federalism. Second, Schedule Seven of the Constitution explicitly lists competencies as either State, Federal, or Concurrent. However, an overly rigid and pro-center application of these lists will lead to a whittling down of state powers because both residual powers and concurrent powers lie with the federal government in case of conflict.*

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I. Introduction

The Constitution of India begins "India, that is Bharat, shall be a Union of States."[1] While the precise nature of Indian federalism has been debated over the years, in 1994 the Supreme Court of India affirmed that "[d]emocracy and federalism are the essential features of our Constitution and are part of its basic structure."[2] Federalism predates Indian Independence, was referenced extensively by the Constituent Assembly that drafted the Constitution, and is an integral element of the Constitutional structure. After the formation of new states based on language post-Independence, federalism played a critical role in harmonizing and keeping together a vast and diverse country. While some of India's founders had a vision of a unitary India where subnational entities were not drawn on ethnic or linguistic lines, state identity has become a fundamental feature of the Indian polity.

In the Indian constitutional structure, the Supreme Court must play an essential role as the mediator between state and center disputes, because of the Court's extensive original jurisdiction and the failure of other branches of government to stand up for states' interests.[3] However, except for a few isolated instances, the Supreme Court has failed to act as a guardian of states' rights, especially when it has been asked to invalidate federal government action that encroaches on state sovereignty. While examples of the Court's pro-center orientation can be observed throughout its federalism jurisprudence, it is particularly noteworthy in the context of regional emergencies and legislative competency disputes. These two areas present the largest threats to state autonomy, the former because it permits the center to dismiss and assume the role of state governments, and the latter because it proscribes what a state can regulate and control. While regional emergency powers had been curtailed after the *S.R. Bommai* decision in 1994, a December 2023 decision regarding the former state of Jammu and Kashmir threw open the possibility of further abuses, demanding a revaluation of the Court's approach to federalism more broadly.[4]

This article will proceed in three primary parts. Part II will examine the history of the Indian state and discuss how different academics and historians view the federal nature of the Indian system given history and political context. Decentralized governance pre-dates the formal adoption of the Constitution in 1950, as evidenced both by the British Raj administrative sub-units and the integration of royal regimes called "Princely States" across the country. Despite this, early academics characterized India as a "quasi-federal" system with a strong unitary bias, based on an analysis of the textual provisions of the Constitution as compared to those of Western democracies.[5] From the beginning, the United States has been the benchmark against which the Indian Constitution is compared, specifically on the

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[1] India Const. art. 1.

[2] S.R. Bommai v. Union of India, (1994) 2 SCR 1, ¶ 96.

[3] For a discussion regarding the Court's original jurisdiction, *see* Supreme Court of India, *Jurisdiction of the Supreme Court* (Feb. 11, 2023), https://main.sci.gov.in/jurisdiction.

[4] *See* S.R. Bommai, 2 SCR 1; *see* In Re Article 370 of the Constitution, AIR 2019 SC 29796.

[5] K.C. WHEARE, FEDERAL GOVERNMENT (The English Language Book Society and Oxford University Press ed.1951).

issue of federalism. B.R. Ambedkar, the father of the Indian Constitution, extensively compared Indian and American federalism on the floor of the Constituent Assembly Debates.[6] Subsequent reductive comparisons of the textual provisions of the Indian and American Constitution have contributed to the flawed understanding of India as "quasi-federal".[7] However, the federal systems of the United States and India provide a useful point of comparison, especially given how federalism has evolved in each country. This article continues this comparative tradition by examining specific aspects of federalism jurisprudence in each country.

The conception of a unitary bias in Indian federalism still influences legal academics and has historically limited the Court's willingness to decide in favor of states in contested cases. However, this static "quasi-federal" descriptor does not account for the development of strong state identity, which has led to the formation of a robust federalism on the ground. Part II will end with an affirmative argument why the Supreme Court is best suited to enforce federalism guardrails compared to other branches of government which have proven not up to the task.

Part III examines the regional emergency powers in the Indian Constitution, which are housed in Article 356 and are titled "Provisions in case of failure of constitutional machinery in State."[8] While these "President's Rule" invocations are uncontroversial when the ruling coalition in a state falls apart, they have been abused in recent decades to dismiss state governments led by a different political party than that which rules in the center.[9] President's Rule presents an existential threat to the federal system because it allows the central government to dissolve regional governments with relatively few guardrails. No such explicit mechanism for taking over a state government exists in the United States Constitution, except for perhaps the Republican Form of Government Clause in Article IV, Section 4 which has been held to be non-justiciable.[10]

The Indian Supreme Court initially held that the invocation of President's Rule was a non-justiciable political question, but after further sustained abuse it began to enact some guardrails around the practice.[11] In *S.R. Bommai*, the Supreme Court unanimously held that President's Rule declarations were justiciable and could be struck down if found to be *mala fide* or based on wholly irrelevant or extraneous grounds.[12] Subsequent decisions continued to put restrictions on the invocation of emergency powers, and restored improperly dissolved state governments.[13] However, despite these important reforms to regional emergency declarations, the Supreme Court took a significant step backward in a recent decision regarding the northern, Muslim-majority state of Jammu and Kashmir.[14] Jammu and Kashmir

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[6] Sudhir Krishnaswamy, *Constitutional Federalism in the Indian Supreme Court, in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA, 355, 356 (2015) (citing Constituent Assembly Debates (Nov. 4, 1948), Volume 7)).

[7] WHEARE, *supra* note 6.

[8] India Const. art. 356.

[9] *See* Krishnaswamy, *supra* note 7, at 371.

[10] Luther v. Borden, 48 U.S. 1, 51 (1849).

[11] State of Rajasthan v. Union of India, (1977) 1978 SCR (1) 1.

[12] S.R. Bommai v. Union of India, (1994) 2 SCR 1 at ¶ 92.

[13] Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.

[14] Krishnadas Rajagopal, *SC upholds abrogation of Article 370, says move was part of 70-year old exercise to integrate J&K to the Union*, THE HINDU (Dec. 11, 2023, 12:00 PM),

had enjoyed a special status per Article 370 of the Constitution, but the central government abrogated this provision after it declared President's Rule and dissolved the state legislature.[15] The Supreme Court affirmed the validity of these actions, and the decision has existential implications for the future of India's asymmetric system of federalism; in the future the Court should be very wary of altering states' special status through emergency declarations.

Part IV evaluates legislative competency disputes and argues for a more state-protective interpretive framework in part as a prophylactic to the recent backsliding in the regional emergency space. Specifically, the Supreme Court must be wary of applying an overly broad reading of Constitutional provisions which skews in favor of the center in the face of textual ambiguity. Unlike the American Constitution, the Indian Constitution includes three lists of legislative competencies (state, federal, and concurrent) which are listed out in the Seventh Schedule (Article 246).[16] The Union List includes ninety-seven subjects, the State List includes sixty-six, and the Concurrent list includes fifty-two.[17]

While the listing of competencies might seem to create a clear and very narrow role for the Supreme Court, a rigid reading that cabins the listed state competencies would lead to the whittling down of state powers over time. First, Article 248 of the Constitution holds that the central government has exclusive power to make law with respect to residuary matters not enumerated in the State or Concurrent List.[18] Second, if there is a conflict between state and federal law involving the Concurrent List, the central law wins out.[19] Finally, as new challenges emerge, it is likely that a contested law will touch on several different listed competencies, making it more likely that state and central law will clash if the Court reads the subjects expansively. The Court should decide legislative competency disputes using structural inferences and unwritten principles to ensure that state rights are more adequately protected. Additionally, even if the Court believes there is a pro-center skew in the Indian Constitution, this is not an affirmative reason to decide ambiguous cases in favor of the federal government. Indeed, it could be a greater reason to robustly protect states' domains.

II. Indian Federalism and the Role of the Judiciary

A. Brief History of Indian Federalism

Federalism has a long history in India that predates the nation's independence. The British Raj began introducing aspects of local government in India as early as 1882 and more formally in the Government of India Acts of 1919 and 1935.[20] However, Indian federalism is quite unlike the United States because it did not involve separate, sovereign states that

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https://www.thehindu.com/news/national/sc-upholds-abrogation-of-article-370-says-move-was-part-of-70-year-old-exercise-to-integrate-jk-to-the-union/article67626914.ece.

[15] *Id.*

[16] India Const. sched. VII.

[17] *Id.*

[18] India Const. art. 248.

[19] India Const. art. 254.

[20] ARUN K. THIRUVENGADAM, *Federalism and Local Government*, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS, 73 (2018).

gave up their independence to create a federal union. As one political scientist put it, unlike the delegates in the United States Constitutional Convention who were representatives of separate states coming together, the members of India's Constituent Assembly were like "members of a family, who, for the first time in possession of their own house, must find a way to live together in it."[21]

Colonial India was divided into two units: British India, which was administered directly by the British government and accounted for 54% of the territory and 70% of the population, and the Princely States, which comprised more than six hundred feudal units who were granted limited autonomy in exchange for acquiescing to British control.[22] At the time of Indian independence in 1947, there were seventeen formal provinces in British India along with a patchwork of Princely States ruled by monarchs.[23] The Government of India Act of 1919 was passed by the British Raj in response to growing agitation by Indian nationalists and devolved a substantial amount of power to the provincial level.[24] In the Government of India Act of 1935, the British incorporated more aspects of federalism into the Indian system, drawing from the Canadian and Australian models.[25] The 1935 Act included three primary units: the provinces, the Princely States, and the "Chief Commissioner's Provinces" (directly administered by the central authorities).[26] Additionally, there are several elements of the 1935 Act which found their way into the Indian Constitution of 1950.[27] The 1935 Act listed out competencies of the provincial governments, central governments, and included a concurrent list.[28] In addition, per Section 93, the central government could take over a provincial government in the case of emergency, a corollary to the Article 356 regional emergency powers.[29]

By the time the Constituent Assembly Debates began in 1947 to draft a new constitution for India, the political landscape of the country had changed dramatically. The Partition of India and Pakistan in August 1947 was caused by a failure to reach a compromise on important federal issues.[30] The Muslim League, led by Muhammad Ali Jinnah, made demands for a non-territorial federal system based on consociationalism to accommodate the Muslim minority, and these demands were rejected by the Indian National Congress Party.[31] The violence of Partition was extraordinary, with more than a million dead and fifteen million displaced, and it brought the threat of communal tensions to the forefront.[32] Before partition,

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[21] FRANCINE R. FRANKEL, INDIA'S POLITICAL ECONOMY 1947-2004: THE GRADUAL REVOLUTION (Oxford Univ. Press, 74 2nd ed. 2005).

[22] *See* THIRUVENGADAM, *supra* note 21, at 74.

[23] *Id.*

[24] B. Shiva Rao, *Relations Between the Union and States*, The Framing of India's Constitution: A Study, 2 THE INDIAN INST. OF PUB. ADMIN. NEW DELHI 574, 592-95 (2010).

[25] AB KEITH, A CONSTITUTIONAL HISTORY OF INDIA*, 1600 – 1935*, Pacific Publications, 354-59 (2010).

[26] *See* THIRUVENGADAM, *supra* note 21, at 75.

[27] *See* India Const.

[28] *Id.*

[29] *Id.*

[30] *See* Krishnaswamy, *supra* note 7, at 356.

[31] Lloyd I. Rudolph & Susanne H. Rudolph, *Federalism as State Formation in India: A Theory of Shared and Negotiated Sovereignty*, INT'L POL. SCI. REV., 553 (2010).

[32] Alex Shashkevich, *Stanford scholar explains the history of India's partition, its ongoing effects today*, Stanford Report (Mar. 8, 2019), https://news.stanford.edu/stories/2019/03/partition-1947-continues-haunt-india-pakistan-stanford-scholar-says.

some thought federalism could be a mechanism to reduce communal fervor, but in the aftermath of the violence, the consensus was that only a strong central government could respond to this dire challenge.[33]

In addition to the threats of communal violence, there were other pragmatic reasons to prefer a strong central government over a loose confederation of states. Most of the Princely States did not have an effective governance structure and few were eager to cooperate with the newly formed Indian government.[34] Many leaders of the Indian National Congress also became convinced that the only way to raise people up from poverty, achieve agricultural prosperity, financial stability, and industrial productivity was through a strong central authority.[35] There was a sizable faction of "Gandhians" in the Constituent Assembly who rallied around an "anti-modern localist vision of a radically decentralized India" based primarily on local governance centered around the village, or "panchayats."[36] B.R. Ambedkar, considered the father of the Indian Constitution, firmly opposed this proposal, calling the village "a sink of localism, a den of ignorance, narrow-mindedness, and communalism."[37] The radical vision of hyper-localized federalism did not win out in the Constituent Assembly. Eventually, the Gandhians were placated with the use of non-justiciable directive principles in Article 40 of the Constitution, which directed Indian states to "take steps to organize village panchayats … as units of self-government."[38]

While the history of India points towards a longstanding experience with, and a respect for, a federal system, it is also important to recognize that the Indian Constitution initially sought to create and sustain a strong central government. Provincial leaders fought vigorously for greater state rights in issues of taxation and legislative competencies but were eventually overruled by a majority keen to prevent further fracturing and communal violence.[39] Noted jurist Mahendra Pal Singh points to three structural aspects of the Indian Constitution that demonstrate its "centralized character."[40] The first aspect is Parliament's expansive authority to create new states and redraw state boundaries per Article 3.[41] Second is how legislative competency disputes have often been resolved in favor of the center by the Supreme Court.[42] The third aspect is the existence of the regional emergency mechanism which allows the central government to dissolve state legislatures.[43] These central features are undoubtedly part of the Indian Constitution, but they have been overstated by academics and jurists to the severe detriment of state interests.

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[33] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 236 (Oxford Univ. Press, 1966).

[34] *See* THIRUVENGADAM, *supra* note 21, at 78.

[35] *Id.*

[36] Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 INT'L J. CONST. L. 389, 401 (2018).

[37] *Id.* (citing Constituent Assembly Debate, 39 (Nov. 4 1948)).

[38] *Id.* at 407 (quoting India Const. art. 40).

[39] RAMACHANDRA GUHA, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY 109-10 (2022).

[40] Mahendra Pal Singh, *The Federal Scheme*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 458-64 (Sujit Choudhry, et al. eds., 2016).

[41] *Id.* at 458.

[42] *Id.* at 461-63.

[43] *Id.* at 463-64.

B. India as "Quasi-Federal" and Impact on Jurisprudence

In 1951, Australian academic K.C. Wheare conducted a structural analysis of the Indian Constitution and deemed that it was "quasi-federal."[44] Members of the Constituent Assembly, including B.R. Ambedkar himself, cautioned against comparing the Indian federal model with that of the United States.[45] Nonetheless, Wheare used the United States as a model example of federalism and for numerous reasons felt that India fell short of this ideal. There are several structural reasons why Wheare, and others, concluded that India is quasi-federal, especially compared to the United States. First, states in India do not have separate constitutions, nor is there is a concurrent state court system as there is in the United States.[46] Second, while the 14th Amendment of the United States Constitution contemplates both state and federal citizenship, there is no equivalent concept in the Indian Constitution.[47] Third, the size and proportionate composition of the Indian upper house (Rajya Sabha) favors larger states unlike the equal representation in the United States Senate.[48] Finally, there are the regional emergency powers and plenary powers of the Union to alter state boundaries granted by Article 3.[49]

However, the quasi-federal moniker rests on a flawed understanding of federalism that assumes American federalism as the ideal and does not consider regional differences or how the Indian Constitution was operationalized in the several decades since its ratification. Wheare's work was published just one year after the ratification of the Constitution, and some have questioned whether he would have stuck to his initial assessment after seeing the subsequent development of Indian federalism.[50] There are a variety of different federal systems and federalism is an "institutional arrangement for sharing power across multiple levels of government" that is highly dependent on social and historical circumstances.[51] Today, federalism scholars recognize that there is no single idealized federal model, and every nation will adopt their own requirements as needed.[52] The demands of federalism are dynamic and deeply contextual, and a static understanding of India as "quasi-federal" from the 1950s should not dominate the legal and academic discourse.

Unfortunately, quasi-federalism has left a deep mark on Indian legal education and federalism jurisprudence. In one recent article, federalism scholar Professor Balveer Arora

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[44] *See* WHEARE, *supra* note 6.

[45] 7 Constituent Assembly Debates, Nov. 4, 1948, 32-33 (Ambedkar).

[46] Abishek Kumar, *Nature of the Indian Constitution*, TIMES OF INDIA: READER'S BLOG, (Sep. 20, 2021, 5:28 PM), https://timesofindia.indiatimes.com/readersblog/rationalthoughts/nature-of-the-indian-constitution-37599/; Louise Tillin, *Chapter 30: Asymmetric Federalism*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 540, 545 (Sujit Choudhry, et al. eds., 2016) (noting that only Jammu and Kashmir had its own constitution until its statehood was abrogated).

[47] *See* Kumar, *supra* note 47.

[48] Vignesh Karthik K.R., *Quasi-federalism*, THE HINDU (May 3, 2022), https://www.thehindu.com/specials/text-and-context/quasi-federalism/article65375428.ece.

[49] *Id.*

[50] Balveer Arora & K.K. Kailash, *Beyond Quasi Federalism: Change and Continuity in Indian Federalism*, 6 STUD. INDIAN POL. 297 (2018).

[51] *Id.* at 298.

[52] Kevin James & Balveer Arora, *The Judicial Journey of Indian Federalism*, C*ontinuities and Discontinuities: Politics and Society in Contemporary India* (publication forthcoming) (citing DANIEL J. ELAZAR, EXPLORING FEDERALISM (Univ. Ala. Press 1987)).

observes that across the Indian educational system "Wheare's thesis is the beginning and often the end of any theoretical discussion" and he suggests a series of modifications that can be made to remedy this problem.[53] In another recent piece, scholar Kevin James and Professor Arora survey the powerful impact that "quasi-federalism" has had on Supreme Court jurisprudence.[54] In *State of West Bengal v. Union of India*, the Supreme Court described the United States and Australia as "true federations" while discounting the sovereign powers of the Indian states in comparison.[55] In *State of Rajasthan v. Union of India*, dealing with early invocations of President's Rule, the Court held that the Indian Constitution is "more unitary than federal" and that the "extent of federalism is largely watered down by the needs of progress and development."[56] In *State of Karnataka v. Union of India*, decided a few months later, the Court similarly questioned whether India could even be called "federal" given its "strongly unitary features."[57]

It wasn't until the 1990s that federalism became entrenched by the Supreme Court as an important aspect of the Indian Constitution. In the landmark *Kesavananda* case decided in 1973, the Supreme Court held that the legislature's ability to pass amendments could not be used to alter the "basic structure" of the Constitution, creating what is known as the Basic Structure Doctrine.[58] While some concurrences in *Kesavananda* stated that federalism was a part of the Basic Structure, the controlling opinion did not, as it was not operative in deciding the case.[59] In the 1992 case *S.R. Bommai*, which placed limits on regional emergencies, the Court minimized the importance of labels like "federal", "quasi-federal, or "unitary."[60] Rather, the Court focused on the "practical implications" of the Constitution and held that "[d]emocracy and federalism are the essential features of our Constitution."[61] *Bommai* is the high watermark of the Supreme Court's rejection of quasi-federalism and showed its commitment to protecting state rights against federal encroachment. Later decisions regarding legislative competency disputes cited *Bommai* to effectuate expansive readings of state authority.[62]

However, this victory may have been short-lived. In 2006, the Court upheld an amendment changing the Rajya Sabha domiciliary requirements and rejected federalism-based arguments by stating that India was quasi-federal and not a "strong federalism" because of the unitary bias in the Constitution.[63] The Court used similar "quasi-federal" and "not strictly federal" language in a 2010 case regarding legislative competencies.[64] In a 2016 case regarding the validity of certain state laws, the Court held that "the legal position appears to be fairly well settled that the Constitution provides for a quasi-federal character with a strong bias towards the Centre", yet the Court still sided with the states regarding the dispute

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[53] *See* Arora & Kailash, *supra* note 51, at 1-2.
[54] *See* James & Arora, *supra* note 53, at 4.
[55] State of West Bengal v. Union of India, (1964) 1 SCR 371.
[56] State of Rajasthan v. Union of India, (1977) 3 SCC 59.
[57] State of Karnataka v. Union of India, AIR 1977 SC 68.
[58] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[59] *Id.*
[60] S.R. Bommai v. Union of India, AIR 1994 SC 1918.
[61] *Id.*
[62] *See* James & Arora, *supra* note 53, at 9.
[63] Kuldip Nayar v. Union of India, AIR 2006 SC 3127.
[64] Bhim Singh v. Union of India, (2010) 5 SCC 538.

in question.[65] In a recent 2018 decision, the Supreme Court upheld the special status of the Union Territory of Delhi against encroachments by the Lieutenant Governor appointed by the Center.[66] The majority opinion emphasized that federalism is part of the Constitution's basic structure and held that courts should use a "pragmatic federalism" when accounting for quasi-federal or unitary provisions in the Constitution.[67] In its most recent major federalism decision, the Court held that Jammu and Kashmir's special protections could be abrogated, even when the state legislature was dissolved via an emergency declaration.[68] However, even in this firmly pro-center decision, the Supreme Court reaffirmed the importance of asymmetric federalism in the federal scheme.[69]

While it can be tempting to dismiss "quasi-federalism" as an insignificant academic label, it has had a profound impact on federalism jurisprudence in India. K.C. Wheare's initial categorization relied upon a highly formalistic analysis of the textual provisions of the Indian Constitution compared against those of the United States, which was considered the pinnacle of federalism. This misguided approach had a strong impact on the Indian judiciary, which was quick to dismiss states' rights causes because India was not truly federal. The *S.R. Bommai* decision solidly entrenched federalism as part of the basic structure of the Constitution, yet even after this seminal case, the application of the Basic Structure Doctrine has been highly inconsistent.[70] The Indian Supreme Court should move beyond the vestige of quasi-federalism and work to truly preserve federalism guardrails in India.

C. Normative Importance of Federalism in India

Given the "centralized character" of parts of the Indian Constitution and the powerful impact of "quasi-federalism" on the Supreme Court, it might be tempting to conclude that the Indian system does not contemplate greater protections for states. Perhaps India represents a completely distinct federal system than that of the United States, and the pro-center valence of India's federalism jurisprudence is appropriate given the constitutional structure. This would be an incorrect conclusion for several reasons. First, the text of the Indian Constitution contains no explicit acknowledgement of a unitary, pro-central, or quasi-federal state. The Constitution's first words acknowledge that India "shall be a union of states" and later sections like Schedule Seven and Article 371 take great pains to explicate the domains of state control.[71] Evaluating the overall constitutional structure as compared to other federations is an interesting academic exercise, but to conclude that the entire system is so pro-center that the federal government should have a consistent advantage in federalism disputes seems deeply atextual.

Second, the Supreme Court has repeatedly held that federalism is part of the Constitution's Basic Structure. In both *S.R. Bommai* and *In Re Article 370 of the Constitution*, the Court has affirmed that federalism is integral to India's constitutional system and must

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[65] Jindal Stainless LTD v. State of Haryana, AIR 2016 SC 5617, ¶ 32.
[66] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[67] *Id.*
[68] In Re Article 370 of the Constitution, AIR 2019 SC 29796.
[69] *Id.* at ¶ 164.
[70] *See* S.R. Bommai v. Union of India, AIR 1994 SC 1918; *see* Krishnaswamy, *supra* note 7 at 372-374.
[71] India Const. art. 1, art. 371.

be respected.[72] It is notable that in *In Re Article 370*, decided in December 2023, the Court affirmed the importance of federalism in constitutional interpretation even as it decided in favor of the central government to abrogate state sovereignty.[73] Including federalism as part of the Basic Structure Doctrine means that even a constitutional amendment can be invalidated by the Supreme Court if it threatens a critical aspect of federalism. While the United States Supreme Court has developed a robust doctrine of federalism to protect state interests, it has never been suggested that a constitutional amendment could be invalidated on federalism grounds.

Finally, federalism in India has developed since the enactment of the Constitution in 1950 and has become a critical element of Indian society. One key problem with Wheare's "quasi-federal" label from 1951 is that it does not reflect how federalism operated in practice after ratification. Post-ratification practice is critical for understanding a federal system and should be considered in deciding contemporary disputes between the states and center. Evaluating subsequent practice is an important factor in constitutional interpretation, as exemplified by the doctrine of "desuetude" which holds that a constitutional provision can lose its binding force because of sustained non-use and public repudiation.[74] In his seminal historical work *India After Gandhi*, Ramachandra Guha advances a convincing argument that the redrawing of state boundaries along linguistic lines quelled secessionist tendencies and led to the development of a robust and dynamic federalism.[75] India's founding fathers, Jawaharlal Nehru, Vallabhbhai Patel, and C. Rajagopalachari, were highly anxious about creating states drawn by linguistic lines in the aftermath of Partition.[76] In 1950, Madras State was a colossal unit that encompassed speakers of Tamil, Kannada, Malayalam, and Telegu, while Bombay State included speakers of Marathi, Gujarati, Urdu, Sindhi, and more.[77] After the violence of Partition, there was a sensible fear of further balkanization and that acquiescing to demands of linguistic statehood might throw fuel on the fire. Instead, Nehru hoped to promote national unity through multilingual and multicultural states which could avoid the factionalism that might develop if citizens developed a strong state-based identity.[78] This is a distinct vision of Indian federalism, but it is not the one that carried the day.

In December 1952, an activist named Potti Sriramulu began a fast unto death unless a new state of Telugu speakers was carved out of Madras State.[79] He died fifty-eight days later and the riots that followed forced Nehru to accede to the creation of the new state of Andhra Pradesh, in October 1953.[80] New linguistic states soon followed, including Karnataka, Kerala, and Tamil Nadu, followed by Gujarat and Maharashtra a few years later.[81] Reflecting on the formation of Andhra Pradesh, Nehru was concerned he had "disturbed the

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[72] *See* S.R. Bommai, AIR 1994 SC 1918; *see* In Re Article 370 of the Constitution, AIR 2019 SC 29796.

[73] *See* In Re Article 370 of the Constitution.

[74] Charles R. Buck, The Desuetude of the Notwithstanding Clause – Fact or Fiction?, (2022) (M.A. thesis, University of Toronto).

[75] *See* GUHA, *supra* note 40, at 196.

[76] *Id.* at 179-80.

[77] *Id.* at 178.

[78] *Id.*

[79] *Id.* at 185.

[80] *Id.* at 156.

[81] For a history of state formation in India, *see generally id*.

hornet's nest" and other members of the nationalist elite were worried these newly formed states would tear the country apart.[82]

These predictions did not materialize. Instead, the Indian polity developed a strong sense of state identity reflecting the unique language, culture, and ethnic composition of their respective states. Guha concludes that "linguistic reorganization seems to have consolidated the unit of India … on the whole the creation of linguistic states has acted as a largely constructive channel for provincial pride."[83] State creation went beyond language and even included ethnic and religious considerations, as evidenced by the formation of Nagaland in 1963, which is more than 80% Christian.[84] Offers of greater regional autonomy to the northeast states have helped quell armed uprisings, further evidence of the importance of federalism in keeping the country together.[85] Contrast India's experience with that of its neighbors Pakistan or Sri Lanka, which endured brutal civil wars based on a strict imposition of the majority language on minority populations.[86]

History shows that federalism has led to the development of a strong sense of state identity (Tamilian, Kannada, etc.) but also helped the Indian system flourish as a vibrant and diverse democracy. This is in sharp contrast to the American experience, where most Americans identify much more strongly with their national identity than with their home state.[87] It is an odd mismatch where a country with a much stronger sense of state pride and identity is deemed "quasi-federal" while a nation with a more tenuous sense of state identity is considered the exemplar of federalism. The importance of federalism in India's post-ratification history provides an additional normative justification to take state interests seriously in the context of state-center disputes.

D. Other Potential Mechanisms to Promote State Interests

The Supreme Court is the best-suited institution to vindicate states' rights and preserve federalism guardrails in India's constitutional structure. Before turning to the specific aspects of India's Supreme Court that would make it a strong guardian of federalism, it is worth discussing why alternative institutions are not well-equipped to meet this challenge on their own. Commonly touted alternative institutions that might be able to push back against federal encroachment are the Rajya Sabha, Interstate Council, or the ordinary workings of politics in India's parliamentary democracy.

The Indian Parliament is a bicameral body comprised of two components: the House of the People (Lok Sabha) and the Council of States (Rajya Sabha).[88] The Lok Sabha is composed of representatives that are directly elected by the people in elections that must happen at least every five years.[89] The distribution of membership is proportional and is done

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[82] *Id.* at 186.
[83] *Id.* at 196.
[84] *Id.* at 472.
[85] *Id.*
[86] *Id.* at 755-56.
[87] G. Alan Tarr, *Federalism and Identity: Reflections on the American Experience*, 369 L'EUROPE EN FORMATION 20, 37 (2013).
[88] *Legislature*, *Know India Programme: Ministry of Foreign Affairs*, KNOW INDIA (Feb. 15. 2023), https://knowindia.india.gov.in/profile/the-union/legislature.
[89] *Id.*

in a way to equalize the ratio between the number of seats allotted to a state and the population of that state.[90] The Prime Minister is formally appointed by the President, but must at all times maintain the confidence of a majority of the Lok Sabha members in order to govern.[91] In contrast, nearly all of the members of the Rajya Sabha are elected by the state assemblies for staggered six year terms (with a small percentage nominated by the President and who possess specialized knowledge or practical experience).[92] Several different justifications for the Rajya Sabha were put forward during the Constituent Assembly Debates including that it would serve as a more sober and reflective chamber, act as a second legislative chamber to originate new laws, and that it could "represent the federal ethos of India."[93]

While the Rajya Sabha can be seen as an instrument to support federalism because its members are elected by state legislatures, and not the population generally, there are several reasons why it is a weak guardian of federalism. First, the Rajya Sabha is still an instrument of the federal government, and no matter how its members might be elected there will likely be a centralizing bias in its decision-making as it contemplates expanding federal power. While India has some strong regional parties, the central government has always been led by national parties (India National Congress, Bharatiya Janata Party) which in turn have strong operations in state political apparatus. Given Rajya Sabha members are elected by state assemblies instead of the people, the possibility of pro-central capture by the ruling party might be even higher. In addition, the number of Rajya Sabha seats per state is proportional based on population, giving less populous states relatively less voting power.

This concern is heightened when one considers the second flaw in the Rajya Sabha's structure: the lack of a state domicile requirement for members. Article 84 of the Constitution specifies that members of the Rajya Sabha must be Indian citizens and at least thirty years old but leaves other qualifications up to the discretion of Parliament.[94] The Representation of People Act of 1951 required that Rajya Sabha members be residents of the states they represent, but this requirement was subsequently amended in 2003.[95] The Supreme Court heard a challenge to this amendment on the grounds that it altered the Basic Structure of Indian federalism and the bicameral nature of the parliamentary legislature.[96] The Court upheld the amendment, stating that while petitioner's arguments may have force in a "strict federalism," the Indian system did not require that the Rajya Sabha act as a strong representative of state interests.[97] Without a state domicile requirement, the representatives in the Rajya Sabha are less likely to support the interests of the states they represent.

Finally, the Rajya Sabha can be thought of as subordinate to or less important than the Lok Sabha because most bills originate from the Lok Sabha and because "money bills"

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[90] *Id.*

[91] India Const. art. 75, cl. 1.

[92] B.L. Shankar and Valerian Rodrigues, *7 The Lok Sabha and the Rajya Sabbha*, *in* THE INDIAN PARLIAMENT: A DEMOCRACY AT WORK, 292, 293 (2011).

[93] *Id.* at 298 (citing L.M. Singhvi, *Upholding the Federal Ethos of Indian Polity*, Role and Relevance of Rajya Sabha in Indian Polity, 13 (2004)).

[94] *See* Krishnaswamy, *supra* note 7, at 360.

[95] *Id.*

[96] Kuldeep Nayar v. Union of India, (2008) 7 SCC 1.

[97] *Id.*

concerning taxation and public expenditures do not need to be passed by the Rajya Sabha.[98] There have also been several historical attempts by the Lok Sabha to abolish the Rajya Sabha altogether via constitutional amendment.[99] Overall, while the Rajya Sabha promotes state representation in the federal government, a weakened political branch cannot serve as the primary vindicator of federalism in the Indian system.

An alternative to the Rajya Sabha is the Inter-State Council, which was established under Article 263 of the Constitution and is meant to serve as a forum for inter-state and center-state dialogue.[100] The President has the discretion to constitute the Council and its main functions are to advise on disputes between two states or in areas in which the states and central government have a common interest.[101] The Prime Minister serves as the chairman of the Council and other members include Chief Ministers of states and union territories as well as six cabinet ministers.[102] The Inter-State Council came into existence in 1990 in response to a report by the Sarkaria Commission which conducted a comprehensive review of the federal-state relationship in India.[103] Since this time, meetings have been sparse (just eleven in total) and despite growing calls for its revival, the last session was in 2016.[104] While the Inter-State Council may serve a valuable purpose in promoting cooperative federalism and dialogue in the Indian system, it is unlikely that such a dormant institution, which is entirely dependent on the central government's discretion, will be much of a check against abuse by the center.

A final institutional check against federal government encroachment could come from the political process itself. Much scholarship regarding Indian federalism has tracked doctrinal developments alongside changes to which parties were ruling in the center.[105] This is a compelling framework to use because when a strong national party rules both parliament and several state assemblies, there is not likely to be as much pushback against federal encroachment because most of the players are on the same team. In the first few decades of Indian electoral politics, the Congress Party exercised relative dominance at the state and federal level.[106] However as this political dominance began to splinter, and coalition governments became more common, regional parties were able to assert state interests. In the late 1990s, single Chief Ministers' endorsements could become decisive for federal elections (to form a winning coalition), and in turn gave states much more power.[107]

While it may be true that greater political friction gives certain states more leverage at certain times, this does not appear to be a stable or reliable guardian for federalism in the

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[98] *See* Shankar and Rodrigues, *supra* note 93, at 293-94.

[99] *Id.*

[100] Rishika Singh, *Explained: What is the Inter-State Council?*, THE INDIAN EXPRESS (Jun. 17, 2022) https://indianexpress.com/article/explained/everyday-explainers/explained-what-is-the-inter-state-council-7975901/.

[101] *Id.*

[102] *Id.*

[103] Nayakara Veeresha, *It's time to rejuvenate the inter-state council*, DECCAN HERALD (Oct. 23, 2022) https://www.deccanherald.com/opinion/it-s-time-to-rejuvenate-inter-state-council-1156236.html.

[104] *Id.*

[105] *See, e.g.*, THIRUVENGADAM, *supra* note 21, at 118-35; James & Arora, *supra* note 53, at 3.

[106] See Guha, *supra* note 40, at 3.

[107] Vinod Sharma, *Chandrababu Naidu 2.0: Can he recreate 1996 in 2019 in the Capital?*, HINDUSTAN TIMES (Nov. 10, 2018).

long term. One must also be cautious about the spread of "partisan federalism" in which a political party tries to alter the rules of the federal structure for political benefit.[108] The partisan federalism dynamics may not be as bad as they are in the United States because of India's multiparty system, because Indian states are organized along ethnic and linguistic lines, and because many federalism challenges are brought by private litigants.[109] Still, relying on the political system to enforce the rules of the game seems like an incomplete remedy.

E. Role of the Supreme Court in Safeguarding Federalism

The Supreme Court is the ideal guardian of federalism in India given its unique position as a constitutional court of last resort, its expansive jurisdiction, and its strong independence in judicial appointments. Article 131 of the Indian Constitution provides that the Supreme Court has original jurisdiction over suits between states, or between states and the Union.[110] Despite the presence of the Inter-State Council in the Constitution, there was no serious doubt that the Supreme Court would be the primary arbiter of federalism-based disputes.[111] The Supreme Court later validated this understanding by arguing that its original and appellate review of federalism disputes was a "necessary concomitant of a federal or a quasi-federal form of government."[112] The Supreme Court is a separate branch of government that can act as a neutral arbiter or referee when evaluating state and federal claims. The alternative instrumentalities discussed earlier were enmeshed in either the state or federal system, and it would be difficult for a body like Parliament to adopt a veil of ignorance when evaluating a federalism dispute. The Supreme Court of India also has the benefit of finality, as it is the court of last resort, and all judgements are binding on all lower courts and all civil, judicial, and executive authorities.[113]

Another attribute in favor of the Court is its strong degree of independence by virtue of its unique appointments system. The Constituent Assembly was highly concerned with creating a Court independent of tinkering by an executive branch that was not receptive to the Court's decisions.[114] Article 124(2) governs appointments and states that the President may only appoint new Supreme Court justices after "consultation" with Judges of the Supreme Court and of the High Courts of the States.[115] Subsequent Supreme Court decisions gave meaning to this cryptic provision, interpreting "consult" to impose a requirement that the Chief Justice be consulted and that their opinion should prevail.[116] In a 1990s decision, the Court grafted onto this, holding that the "collegium system" required a panel including

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[108] *See* Krishnaswamy, *supra* note 7, at 369.

[109] *Id.* at 370.

[110] India Const. art. 131.

[111] Raeesa Vakil, *Chapter 21: Jurisdiction*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 367, 375 (2016).

[112] *Id.* (citing State of Karnataka v. Union of India, (1977) 4 SCC 608, 201).

[113] *Id.* at 378.

[114] Justice (retd.) BN Srikrishna, *Chapter 20: Judicial Independence*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 349, 352 (2016).

[115] *Id.*

[116] See THIRUVENGADAM, *supra* note 21, at 132 (citing *Union of India v. Sankalchand Seth,* (1977) 4 SCC 193).

the Chief Justice and the two-senior most judges of the Supreme Court to sign off on new justices (the collegium composition was later tweaked).[117]

In 2014, a new government eager to dispense with the Supreme Court's pocket veto on appointments passed the 99th Amendment which sought to replace the collegium with an alternate committee that would no longer give the justices the majority.[118] The Supreme Court struck down this amendment as conflicting with the Basic Structure of the constitution and reinstated the collegium system in a 4-1 decision.[119] This level of judicial independence is significantly higher than that which exists in the United States, where existing justices have no say over new appointments. The Indian Supreme Court has fiercely guarded the sanctity of its appointments process from repeated executive attacks over decades, and from a structural perspective the bench cannot be tampered with for political ends.[120] The collegium system still has its detractors (who accuse it of being opaque and antidemocratic),[121] but the level of independence it promotes is a benefit for evaluating federalism disputes from an objective lens. Nor does this independence mean that the Supreme Court has been a consistent champion of federal rights, as seen from its spotty track record in the previous section.[122]

There are some additional features of the Supreme Court that prevent it from developing a consistent federalism jurisprudence. The Court can have up to thirty-five members but never sits *en banc*, instead sitting in different panels of various sizes to hear cases.[123] Article 145(3) states that all questions of law involving interpretation of the Constitution must be decided by benches of at least five judges, but the Court will often opt for seven or nine judges because larger bench cases have more precedential value.[124] This can create a highly fractured jurisprudence and could lead to seemingly conflicting opinions issued by the Court in the same term. In addition, the Chief Justice plays a critical role in setting the benches or rosters for the cases and therefore has a lot of discretion on who decides what.[125] Also, because of the mandatory retirement age of sixty-five, the tenure of a Chief Justice is extremely short, averaging just 1.5 years.[126] Unlike in American jurisprudence where one can point to the "Warren Court" or the "Rehnquist Court" to try and make sense of a doctrinal development, this is much tougher to do in India given the size of the Court and brief tenure of the Chief Justice. Some scholars have noted doctrinal shifts in Supreme Court jurisprudence over time, going from textualism to structuralism to a more free-

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[117] *Id.* (citing Sup. Ct. Advoc.-on-Rec. Ass'n v. Union of India, (1993) 4 SCC 441).

[118] *Id.* at 134.

[119] *Id.* (citing Supreme Advoc.-On-Rec. Ass'n v. Union of India, (2015) SCC Online 964.

[120] Soutik Biswas, *Supreme Court collegium: The growing row over picking judges in India*, BBC (Jan. 24, 2023), https://www.bbc.com/news/world-asia-india-64372672.

[121] *Id*.

[122] Wilfried Swenden & Rekha Saxena, *Policing the federation: the Supreme Court and Judicial Federalism in India,* 10 TERRITORY, POL., GOVERNANCE 17 2022; Baby Huma, *Understanding Indian Federalism*, 76 THE INDIAN J. OF POL. SCI. 795 2015.

[123] Chintan Chandrachud, *Constitutional Interpretation*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, (2016), at 73-74.

[124] *Id.*

[125] Nick Robinson, '*Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts*, 61 Am. J. of Compar. L.101, 103 (2013).

[126] Mihir R, *Average Tenure of a CJI is 1.5 Years*. Supreme Court Observer Court Data (Apr. 24, 2021), https://www.scobserver.in/journal/the-average-tenure-of-a-cji-is-1-5-years/.

wheeling results-oriented jurisprudence.[127] Despite these limitations, the Supreme Court is still the best institution to protect states' interests in India's federal democracy.

III. Regional Emergency Powers and the Threat to Asymmetric Federalism

Regional emergency powers have had a long history of use and misuse in Indian politics, starting in the years immediately after the Constitution's ratification. While the Supreme Court was initially hesitant to conduct any judicial review on the decision to dissolve a state legislature, or the reasons justifying that decision, the Court finally began implementing guardrails in the seminal *S.R. Bommai* decision in the 1990s. Since that time, the Supreme Court has continued to impose restrictions on emergency declarations and restored dismissed state governments which had been invalidated on partisan grounds. In the years since *S.R. Bommai*, the number of declared emergencies dropped precipitously, and many thought the limits on the Article 356 power were a settled matter of constitutional law.

However, a recent decision from December 2023 involving the union government's abrogation of Jammu and Kashmir's special status has thrown regional emergency abuses back into the spotlight.[128] As in this case, regional emergency powers could be used to permanently alter state-specific protections in the Indian constitution, fundamentally altering India's system of asymmetric federalism. In future regional emergency cases, the Court should enact a higher level of scrutiny for subsequent legislative enactments which alter the existing system of asymmetric federalism and confine the Jammu and Kashmir decision as *sui generis* given the unique nature of Article 370 of the Constitution.

A. History of Article 356 Emergency Powers and Subsequent Curtailment

Article 356, which was inspired by a similar provision in the Government of India Act of 1935, gives the President of India (acting under the authority of the Union cabinet led by the Prime Minister) power to assume control of a state if "the government of the State cannot be carried in accordance with the provisions of the Constitution."[129] Through this provision, the President has the power to dissolve the state legislature, assume all state government functions, and declare that legislative powers in the state shall be exercised by the Union Parliament.[130] While the Governor of the State technically has to send a report to the President calling for an emergency declaration, this is a hollow check given the Governor is appointed by the President (unlike the Chief Minister who is appointed by a the state legislative assembly).[131] There was serious debate in the Constituent Assembly over why it was necessary to include Article 356, given how its colonial predecessor, Section 93, was abused by the British to dissolve provincial governments.[132] Some participants who defended the provision argued it was necessary to prevent against communal terrorism, nascent

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[127] *See generally* Chandrachud, *supra* note 124.
[128] *See* In Re Article 370 of the Constitution, AIR 2019 SC 29796.
[129] *See* THIRUVENGADAM, *supra* note 21, at 85 (citing India Const., art. 356(1), 1950.
[130] India Const., art. 356(1)).
[131] *Id.*
[132] *See* THIRUVENGADAM, *supra* note 21, at 85.

communist insurgencies, and agricultural or financial disaster.[133] B.R. Ambedkar was wary of the potential for Article 356 to be abused, and hoped it would only be used as a last resort by a responsible government.[134]

Article 356 was quickly abused after ratification and was invoked as frequently as 1.5 times per year between 1951 and 1966, 3.1 times per year between 1967 and 1988, and 2.3 times per year between 1989 and 1997.[135] In 1959, Prime Minister Jawaharlal Nehru declared President's Rule and dissolved the lawfully elected government of Kerala, run by the Communist Party of India.[136] The Communist Party's surprise victory in the prior elections greatly angered rival political factions in Kerala and led to a sustained period of political unrest and occasional violence.[137] Some applauded this early invocation of President's Rule to restore peace and oust a highly ambitious Communist government, but others thought the decision had "tarnished Nehru's reputation for ethical behavior in politics" and set a bad precedent for future Prime Ministers.[138] The first Supreme Court decision on Article 356 came in 1977 in *State of Rajasthan v. Union of India*.[139] The Janata Party broke the Congress dominance over Parliament for the first time and immediately directed six Congress-led state governments to resign or face dissolution via Article 356.[140] The state governments challenged their openly partisan dismissal before the Supreme Court, which refused to overrule the emergency declarations.[141] The Court held that the declarations were "matter[s] of political judgement for the executive branch" and opened the floodgates for further partisan abuse in the subsequent decades.[142] In nearly all the emergency declarations until 1994, the party governing in the center was different than the party governing the dismissed state legislature.[143]

The high rate of regional emergency declarations declined after the Court's *S.R. Bommai* decision in 1994, which was decided by a nine-judge panel.[144] The Court was asked to evaluate six regional emergency declarations and formulate guidelines for future invocations, but the Court could not give relief to the petitioners since intervening elections had taken place in the affected states.[145] The Court first held that federalism and democracy were part of the Basic Structure of the Indian Constitution.[146] It then held that the President's Rule declarations in Karnataka, Meghalaya, and Nagaland were invalid because of insufficient explanation, specifically because the President had not shown that other constitutional options had been exhausted and the declarations seemed overly partisan.[147] In

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 86 (citing Subrata K. Mitra and Malte Pehl, *Federalism*, *in* THE OXFORD COMPANION TO POLITICS IN INDIA, 46-47 (2010)).

[136] *See* GUHA, *supra* note 40, at 294.

[137] *Id.*

[138] *Id.*

[139] State of Rajasthan v. Union of India, AIR 1977 SC 1361.

[140] *Id.*

[141] *See* Krishnaswamy, *supra* note 7, at 372.

[142] *Id.*

[143] *Id.*

[144] *Id.* (citing S.R. Bommai v. Union of India (1994) 3 SCC 1).

[145] *See* Singh, *supra* note 41, at 463.

[146] *See* Krishnaswamy, *supra* note 7, at 372.

[147] *Id.*

contrast, the Court upheld dismissals in Himachal Pradesh, Madhya Pradesh, and Rajasthan because the proclamations were justified by the involvement of several members of the state legislative assemblies in the destruction of the Barbri Masjid and subsequent religious riots.[148] The Court therefore drew lines between permissible and impermissible invocations of President's Rule and rebuked the *Rajasthan* Court's holding that these determinations were essentially political questions. The Court also emphasized the extraordinary dangers partisan federalism can cause when coupled with Article 356 and noted that historically "state governments have been sacked and the legislative assemblies dissolved on irrelevant, objectionable and unsound grounds."[149] Noting that regional emergencies had been invoked more than ninety times and almost always against opposing political parties, the Court held that the judiciary's task was to intervene in order to save Indian federalism and democracy.[150]

In the 2007 case *Rameshwar Prasad v. Union of India*, the Court again confronted the outer limits of the Union's regional emergency powers.[151] The Union-appointed Governor of Bihar had issued a notification to dissolve the state legislature before its first meeting because of allegations that that the opposition was trying to form a majority by illegal means.[152] The Governor's report to the President alleged a potential for a democratic constitutional crisis if these activities by the opposition were allowed to persist.[153] The Court invalidated the Governor's dissolution, primarily based on the insufficient justifications provided in his report.[154] The Court held that "[t]he extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics."[155] Therefore, without more specific evidence of impropriety by the group trying to form the majority, the Court attributed partisan motives to the Governor and refused to certify the dissolution, adding more guardrails to Article 356.[156] As recently as 2016, during the Modi regime, the Supreme Court restored an improperly dissolved Congress-led legislative assembly in Arunachal Pradesh.[157]

S.R. Bommai and its progeny caused a marked decline in emergency declarations and imposed serious guardrails on future invocations.[158] Some scholars went so far as to speculate that the Supreme Court's jurisprudence had "constrained, if not eliminated, partisan federalism in this area of Indian constitutional practice."[159] Others were more cautious, both encouraged by the "creativeness" of the Supreme Court in interpreting Article 356 to impose checks on the center, while reserving judgement on how the Court would respond to fresh emergency declarations by the Modi government to see if "this signals yet another chapter

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[148] *Id.* at 373

[149] S.R. Bommai v. Union of India, (1994) 3 SCC 1, 117 ¶ 104.

[150] *See* Krishnaswamy, *supra* note 7, at 374.

[151] Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.

[152] *See* Krishnaswamy, *supra* note 7, at 374.

[153] *Id.*

[154] *Id.* at 375.

[155] *Id.*

[156] *Id*.

[157] BS Web Team, *SC restores Congress' rule in Arunachal Pradesh: A timeline of events so far*, BUSINESS STANDARD NEW DELHI (Jul. 23, 2016, 11:38 AM), https://www.business-standard.com/article/politics/sc-restores-congressrule-in-arunachal-pradesh-a-timeline-of-events-so-far-116012700422_1.html.

[158] *See* THIRUVENGADAM, *supra* note 21, at 86.

[159] *See* Krishnaswamy, *supra* note 7, at 374.

in the tortuous saga of Article 356."[160] Reserving judgement appears to have been the safer call, because while traditional regional emergencies have been curtailed, the Supreme Court sanctioned its use to alter asymmetric federalism in Jammu and Kashmir.

B. Asymmetric Federalism in the Indian System

Classic federal systems treat all constituent units equally and are therefore thought of as "symmetric."[161] The United States Constitution exemplifies symmetric federalism because there is no specific mention or special treatment of any state in its text. In contrast, "asymmetric federalism" refers to the granting of different rights to different federal subunits, including via increased powers of self-government, often in recognition of a state's unique ethnic, linguistic, or cultural history.[162] While the scholar who coined the term "asymmetric federalism" used the term pejoratively, largely because of its perceived unfairness and potential for secession, it has since been viewed more positively.[163] In particular, asymmetric federalism in India fits within a broader conception of the Indian Constitution as "holding together" diverse and sometimes discontented subunits rather than a "coming together" Constitution like the United States that was more focused on equal footing between various states.[164] Asymmetries help respond to specific needs of a constituency and can arise in response to demands from mobilized groups or as a condition of ratification or accession by a subunit.[165] Further normative justifications for asymmetrical federalism include the benefits of recognizing the unique needs of specific geographical areas and tailoring a system that works best for all players.[166] It is interesting that India, which has fully embraced affirmative action in education and employment, has similarly adopted a form of affirmative action for different states.

Whatever its justifications, asymmetry is a critical part of Indian federalism, and the Indian Constitution's approach to addressing ethno-linguistic and regional diversity.[167] The authority of Parliament to admit and constitute new states subject to special, asymmetric provisions is near-plenary given a Supreme Court holding from 1994, so long as the provisions comport with the Basic Structure of the Constitution.[168] There are two primary sources of asymmetric federalism in the Indian Constitution: first, measures that allow for advanced levels of autonomy and self-government, and second, measures that mandate positive discrimination in certain states to mitigate inequality.[169] This section is primarily concerned with the first category given it presents the stronger federalism-related issues.

Article 370 regarding Jammu and Kashmir falls into this first category. Jammu and Kashmir was the only state in India which had its own constitution and negotiated special

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[160] *See* THIRUVENGADAM, *supra* note 21, at 86.

[161] *Id.* at 89.

[162] *See* Tillin, *supra* note 47, at 540.

[163] *See* THIRUVENGADAM, *supra* note 21, at 89 (citing Charles Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, 27(4) J. of Pol. 861, 861-74 (1965)).

[164] *Id.*

[165] *See* Tillin, *supra* note 47, at 540-41.

[166] *Id.*

[167] *Id.*

[168] RC Poudyal v. Union of India (1994) SCC (Supp) 1 324.

[169] *See* Tillin, *supra* note 47, at 540-41.

terms regarding its accession in the wake of a violent conflict between India and Pakistan.[170] Jammu and Kashmir was formerly a Princely State comprised mostly of Muslims, and because of its strategic location became an object of contention between the newly partitioned countries.[171] Article 370 was debated extensively between Nehru and Sheikh Abdullah, who led Jammu and Kashmir, and the final version exempted the state from several constitutional provisions that governed other subunits.[172] Parliament could only regulate Jammu and Kashmir in relation to very narrow areas like defense and foreign affairs, and further legislation could only be passed with the "concurrence" of the state assembly.[173] Abrogation or amendment of Article 370 could only be actioned after the Constituent Assembly of Jammu and Kashmir consented, which occasionally would voluntary give more legislative powers to the center.[174]

Further asymmetric provisions are housed in Article 371, granting higher degrees of autonomy to several states in India's northeastern region in response to protracted armed conflict and rebellions in the area.[175] Articles 371 A and G were passed in response to armed rebellions in Nagaland and Mizoram, respectively, and require the state legislatures to consent before a Parliamentary law regarding religious practice, social practice, certain land transfers, and customary law can apply in the states.[176] Similar provisions apply to the state of Sikkim, including a system of reservations that would otherwise violate the constitutional requirement of one-person, one-vote.[177] In sum, the Indian Constitution has numerous asymmetric provisions which are necessary to hold together an incredibly diverse array of territorial and ethno-linguistic communities.

C. The New Threat to Asymmetric Federalism

In December 2023, the Indian Supreme Court signed off on an expansive use of the regional emergency power, which, if not contained, could have serious implications for the federal system. On August 6th, 2019, the Union government repealed Article 370, thereby revoking Jammu and Kashmir's special status, as discussed above.[178] The central government had previously declared a state of emergency in Jammu and Kashmir, dissolving the state legislature and granting Parliament legislative authority over the state.[179] The day before, on August 5th, the President issued a presidential order interpreting Article 370(3), regarding amendability, to require consent by Jammu and Kashmir's "legislative assembly" rather than a "constituent assembly", the latter being much more onerous to convene.[180] The Parliament (acting as the Jammu and Kashmir legislature) then voted to abrogate Article 370 without

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[170] *Id.*
[171] *Id.* at 545.
[172] *Id.*
[173] *Id.* at 546.
[174] *Id.*
[175] *Id.* at 556.
[176] *Id.*
[177] *Id.* at 557.
[178] *Challenge to the Abrogation of Article 370*, SUPREME COURT OBSERVER (Feb. 17, 2024), https://www.scobserver.in/cases/challenge-to-the-abrogation-of-article-370-case-background/.
[179] *Id.*
[180] *Id.*

any approval or consultation with the affected state government.[181] The central government then bifurcated the state of Jammu and Kashmir into two union territories, which have a lesser degree of autonomy than states.[182] This novel usage of regional emergency authority to abrogate a significant aspect of asymmetrical federalism and then demote the state to a union territory was immediately challenged in court.[183]

On December 11, 2023, a five-judge bench of the Supreme Court unanimously upheld the abrogation of Article 370 primarily on the grounds that Article 370 was a temporary measure intended to achieve Jammu and Kashmir's integration into India.[184] The Supreme Court declined to hold that the central government could not take irreversible actions on behalf of the state during a period of President's Rule, largely based on reasoning around the state's lack of sovereign powers.[185] Chief Justice Chandrachud wrote that "the State of Jammu and Kashmir did not retain an element of sovereignty when it joined the Union of India," relying on various proclamations and textual provisions contemporaneous with Kashmir's accession to India.[186] The Court declined to respond to the intuitive objection that in this case the Union was essentially being asked to consent to an action that it decided to initiate at the permanent expense of the State, which was stripped of its voice.[187] In addition, the Court declined to find *mala fide* or deception on the part of the Union government in the entire abrogation process.[188] Commentators have noted that while the full measure of Jammu and Kashmir's autonomy had gradually been eroded over a series of enactments, these measures were all carried out with the concurrence of the state assembly.[189] It seems significant that this seminal decision to abrogate Article 370 altogether was taken while the assembly was dissolved. The Court also held that the invocation of Article 3 to split and demote Jammu and Kashmir was a valid "culmination of the process of integration" and took the Solicitor General at his word that statehood would be restored at an unspecified future date.[190]

While *In Re Article 370* was significant for its denial of regional autonomy in Jammu and Kashmir, the expansive use of Article 356 emergency powers creates troubling implications for the future of asymmetrical federalism in India. It is particularly concerning that the Court sanctioned a weaponized use of regional emergency powers against the only Muslim-majority state in India. The invocation of President's Rule is still governed by *S.R. Bommai* and its progeny, but once the emergency is declared, it could be possible for the Union Parliament to give its assent to alterations of constitutional asymmetries acting on

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *See* In Re Article 370 of the Constitution, AIR 2019 SC 29796.

[185] HT News Desk, *Article 370 Abrogation in J-K constitutionally valid: Supreme Court backs Centre in landmark verdict*, HINDUSTAN TIMES (Dec. 11, 2023).

[186] *Id.*

[187] Anuradha Bhasin, *The Supreme Court's Verdict on Article 370 Brushes Aside Both Legality and History*, SUPREME COURT OBSERVER (Dec. 18, 2023), https://www.scobserver.in/journal/the-supreme-courts-verdict-on-article-370-brushes-aside-both-legality-and-history/.

[188] *Id.*

[189] *Id.*

[190] *Id.*; *see* HT News Desk, *supra* note 186; In Re Article 370 of the Constitution, AIR 2019 SC 29796, ¶ 420.

behalf of the state assembly. The Article 370 judgement made specific reference to asymmetric federalism, including the provisions in Article 371-371J, and further acknowledged that asymmetric federalism is a part of the Basic Structure of the Indian Constitution.[191] The Court acknowledged that Jammu and Kashmir joined India subject to negotiated autonomy within the asymmetrical federalism model.[192] This pro-federalism and pro-asymmetry language is surprising given the ultimate verdict and is hard to square as logically consistent. The Court ultimately held that Jammu and Kashmir lacked "internal sovereignty" and therefore its asymmetric protections could be abrogated, but it's not clear what the connection between the rationale and the holding is, and whether it can be extended to other states in the Article 371-371J list.[193]

Immediate questions were raised about whether the same playbook could be used to amend special provisions impacting the northeastern states of Manipur, Assam, Nagaland, Arunachal Pradesh, Sikkim, and Mizoram.[194] Home Minister Amit Shah attempted to assuage these concerns by stating that "Article 371 will not be touched," possibly because it would not be politically favorable to do so.[195] Unlike Jammu and Kashmir, which has been a sought-after, contested region and has been the subject of repeated warfare with Pakistan, the northeast states have a different history. Mizoram and Nagaland experienced bloody insurgencies for independence, and any abrogation of their special status could risk fresh bloodshed that both the ruling party and Indian public would be averse to.[196] Still, relying on the grace of the central government to avoid further asymmetric federalism encroachment does not seem like a sustainable strategy.

Instead, the Indian Supreme Court should guard against further threats to asymmetric federalism through a series of interpretive steps. First, the Court should cabin the holding of *In Re Article 370* using the *sui generis* nature of Jammu and Kashmir to ensure that the reasoning cannot be weaponized to effectuate further incursions on asymmetric federalism. There is support for this from the Article 370 decision itself, which makes repeated reference to the historical context and temporary nature of the asymmetric provisions at issue (the word "temporary" is used ninety times in the verdict). One of the justices that participated in the decision emphasized that the verdict could not be looked at from a "federalism point of view" and that what happened could not be replicated in other circumstances.[197] Ostensibly, this is because of the unique context of Kashmir's accession which included a Constituent Assembly, a state Constitution, and gradual integration by the

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[191] V. Venkatesan, *Supreme Court's Article 370 judgment leaves crucial questions unanswered on federalism and sovereignty*, FRONTLINE (Dec. 16, 2023, 12:04 PM), https://frontline.thehindu.com/columns/legal-acumen-v-venkatesan-supreme-courts-judgment-on-article-370-a-setback-to-asymmetric-federalism/article67645407.ece; In Re Article 370 of the Constitution, AIR 2019 SC 29796, ¶ 164.

[192] *Id.*

[193] *Id.*

[194] Akshat Jain, *Special status to 12 states, 6 in Northeast – what is Article 371, which govt has 'no plans' to amend*, THE PRINT (Aug. 24, 2023, 4:52 AM), https://theprint.in/theprint-essential/special-status-to-12-states-6-in-northeast-what-is-article-371-which-govt-has-no-plans-to-amend/1728294/.

[195] *Id.*

[196] *See* Tillin, *supra* note 47, at 556.

[197] Justice Sanjay Kishan Kaul, *Article 370 verdict cannot be looked at from a federalism point of view*, TIMES OF INDIA (Dec. 29, 2023, 8:20 AM), https://timesofindia.indiatimes.com/india/article-370-verdict-cannot-be-looked-at-from-a-federalism-point-of-view-justice-kaul/articleshow/106383581.cms .

issuance of several governmental orders which gave increasing powers to the central government.[198] Some may question whether these are salient or relevant differences as compared to how other states joined India, and others may debate this historical account, but either way it gives the Court a useful out when a future government asks it to sanction an abrogation of an asymmetrical provision in an emergency posture.

Second, the Court should exercise an elevated level of scrutiny of the justifications for a President's Rule declaration which subsequently results in the permanent alteration of an asymmetric provision. The point of several asymmetric federalism provisions is to provide a mechanism for state assent before an encroachment by the federal government into certain protected areas occurs. In the context of Nagaland and Mizoram, this was a critical part of the peace deals which ended armed conflict and ultimately brought rebelling factions into the government.[199] It defies logic that the central government can somehow act as the state and approve a permanent degradation of state autonomy through an emergency mechanism. Such legislative acts should be presumptively invalid, absent some specific historical or contextual factors like those that might have been present in the Article 370 case.

Finally, the Court should consider invoking the Basic Structure Doctrine to invalidate amendments which would destroy significant aspects of asymmetric federalism or that would alter and degrade states' territorial integrity. Author Kritika Vohra advanced a powerful argument that the Court should invoke the Basic Structure Doctrine whenever regional emergency powers are used by the center to permanently disadvantage a state.[200] This is a powerful and well-justified position, but the Court unfortunately rejected it in signing off on the abrogation of Article 370. Considering the Article 370 decision, which validated asymmetric federalism as a part of the Basic Structure, the Supreme Court should live up to its words and invalidate an amendment that would enact a wholesale abrogation of asymmetric state protections. This could similarly be used in a situation where the federal government might seek to demote a state to a union territory or substantially redraw state boundaries, despite that state having asymmetric protections in the Constitution. While these interpretive moves will not bring back Jammu and Kashmir's special status, they can help stop the bleeding and confine that decision to its highly specific context.

IV. Legislative Competency Disputes

The renewed threat posed by the central government's regional emergency powers demands a fresh examination of another key area of federalism jurisprudence: legislative competency disputes. Schedule Seven of the Indian Constitution dictates what subjects states can legislate on and is arguably the second most critical provision regarding state sovereignty after the regional emergency power. Legislative competencies are distributed between the Union and states in three lists: Union, State, and Concurrent. This extensive listing presents more specificity than constitutions like that of the United States, which simply list out the legislative competencies of the federal government. However, an overly simplistic and

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[198] *Id.*

[199] *See* Tillin, *supra* note 47, at 556.

[200] Kritika Vohra, *Responding to Democratic Decay in South Asia: The 'Federalism Constraint' on Regional Emergency Powers in India*, 15 ICL J., 163, 204-05 (2021).

constrained reading of the Schedule Seven lists with a pro-center bias will lead to an incremental diminution of state power over time, as demonstrated by a long line of Supreme Court cases. Instead, the Court must make a conscious effort to read state powers expansively, in part by making use of unwritten principles which can also be seen in American federalism jurisprudence. Reframing legislative competency jurisprudence in this manner can serve as a prophylactic measure in response to the threats to federalism and state sovereignty arising from *In Re Article 370*.

A. Framework of Schedule Seven

The legislative competencies are listed exhaustively in Schedule Seven of the Constitution with ninety-seven subjects in the Union List ("List I"), sixty-six on the State List ("List II"), and fifty-two on the Concurrent List ("List III").[201] By way of example, only the federal government can levy income taxes (List I) while states are exclusively permitted to impose land and property taxes (List II).[202] Article 246 spells out how power can be exercised over the subjects in each of the three lists.[203] Per Article 246, parliament is given exclusive authority to legislate in areas in List I, even if that subject can plausibly read to exist in Lists II or III as well.[204] Additionally, Parliament can legislate on a subject if it is in the List III concurrent competencies even if that subject can be plausibly read to exist in List II.[205] In contrast, states have exclusive legislative domain over List II subjects unless that subject or any part of it also appears in List I or List III.[206] Finally, residuary powers that are not listed in Schedule Seven are vested with the federal government, unlike the Tenth Amendment of the United States Constitution which grants residuary powers to the states.[207] The decision to vest residuary powers with the Union was a point of contention during the Constituent Debates, and split along religious lines with the Hindu groups asking for residual power to vest with the center while Muslim groups wanted residuary power in the provinces to preserve minority protections.[208]

Just from a cursory look at Schedule Seven, the federal government has a more dominant position in the legislative domain compared to state assemblies. List I contains both a numerically higher number of subjects and more significant subjects like defense, foreign trade, railway administration, income tax, corporate tax, and interstate commerce.[209] The aforementioned Article 246 "tiebreaker" rules mean that List I items will override List II and III subjects in the case of conflict. The Indian Supreme Court has borrowed the "pith and substance" doctrine from Canada to assess what the essential character of a proposed

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[201] *See* Singh, *supra* note 41, at 454 (the precise number in each list fluctuates given constitutional amendments).

[202] Louise Tillin, *Indian Federalism* in OXFORD INDIA SHORT INTRODUCTIONS SERIES (2019).

[203] *See* Singh, *supra* note 41, at 454.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *See* THIRUVENGADAM, *supra* note 21, at 83.

[209] Vankatesan Niranjan, *Chapter 26: Legislative Competence*, Oxford Handbook on the Indian Constitution, 466, 470 (2016).

law is in order to see if it falls within the Union, State, or Concurrent List.[210] In applying pith and substance, the Supreme Court has held that states have absolute control over certain matters that squarely fit in the state list.[211] In the case of a declared national or regional emergency per Article 356, the President may authorize Parliament to make laws on behalf of the state assemblies including those in List II.[212] The combination of pro-central mechanisms present in Schedule Seven have led the Court to consistently side with the central government in cases of ambiguity or dispute.

B. Pro-Center Constructions of Legislative Competencies

The Supreme Court has heard several legislative competency disputes, mostly brought by private litigants challenging the validity of a state regulation. In *State of West Bengal v. Union of India* (1963), the plaintiff state challenged Parliament's Coal Bearing Areas Act of 1957 which authorized the Union government to acquire coal-bearing land that had been vested to the states.[213] The Court rejected the challenge and, while acknowledging that the states had some measure of sovereignty, and that both List I and List II issues were implicated, held Parliament had superiority given the nature of Indian federalism and the strong federal interest in regulating coal-producing areas.[214] In a case decided shortly after, the Court had to evaluate whether the federal or state government had the authority to prescribe the medium of education in state universities in the state of Gujurat.[215] Item 66 in List I provides that the federal government can legislate on "standards in institutions for higher education" but Item 11 of List II gave states similar authorities over "Education including universities".[216] The Court held that to the extent these two provisions overlapped, "the power conferred by . . . List I must prevail over the power of the State under . . . List II."[217] These early cases show a high degree of deference to the federal government when subjects in different lists come into conflict. Under this jurisprudential framework, states need to be extremely wary that when they pass new legislation, they do not inadvertently brush against a competency in List I. The logic of such opinions seems to be based on a generalized assumption that the quasi-federal nature of the Indian Constitution requires siding with the center in ambiguous cases, rather than because of a requirement from the constitutional text.

The Supreme Court went even further in *Union of India v. Harbhajan Singh Dhillon* (1971), which involved the residuary powers not mentioned explicitly in Schedule Seven.[218] The case involved a wealth tax levied by the central government which included a tax on agricultural land, even though agricultural land was explicitly exempted from Item 86 in List I regarding the central government's taxing powers.[219] Item 49 of List II covered "Taxes on

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[210] *Id.*
[211] State of Bombay v. F.N. Balsara, 1951 AIR 318.
[212] India Const. arts. 250, 256.
[213] State of West Bengal v. Union of India, (1963) 1 SCR 371.
[214] *Id.*
[215] Gujurat University v. Krishna Ranganath Mudholkar, (1963) 3 SC 122.
[216] India Const., Schedule 7.
[217] *Id.*
[218] Union of India v. Harbhajan Singh Dhillon, (1971) 2 SCC 779.
[219] *Id.*

land and buildings" and therefore the respondent argued that this tax could be only be levied by the state governments.[220] Undeterred, the Court took an expansive reading of the residual powers clause, coupled with Item 86 of List I and held that the Union tax could be sustained on this basis, despite land taxes being included on List II.[221] With such an overbroad reading of the residuary legislative powers of Parliament, it is hard to imagine which areas of state legislation would be off limits from central encroachment. In addition, when it comes to military and security matters, the Supreme Court has taken an expansive view of federal authority even though the first Item in List II is maintaining "public order."[222]

In more recent cases, the Court has continued to lean on the "quasi-federal" construction to justify siding with the Union on legislative competency disputes. In *Bhim Singh v. Union of India* (2010), the Supreme Court affirmed the practice of Centrally Sponsored Schemes, which provide significant conditional funding to states to enact certain policies that fall within List II.[223] States challenged this policy as being overly domineering and reducing their sovereignty, but the Supreme Court responded that the Constitution is "only quasi-federal" and upheld the federal scheme.[224] Taken together, these cases suggest that the ability of the federal government to encroach upon the state legislative domain is only limited by the imagination and discretion of those in the center. Given the expansive wording of the tiebreaker rules in Schedule Seven, and the capacious holdings in cases like *Dhillon*, it's hard to imagine any List II competency that is safe from encroachment. There appears to be a clear thumb on the scales in favor of the central government in legislative competency disputes, deriving less from the text of Schedule Seven and more on generalized principles of quasi-federalism.

C. Using Unwritten Principles and Statutory Interpretation to Read State Legislative Competencies Expansively

The Court has occasionally supported a more expansive view of state powers, largely relying on structural inferences of the constitutional structure and unwritten principles regarding the nature of federalism in India. When evaluating legislative competency disputes, the Court should always be mindful that an overly rigid application of the Lists and tiebreaker provisions can lead to a gutting of state powers as legislative challenges become more complex and laws passed in response will often touch on multiple subjects across Lists I, II and III. Given the pro-center tilt of many of the Article 256 tiebreaker provisions and Schedule Seven generally, it is unclear why the federal government should enjoy a presumption of power when ambiguities arise. Instead, a convincing argument can be made that in the face of textual silence or ambiguity, the Court should side with the states because if the Constitution intended for the central government to prevail, it would have said so clearly (as it has in several other provisions). In a few cases the Indian Supreme

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[220] *Id.*

[221] *Id.*

[222] Kartar Singh v. State of Punjab, (1994) 3 SCC 569; Naga People's Movement of Human Rights v. Union of India, (1988) 2 SCC 109.

[223] Bhim Singh v. Union of India, (2010) 5 SCC 538 (the "MPLADS" scheme in question provided funding for local projects via local MPs, with no approval required from state governments at all).

[224] *Id.*

Court has used reasoning that aligns with unwritten principles in United States federalism jurisprudence, namely in cases involving anti-commandeering, sovereign immunity, and limits on the dormant commerce clause. The Indian Supreme Court should continue to utilize these unwritten principles to situate competency disputes in the larger framework of Indian federalism and to stop the gradual curtailment of state competencies. This does not mean that the Indian Court should port over the *doctrines* of anti-commandeering or sovereign immunity from the United States, but merely that it might be helpful to consider the state interests that the United States Supreme Court discusses in these opinions.

In *International Tourism Corporation v. State of Haryana* (1981), the Court evaluated a challenge by petitioners regarding a "passengers and goods tax" that the State of Haryana had levied on trains that passed through the State.[225] Petitioners argued that this should be exclusively within the domain of the federal government because of several provisions in List I that reference railways and the residuary powers, while the State responded that subjects in List II gave them authority to levy the tax.[226] The Court upheld the state tax, holding that Parliament's residuary powers "cannot be so expansively interpreted as to whittle down the power of the State legislature" because this "might affect and jeopardize the very federal principle."[227] The Court went a step beyond calling for a limited interpretation of residuary powers and stated:

> The federal nature of the constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle state autonomy must be rejected.[228]

While this language is limited to the residuary powers, it is equally applicable when an enumerated List I subject conflicts with an aspect of List II. The Court should be mindful of how its interpretation might impact state autonomy and avoid overly broad interpretations that would prevent states from legislating on important topics which have a hook in List II. The more expansive a List I subject is read, the more likely it is to clash with a state competency (which the state will then lose because of the tiebreaker rules). In a similar vein, the more narrowly a List II subject is read, the more likely the federal government will win on the grounds that the issue in question is really a residuary power reserved for the center.

The focus on the autonomy of states and the dignitary harm that overly expansive federal programs can have has a corollary in caselaw arising from two doctrines in American federalism jurisprudence: state sovereign immunity and anti-commandeering. In the sovereign immunity context, the United States Supreme Court has emphasized that the doctrine serves to protect states from "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[229] While the Eleventh Amendment discusses sovereign immunity, the Court held that "sovereign immunity of the

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[225] International Tourist Corporation v. State of Haryana, (1981) 2 SCC 318.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996).

States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[230] In *Alden v. Maine*, Justice Kennedy repeatedly emphasizes that the states retained their dignity at the founding and that hauling states into state or federal court to defend against damages actions by private litigants would create a deep dignitary harm.[231] The Indian Court in *International Tourism Corporation* expresses a similar concern around state dignity, albeit in the context of interpreting legislative powers.[232]

In anti-commandeering cases, the United States Supreme Court has examined whether a federal policy overly domineers or directs states to obey a certain course of conduct. In *NFIB v. Sebelius*, the Supreme Court invalidated the onerous Medicaid requirements in the Affordable Care Act which allowed the federal government to completely terminate Medicaid funding if the states did not comply with certain requirements.[233] The Court held that it was impermissible for federal regulation to "commandeer[] a State's legislative or administrative apparatus for federal purposes" and that when "pressure turns into compulsion," the legislation violates principles of federalism.[234] The two primary reasons advanced for the unwritten anti-commandeering principle are that commandeering violates the residual and inviolable sovereignty of the states, and that a separation of powers issue occurs when voters cannot tell if federal or state officials are responsible for a certain policy.[235] While anti-commandeering deals with a coercive federal program and not necessarily a competency dispute, it still implicates the ability to "destroy or belittle state autonomy" as discussed in *International Tourism Corporation*.[236] These comparisons hinge less on the specifics of the anti-commandeering or sovereign immunity doctrines, but more on the willingness of the American Supreme Court to read state powers capaciously in the context of broader principles regarding the dignity and sovereignty of states. These normative considerations would be beneficial for the Indian Supreme Court to consider as it evaluates legislative competency disputes.

In another case involving taxing powers, *State of West Bengal v. Kesoram Industries* (2004), the Indian Supreme Court sided with the states using unwritten principles derived from structural inferences regarding the Constitution.[237] The dispute involved the taxing of coal, brick and other minerals, the regulation of which is in List II, subject to the Union's power to regulate and develop these industries in the national interest.[238] The Court held that even though the Union government had the authority to regulate these important national industries, "[t]he Union's power to regulate and control does not result in depriving the States of their power to levy tax or fees within their legislative competence without trenching upon the field of regulation and control."[239] In addition, the Court held that "[e]very effort should

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[230] Alden v. Maine, 527 U.S. 706, 713 (1999).

[231] *Id.* at 749.

[232] *See* International Tourist Corporation v. State of Haryana, (1981) 2 SCC 318.

[233] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012).

[234] *Id.* at 577.

[235] Printz v. United States, 521 U.S. 898, 919-25 (1997).

[236] International Tourist Corporation v. State of Haryana, (1981) 2 SCC 318.

[237] West Bengal v. Kesoram Indus., (2004) 1 SCR 564.

[238] Manish Tewari & Rekha Saxena, *The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism*, *in* COURTS IN FEDERAL COUNTRIES, 223, 247 (Nicholas Aroney & John Kincaid eds., Univ. Toronto Press 2017).

[239] *Id.*

be made as far possible to reconcile the seeming conflict between the provisions of the state legislation and the union legislation."[240] *Kesoram* is an example of the Court narrowly reading the potential interstate impact of a state law in order to validate legislation under List II. In *Jindal Stainless Ltd v. State of Haryana* (2016), the Court similarly upheld a state taxing scheme despite arguments that it violated parts of the Constitution that reserve aspects of free trade and interstate commerce to the federal government.[241] The Court affirmed the State's ability to levy these taxes because Constitutional provisions should be interpreted in a way that is mindful and respectful of state sovereignty in the federal system.[242]

These taxing cases have corollaries to American jurisprudence about the outer limits of the dormant commerce clause. The dormant commerce clause is an implied limitation on the states to regulate areas that might impact interstate commerce that is derived from the Commerce Clause.[243] The United States Supreme Court had previously held that an out-of-state seller must have some physical presence in a state for the state to require the seller to collect and remit sales taxes, creating a loophole for online retailers to operate untaxed.[244] In *South Dakota v. Wayfair*, the Court subsequently rejected the physical presence requirement and held that the dormant commerce clause was intended to prevent against economic discrimination by states but not to "relieve those engaged in interstate commerce from their just share of state tax burden."[245] In addition, the Court emphasized the sovereign powers of the states to sustain tax on economic activity and stated that its dormant commerce jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."[246] This case-specific analysis, which favors state legislative powers unless it clearly conflicts with an interstate subject, is highly analogous to both *Kesoram* and *Jindal Stainless*. The Indian Supreme Court should continue to use these unwritten principles when evaluating the impact of legislative competency disputes on state powers to offset the centralizing bias in Schedule Seven.

One response to this call to use unwritten principles is that if the text of Schedule Seven is so pro-center, this is an indication that legislative competency disputes are supposed to come out in favor of the federal government. Adopting unwritten principles could be seen as running away from the text in favor of a nebulous states' rights theory that is not present in the Constitution, but this does not follow. As constitutional law scholar Gautam Bhatia has argued, while it is undeniable that many aspects of Schedule Seven lean towards the center, this does not provide a normative justification that "gaps and silences" should be interpreted in favor of the central government.[247] The Court has assumed that in the face of genuine ambiguity, it should decide in favor of the central government because of the supposed constitutional preference for a strong center. However, Bhatia argues convincingly for a "road not taken" in which courts hold that because so many pro-center elements of the

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[240] *Id.*

[241] Jindal Stainless Ltd. v. Haryana, AIR 2016 SC 5617.

[242] *Id.*

[243] South Dakota v. Wayfair, Inc., 585 U.S. 162, 171 (2018).

[244] *Id.*

[245] *Id.* at 178-79.

[246] *Id.* at 179-80.

[247] Gautam Bhatia, *A Federal Framework and a Centralising Drift: Re-Assessing Federalism under the Indian Constitution*, (June 15, 2022),4, https://ssrn.com/abstract=4137112.

Constitution are explicit, ambiguities should be read to promote decentralization and not centralization.[248] In the *State of West Bengal* case, Justice Subba Rao provides an example of this alternative method of interpretation, writing: "One cannot encroach upon the governmental functions or instrumentalities of [the states] unless the Constitution expressly provides for such interference."[249]

Bhatia argues for a "federalizing approach" in which Courts take heed of the federal structure which predated 1950 as well as the heterogeneity in the existing Indian structure as normative justifications for federalism.[250] At the very least, this theory dispels the notion that the Court needs to have a thumb on the scales in favor of the central government in legislative competency disputes. Siding with the Union because of the central character of the Indian constitution has no support from a textual or normative perspective and is a half-baked method of statutory interpretation. Given how explicitly pro-center many aspects of Schedule Seven are, a convincing argument can be made that ambiguous cases are therefore meant to be resolved in favor of the states.

V. Conclusion

India is a federal democracy, comprised of sub-national units which retain elements of sovereignty and control within the constitutional system. Aspects of federalism predate Indian independence and were highly influential on the drafters of the Indian Constitution. However, there was a centralizing influence on the Constituent Assembly Debates, motivated by the legacy of Partition and the great challenges facing the newly independent India. A number of these centralizing elements made it into the Constitution and led some to classify the Indian system as "quasi-federal," a drastic oversimplification which has had serious implications on the country's federalism jurisprudence. Quasi-federalism does not accurately reflect the evolving importance and development of Indian federalism post-Independence, which includes an essential role of state identity to keep a diverse population together. Over time the Supreme Court has been an inconsistent guardian of federalism, in part because of an overreliance on the quasi-federal fiction. However, the Indian Supreme Court is still the best-suited institution to enforce federalism guardrails given its high degree of independence, expansive jurisdiction, and its role as the constitutional court of last resort.

Regional emergency declarations present a grave and existential threat to state sovereignty. While the Supreme Court implemented important rules around this highly partisan practice in *S.R. Bommai*, the mechanism is still ripe for abuse after the recent Article 370 decision. In order to contain the potential threat President's Rule poses to India's asymmetric federalism, the Court should take a series of steps to constrain its holding in *In Re Article 370* and use heightened scrutiny for comparable cases in the future. However, the renewed threat posed by the regional emergency power demands a reevaluation of other areas of federalism doctrine, including legislative competencies. In the domain of legislative competency disputes, the Court must avoid an overly rigid and pro-center application of the Schedule Seven subjects because doing so will lead to a whittling down of state power over

[248] *Id.* at 15.
[249] *Id.* at 17.
[250] *Id.*

time. Rather, the Court should make use of unwritten federalism principles in evaluating these cases (which have corollaries in American federalism jurisprudence), as it has done in the past.


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USE AND SOVEREIGNTY IN THE OUTER SPACE TREATY AND A SELECTIVE EXAMINATION OF THE U.S. COMMERCIAL SPACE LAUNCH COMPETITIVENESS ACT

Matthew Lively[*]

ABSTRACT

This article analyzes the terms "use" and "sovereignty" under the Outer Space Treaty (OST) Articles I (2) and II and recommends an amendment to the U.S. Commercial Space Launch Competitiveness Act of 2015 (CSLCA). It also recommends an accompanying shaping of international law to increase investor certainty in space resource extraction and use through the mechanism of private property rights. Tension exists between Articles I and II of the OST, the most authoritative source of international space law. Article I requires that the use of space "shall be carried out for the benefit and in the interests of all countries…and shall be the province of all mankind." Article II cabins Article I by stating that "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means[,]" limiting the use of sovereignty to legitimate extraction and use methods, including creation of private property rights. Scholars are divided over whether the OST prohibits creation of private property rights in space resources. Textual interpretation of "use" in Article I and its interaction with OST Article II, as well as teleological and intention-based inquiries into the meaning of "sovereignty" in Article II, suggest that the OST does not prohibit the creation of private property rights in space resources. Lack of clarity on this matter reduces certainty for investors, potentially harming investment incentives for space development. The Commercial Space Launch Competitiveness Act of 2015 (CSLCA) attempts to resolve this problem but likely stretches beyond what the OST permits by allowing the outright sale of space resources. The CSLCA should be amended to more clearly comply with the OST and to reify OST Article I. International law should be shaped to accomplish the same.

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I. INTRODUCTION

The Outer Space Treaty of 1967 (OST) begins:

> The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.[1]
>
> Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.[2]
>
> Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[3]

The commercial development of outer space is no longer the stuff of science fiction; it is occurring, and rapidly growing in economic and technological magnitude.[4] Civilian and military operations are increasingly reliant on satellite infrastructure[5] and some companies and entities have plans to begin space mining operations within the decade.[6] The economic

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[*] The content of this article does not reflect the opinion, position, or stance of any institution the author is or may be affiliated with.

[1] Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST], art. I, ¶ 1.

[2] OST, art. I, ¶ 2.

[3] OST, art. II.

[4] See Melissa J. Durkee, Interstitial Space Law, 97 WASH. U. L. REV. 423, 425 (2019); Gerardo Inzunza Higuera, What Got Us Here, Won't Get Us There: Why U.S. Commercial Space Policy Must Lie in an Independent Regulatory Agency, 73 HASTINGS L.J. 105, 127 (2022); Paul B. Larsen, Minimum International Norms for Managing Space Traffic, Space Debris, and Near Earth Object Impacts, 83 J. AIR L. & COM. 739, 741 (2018); D. Perry Rihl II, Cleaning Up the Mess: Incentivizing the Salvage of Orbital Debris, 10 GEO. MASON J. INT'L COM. L. 68, 75 (2019); John Thurston, Make "Space" for Innovation, 2023 B.C. INTELL. PROP. & TECH. F. 1, 1-2 (2023); ASHLEE VANCE, WHEN THE HEAVENS WENT ON SALE: THE MISFITS AND GENIUSES RACING TO PUT SPACE WITHIN REACH 129, 185, 426, 492 (1st ed. 2023). See generally William M. Callif, Be Wary of the Trojan Horse: A Commercial-Friendly Reading of the Outer Space Treaty as the Key to De-Escalating the Emerging Space Race Between the United States and China, 45 SUFFOLK TRANSNAT'L L. REV. 277 (2022); Akshaya Kamalnath & Hitoishi Sarkar, Regulation of Corporate Activity in the Space Sector, 62 SANTA CLARA L. REV. 375 (2022); Megan Alexa MacKay, Property Rights in Celestial Bodies: A Question of Pressing Concern to All Mankind, 104 MARQUETTE L. REV. 575 (2020).

[5] See Duncan Blake & Joseph S. Imburgia, "Bloodless Weapons"? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining them as "Weapons", 66 A.F. L. REV. 157, 161 (2010); Jackson Maogoto & Steven Freeland, The Final Frontier: The Laws of Armed Conflict and Space Warfare, 23 CONN. J. INT'L L. 165, 183-84 (2007); Caitlyn Georgeson & Matthew Stubbs, Targeting in Outer Space: An Exploration of Regime Interactions in the Final Frontier, 85 J. AIR L. & COM. 609, 609-10 (2020); Robert David Onley, Death from Above? The Weaponization of Space and the Threat to International Humanitarian Law, 78 J. AIR L. & COM. 739, 755, 759 (2013); Jameson Rohrer, Deciphering and Defending the European Union's Non-Binding Code of Conduct for Outer Space Activities, 23 DUKE J. COMP. & INT'L L. 187, 189, 192 (2012); John Yoo, Rules for the Heavens: The Coming Revolution in Space and the Laws of War, 2020 U. ILL. L. REV. 123, 145 (2020).

[6] *See* Karl Decena, *Digging Space: Miners to ignite race for outer space ore*, S&P GLOB.: MKT. INTEL. (Jan. 8, 2024), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/digging-space-miners-to-ignite-race-for-outer-space-ore-

opportunity of space mining, while somewhat temporally distant, is enormous. Financial experts' expectations for the size of the commercial space economy in the coming decades are in the trillions.[7] Furthermore, access to large quantities of precious metals in asteroid deposits could be critical to solving the various existential challenges that global society faces in the twenty-first century.[8]

However, there are many obstacles for the space mining industry to achieve liftoff.[9] This article focuses on a legal obstacle. The most authoritative source of international space law, the Outer Space Treaty of 1967, is silent on the subject of private property rights in outer space.[10] The resulting legal uncertainty of this absence, as well as some normative tension between OST Articles I and II, may have stymied commercial space development for decades.[11] The ongoing argument over whether OST Article II's non-appropriation principle allows or prohibits private property rights in space is one of the oldest and most prominent in space law scholarship.[12]

78269052#:~:text=NASA%20launched%20a%20mission%20in,%2C%20targeting%20near%2DEarth%20asteroids; Luke Dormehl, *Asteroid mining is almost reality. What to know about the gold rush in space*, DIGIT. TRENDS (Apr. 28, 2022), https://www.digitaltrends.com/space/beginners-guide-to-asteroid-mining/; Sarah Scoles, *In the Race for Space Metals, Companies Hope to Cash In*, UNDARK (May 8, 2024), https://undark.org/2024/05/08/asteroid-mining-space-metals/; Mike Wall, *Space mining startup AstroForge aims to launch historic asteroid-landing mission in 2025*, SPACE.COM (Aug. 21, 2024), https://www.space.com/asteroid-mining-astroforge-docking-mission-2025.

[7] *See* Tyler Burdon, *The Final Frontier: A Look at Private Mining Rights in Space*, 24 HOUS. BUS. & TAX L. J. 167, 168 (2024); Callif, *supra* note 4, at 296-97; Durkee, *supra* note 4; Kelsey Eyanson, *Billionaires Eclipse NASA: The Next Space Race Over National Regulation*, 60 HOUS. L. REV. 1181, 1189 (2023); Spencer Haywood, *Commercial Space Mining within the Framework of the Outer Space Treaty: Vexing Issue or Simple Solution?* , 62 U. LOUISVILLE L. REV. 813, 833 (2024); VANCE, *supra* note 4, at 492; Steven Wood, *Some Forward Thinking on Foundations Underpinning the Promethean Task of Planning Strategic Best Practices for Ownership, Licensing, and Enforcement of Patents in Outer Space, Launch, and Re-Entry*, 59 LES NOUVELLES 35, 35 (2024); Shriya Yarlagadda, *Economics of the Stars: The Future of Asteroid Mining and the Global Economy*, HARV. INT'L REV. (2022), available at https://hir.harvard.edu/economics-of-the-stars/.

[8] These challenges include population stabilization, clean energy transition, climate change, and potential kinetic threat protection from rogue asteroids. *See* RAM S. JAKHU, JOSEPH N. PELTON, YAW OTU MANKATA NYAMPONG, SPACE MINING AND ITS REGULATION 11-12 (2017). *See also* Brandon C. Gruner, *A New Hope for International Space Law: Incorporating Nineteenth Century First Possession Principles into the 1967 Space Treaty for the Colonization of Outer Space in the Twenty-First Century*, 35 SETON HALL L. REV. 299, 300-01 (2004); MacKay, *supra* note 4, at 578-81; Yarlagadda, *supra* note 7.

[9] *See* PHILIP DE MAN, EXCLUSIVE USE IN AN INCLUSIVE ENVIRONMENT: THE MEANING OF THE NON-APPROPRIATION PRINCIPLE FOR SPACE RESOURCE EXPLOITATION 140 (2016).

[10] Rory Bennett, *Property Rights in a Vacuum: A Moon Anarchist's Guide to Prospecting*, 63 ARIZ. L. REV. 229, 229 (2012); Matthew P. Hytrek, *Property Rights in Current Space Law: A Hindrance to Space Exploration*, 39 WHITTIER L. REV. 90, 104 (2018); FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 391 (3d ed.) (2024); Kurt Taylor, *Fictions of the Final Frontier: Why the United States Space Act of 2015 is Illegal*, 33 EMORY INT'L L. REV. 653, 656-57 (2019).

[11] *See* De Man, *supra* note 9, at xxv; FABIO TRONCHETTI, THE EXPLOITATION OF NATURAL RESOURCES OF THE MOON AND OTHER CELESTIAL BODIES: A PROPOSAL FOR A LEGAL REGIME 214 (2009).

[12] *See* MICHAEL BYERS & AARON BOLEY, WHO OWNS OUTER SPACE? INTERNATIONAL LAW, ASTROPHYSICS, AND THE SUSTAINABLE DEVELOPMENT OF SPACE 137 (2023); De Man, *supra* note 9, at 308; Haris A. Durrani, *Interpreting "Space Resources Obtained": Historical and Postcolonial Interventions in the Law of Commercial Space Mining*, 57 COLUM. J. TRANSNAT'L L. 403, 415 (2019); Francesca Giannoni-Crystal, *Jurisdictional Choice for Space Resource Utilization Projects: Current Space Resource Utilization Laws*, 22 SANTA CLARA J. INT'L L. 1, 10 (2024); Josselin Lavigne, *Is Space the New Wild West of the 21st Century?*, 42

Article I encourages state use of space, but Article II proscribes any assertion of sovereignty through appropriation, which some argue has had the effect of discouraging the economic development of space by allegedly constraining sovereign actions like establishing property rights.[13] This tension, however, is not unresolvable. The United States Commercial Space Launch Competitiveness Act of 2015 (CSLCA) offers most of a solution through the creation of private property rights.[14] This solution is reinforced through application of all three primary interpretive methods of the Vienna Convention of the Law of Treaties[15] (VCLT) to parts of OST Articles I and II.

This article contributes to space law scholarship through its novel, narrow focus on the individual and synergistic meanings of two of the most important words in the OST: "use" in Article I (2) and "sovereignty" in Article II. "Use" is analyzed textually and in its interaction with Article II and "sovereignty" is analyzed with teleological and intent-based approaches. All of these methods of treaty interpretation stem from the VCLT. The article also joins the chorus of arguments reconciling the OST and private property rights in space[16] and provides the novel contribution of showing that the CSLCA, while a step in the right direction of resolution of the tension between OST Articles I and II, likely goes beyond the OST's limits by permitting the outright sale (a sale involving the transfer of traditional, comprehensive notions of possession and ownership that include the right to exclude) of extracted space resources.[17] The sale of extracted resources authorized by the CSLCA is probably partially constituted by a right to exclude.[18] The OST prohibits such a right in space through Article II's non-appropriation principle, particularly through its contextualization beside the word "use" in Article I (2), which prohibits the same. Scholars have overlooked this important complicating variable in debates of the CSLCA's legality regarding private property rights in space resources.[19]

While the CSLCA might overreach, it still attempts to resolve the increasingly urgent question of whether the OST permits the creation of private property rights in space resources. The magnitude of incentive around extraction of these resources is growing rapidly and the extraction and use of these resources has great potential.[20] Increasing certainty for investors, which can in turn increase the likelihood of the extraction and use of space resources, should be a concern of the law surrounding these resources. Facilitating investor certainty fits neatly under the purpose of OST Article I,[21] and the CSLCA is explicit in its purpose to facilitate the economic development of space, going so far as to command

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B.U. INT'L L.J. 263, 269-70 (2024); Taylor, *supra* note 10, at 656-57; Jared E. Willis, *Sovereignty in Space: Finding a Source of Private Property Rights in the Final Frontier*, 14 Elon L. Rev. 361, 364, 366, 370-71 (2022).

[13] *See* Commercial Space Launch Competitiveness Act, 51 U.S.C. § 51303 (2015).

[14] Public Law No: 114-90 [hereinafter CSLCA], § 51303.

[15] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

[16] *See infra* notes 161, 165-71.

[17] *See infra* note 60.

[18] *See generally* Merrill, *infra* note 197.

[19] De Man has raised the issue of sale under the OST but has not applied it to the CSLCA. *See infra* note 61.

[20] *See supra* notes 7-8.

[21] *See* OST, Art. I. Space "shall be the province of all mankind."

the Secretary of Transportation to "promote commercial space launches and reentries by the private sector."[22]

The CSLCA arguably solidifies, as much as an OST compliant statute probably could, certainty for American space investors.[23] But with the CSLCA's potential breach of the OST, international uncertainty, both for American and non-American investors, still looms.[24] The CSLCA should be amended to exclude the outright sale of space resources, implementing an alternative but still incentivizing mechanism of limited property rights. Article VIII of the OST provides guidance here: it establishes principles of jurisdiction and control over space objects that do not amount to exertions of sovereignty. Amending the CSLCA to prohibit outright sale through limited property rights could increase international certainty for investors and offer a feasible and beneficial way forward for authoritative international interpretation of OST Articles I and II, and particularly their use of the terms "use" and "sovereignty," regarding the extraction and use of space resources.

This article proceeds as follows: The following section of this introduction discusses this article's limitations of scope and their justifications. The body of the article then proceeds in three Parts. Part II provides the relevant legal background to the issue of the creation of private property rights in space resources under the OST, beginning with the OST, then mentions the Moon Agreement and its ineffectuality for resolution of this matter, and concludes with a description of the relevant components of the CSLCA. Part III shows that textual analysis of "use" in OST Article I, its interaction with Article II, and teleological and intention-based analyses of "sovereignty" in Article II, suggest that the creation of limited property rights in space resources is permitted by the OST. Part III further provides scholarly commentary and suggested mechanisms to accomplish the use of space under the OST as it relates to private property rights as well as commentary criticizing such approaches. With conceptualization and contextualization accomplished, Part IV outlines the present problem of the OST's prohibition on the outright sale of space resources. Such sales are probably transitively prohibited under OST Article II, since they are likely grounded in the absolute right to exclude. A pro-commercial and OST-complying amendment to the CSLCA and modification of international law are then recommended, the latter of which is complemented by discussion of implementation mechanisms. Part V concludes.

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[22] CSLCA, § 113(b)(1).

[23] See Stephen DiMaria, *Starships and Enterprise: Private Spaceflight Companies' Property Rights and the U.S. Commercial Space Launch Competitiveness Act*, 90 ST. JOHN'S L. REV. 415, 417 (2016); Durrani, *supra* note 12; Giannoni-Crystal, *supra* note 12, at 27-29; Yutaka Osada, *Governance of Space Resources Activities: In the Wake of the Artemis Accords*, 53 GEO. J. INT'L L. 399, 452 (2022); P.J. Blount & Christian Robison, *One Small Step: the Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploration of Resources in Outer Space*, 18 N.C. J.L. & TECH. 160, 175 (2018).

[24] *See* Durrani, *supra* note 12, at 415 ("If there is significant international disagreement about the legality of space mining or the CSLCA itself, then this uncertainty can deter investors from funding commercial space companies that are beginning to develop mining technologies[.]"); *See also* Durrani, *supra* note 12, at 416; Michael Dodge, *Legal Controversies in Commercial Space Resource Extraction*, 71-SPG FED. L. 54, 55 (2024); Haywood, *supra* note 7, at 824-25.

A. Limitations of Scope and their Justifications

It is important to make four disclaimers about the scope of this article before moving to its argument. First and foremost, this article does not discuss initial extraction of space resources. Thinking about how to commence space resource extraction operations in accordance with Article I (2), which mandates that such resources eventually be used, raises huge questions of line-drawing: Do you need to know the whole manufacturing chain and what the final seller and buyer are intending to use the resource for, and if that use complies with all components of the OST? And if not, how certain do you have to be about the resource's use, and what are the metrics for that evaluation? These are vexing questions far beyond the scope of this article, which focuses on a few key terms of the OST, the CSLCA, and the validity of property rights *after* extraction has occurred.[25] However, the reader should note that this element of space law is foundational for the use of space resources.[26] If you cannot get the stuff out of the ground, you probably cannot (meaningfully) argue about whose stuff it is.[27]

Second, this article makes a positivist assumption of property rights, understanding all such rights to flow in the first place from the sovereign.[28] Alternative bases, such as natural law or pure realist conceptions are not discussed as they would quickly balloon beyond the article's scope.

Third, this article will not substantively discuss the term "celestial bodies" in Article II beyond this introduction. Interpretations range from "any object in space"[29] to "all of the natural bodies within the solar system"[30] to "types of activity in space."[31] The definition of "celestial body" is a discrete dimension of the problem that is separable from the present thesis. Readers interested in the centering of "celestial objects" in analyses of the OST and property rights should refer to Philip DeMan who has posited a comprehensive and insightful thesis on the matter.[32]

Fourth and finally, this article takes the normative position that the continuance of and compliance with the OST is more desirable than alternatives for space development that involve abandonment of the instrument and will not discuss those approaches beyond this

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[25] *See generally* Durrani, *supra* note 12, for one approach to this question, finding that the CSLCA only entitles Americans to property rights in space resources *after* they have been extracted.

[26] My thanks to Diane Tracht for the insight to explicitly note this limitation.

[27] One Mr. Nemitz tried in U.S. court. In *Nemitz v. United States*, No. CV-N030599-HDM (RAM), 2004 WL 3167042 (D. Nev. Apr. 26, 2004), *aff'd sub nom. Nemitz v. N.A.S.A.*, 126 F. App'x 343 (9th Cir. 2005), Mr. Nemitz asserted a claim of ownership over an asteroid and attempted to sue NASA for rent for its spacecraft that landed on the asteroid. He was unsuccessful. *See* Blount & Robison, *supra* note 23, at 166.

[28] *See Legal Positivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3, 2003) https://plato.stanford.edu/entries/legal-positivism/ (last substantive revision Dec. 17, 2019); Taylor, *supra* note 10, at 666; K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L. J. 1487, 1491-92 (2024).

[29] *See* Michael Dodge, *Celestial Agriculture: Law & Policy Governing the Use of* In Situ *Resources for Space Settlements*, 97 N.D. L. REV. 161, 175 (2022).

[30] Leslie I. Tennen, *Enterprise Rights and the Legal Regime for Exploitation of Outer Space Resources*, 47 U. PAC. L. REV. 281, 284 (2016).

[31] *See* DE MAN, *supra* note 9, at 73.

[32] *See id.* at xxiv, xxix, 85, 98, 180-81.

section; such approaches are myriad.[33] The OST has (mostly) kept the peace in space for almost six decades, a remarkable achievement given its creation in the tense Cold War context and amidst current escalating geopolitical tensions.[34] Abandonment of the OST by any of the major spacefaring powers would invite disarray and conflict into the space environment.[35] A related (policy and norms based and not doctrinal) criticism is that any substantive modification to the OST that leans towards permissiveness of property rights, since it will favor the biggest space player, the United States,[36] could risk destabilizing the OST framework by incentivizing China and Russia, the other two major space powers, to exit the treaty and focus on their own space bloc,[37] heightening geopolitical tensions in space policy.[38] This is a reasonable criticism, but I believe the OST was meant to evolve in order to facilitate the use of space in accordance with its purpose, and that the benefit of investor certainty and facilitation of space development through advancement of a permissive property regime, and its resultant benefit for humanity, outweighs the risk of this potential increase in geopolitical destabilization of space policy.[39] Further discussion of that problem is beyond the scope of this work, but it is important to keep in mind.

II. Background: Space Law

Space law can be characterized as an emergent polycentric regime complex, wherein a large corpus of international law and many national laws relating to space activities overlap and potentially conflict.[40] Ambiguity about international space law, particularly around

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[33] See Andrew R. Brehm, *Private Property in Outer Space: Establishing a Foundation for Future Lunar Exploration*, 33 WIS. INT'L L. J. 353, 365 (2015); Haywood, *supra* note 7, at 826, 830.

[34] *See* Melissa J. Durkee, *Space Law as Twenty-First Century International Law*, 6 J. L. & INNOVATION 12, 14 (2023); Durkee, *supra* note 4, at 438; Joshua La Bella, *Star Wars: Attack of the Anti-Satellite Weapons in Anticipatory Self-Defense*, 52 U. PAC. L. REV. 733, 737 (2021); Braden Leach, *Lawfare for the Future*, U. ILL. J. L. TECH. & POL'Y 51, 61 (2023); JIM SCIUTTO, THE RETURN OF GREAT POWERS: RUSSIA, CHINA, AND THE NEXT WORLD WAR 214-15 (2024); Cort S. Thompson, *Avoiding Pyrrhic Victories in Orbit: A Need for Kinetic Anti-Satellite Arms Control in the Twenty-First Century*, 85 J. AIR. L. & COM. 105, 161-62 (2020); Paul B. Larsen, *Outer Space: How Shall the World's Governments Establish Order Among Competing Interests?*, 29 WASH. INT'L L.J. 1, 34-35 (2019); Bret Austin White, *Reordering the Law for a China World Order: China's Legal Warfare Strategy in Outer Space and Cyberspace*, 11 J. NAT'L SEC. L. & POL'Y 435, 453 (2021).

[35] *See* Haywood, *supra* note 7, at 830-31; Scott J. Shackelford, *Governing the Final Frontier: A Polycentric Approach to Managing Space Weaponization and Debris*, 51 AM. BUS. L.J. 429, 440, 448, 460-64 (2014).

[36] *See* VANCE, *supra* note 4, at 129. *See also* Garret S. Bowman, *Securing the Precipitous Heights: U.S. Lawfare as a Means to Confront China at Sea, in Space, and Cyberspace*, 34 PACE INT'L L. REV. 81, 93 (2021); Jesse Oppenheim, *Danger at 700,000 Feet: Why the United States Needs to Develop a Kinetic Anti-Satellite Missile Technology Test-Ban Treaty*, 38 BROOK. J. INT'L L. 761, 789 (2013); Thompson, *supra* note 34, at 157; White, *supra* note 34, at 438; John Yoo, *Rules for the Heavens: The Coming Revolution in Space and the Laws of War*, U. ILL. L. REV. 123, 131 (2020).

[37] *See* Durkee, *supra* note 34, at 13-15; Haywood, *supra* note 7; Leach, *supra* note 34, at 61-65; SCIUTTO, *supra* note 34, at xi, 214-15, 225-37, 284-86.

[38] *See supra* note 35.

[39] *See supra* notes 7-8.

[40] *See* Shackelford, *supra* note 35, at 464-66. "A space regime complex has been created by the increasing number of space powers, the relative fragmentation of governance, and the role of the private sector in space." *Id.* at 464.

resource extraction and use, is enhanced by scarcity of state practice.[41] For the purposes of the question of private property rights in space resources and this analysis of the CSLCA, the most important sources of space law are the Outer Space Treaty (particularly Articles I, II, VI, and VIII), the Moon Agreement (the failed lunar successor to the OST), and the U.S. Space Launch Competitiveness Act (only its provisions on property rights and international law compliance). There are many other important sources of space law such as the treaty progeny of the OST,[42] the Artemis Accords,[43] policy statements of expert third party groups,[44] non-binding agreements,[45] customary international law,[46] and historical practice.[47] Substantial inclusion of those sources here would distract from the article's contribution as a work of narrow treaty interpretation of OST terms and statutory analysis of the CSLCA, and so are not much discussed.

A. The Outer Space Treaty of 1967

Space law has been primarily international for most of its history.[48] Since 1967, the primary international instrument in the field of space law has been the OST. It currently has eighty-nine signatories and 115 parties, including all the major spacefaring states.[49]

The OST is, among other things, a product of Cold War politics, informed by both noble aspirations of international cooperation and realist geopolitical concerns.[50] The OST has defined, shaped, constrained, and directed the development of space law. Some provisions of the OST are so universally followed that they have additionally crystallized into customary international law, binding non-party states.[51]

Articles I and II are the most important articles for understanding whether the OST permits private property rights in outer space. Property rights in space are a subject of great conflict, particularly over whether Article II of the OST permits private appropriation of

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[41] *See* P.J. Blount, *Outer Space and International Geography: Article II and the Shape of Global Order*, 52 New Eng. L. Rev. 95 (2018). *See also* GBENGA ODUNTAN, SOVEREIGNTY AND JURISDICTION IN THE AIRSPACE AND OUTER SPACE: LEGAL CRITERIA FOR SPATIAL DELIMITATION 218 (2012).

[42] *These include at least the Rescue Agreement, the Liability Convention, and the Registration Convention*. *See* Haywood, *supra* note 7, at 815-16.

[43] The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, NASA, https://www.nasa.gov/wp-content/uploads/2022/11/Artemis-Accords-signed-13Oct2020.pdf?emrc=67cc09473f9c4. *See also* Haywood, *supra* note 7, at 820; LYALL & LARSEN, *supra* note 10, at 188-91; Thurston, *supra* note 4, at 5.

[44] *See* LYALL & LARSEN, *supra* note 10.

[45] *See* Blount & Robison, *supra* note 23, at 178-79; White, *supra* note 34, at 465-66.

[46] *See* DiMaria, *supra* note 23, at 421-22; John Myers, *Extraterrestrial Property Rights: Utilizing the Resources of the Final Frontier*, 18 SAN DIEGO INT'L L.J. 77, 123-24 (2016); ODUNTAN, *supra* note 41, at 172-73.

[47] *See* Dodge, *supra* note 29, at 168; Osada, *supra* note 23, at 472-73.

[48] This is now changing. *See generally* Durkee, *supra* note 4; *see generally* Durkee, *supra* note 34; VANCE, *supra* note 4.

[49] United Nations, Office for Disarmament Affairs Treaties Database, Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, OST, RES 2222 (XXI).

[50] *See* LYALL & LARSEN, *supra* note 10, at 52-53; *see also* Durkee, *supra* note 4, at 452.

[51] *See* DiMaria, *supra* note 46; LYALL & LARSEN, *supra* note 10, at 173; Tennen, *supra* note 30.

space resources.[52] Two other articles are also important: Article VI, which imparts responsibility on states to regulate their nationals' activities in space, and Article VIII, which establishes broad mechanisms of registration, jurisdiction, and control of space objects by their launching states without exertion of sovereignty prohibited by Article II.

i. Article I Paras. 1 and 2 (Benefit Sharing, Province of all Mankind, and Freedom of Use by all States)

Article I Paragraph 1 establishes the principles of benefit sharing and the province of all mankind. It states: "The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."[53] A survey of these key terms shows that the hotspots for ambiguity are "celestial bodies,"[54] "use," "shall," "benefit," and "province of all mankind."

The term "use" makes it clear that the economic exploitation of outer space is contemplated by the OST.[55] Though many associate property rights with use, the text of Article I (1) does not mention them.[56] Some conclude that Article II broadly prohibits all forms of appropriation in space, claiming or assuming that Article I (1)'s "use" term is tightly circumscribed by Article II's non-appropriation principle.[57] Some assert the opposite:[58] "The legality of the exploitation of resources in outer space, including on the Moon and other celestial bodies, is unsettled."[59] While I sympathize more with the pro-property rights interpretations, I have not found any persuasive, good-faith interpretation of the OST that permits the outright sale of space resources.[60] Outright sale of space resources is not a valid form of use under Article I (2)'s non-discrimination principle, discussed below.

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[52] *See* Bennett, *supra* note 10, at 232; DE MAN, *supra* note 9, at 106, 165; INTERNATIONAL SPACE LAW, 647, 649 (Frans G. von der Dunk eds., 2018); Elliot T. Tracz, *Markets, Regulation, and Inevitability: The Case for Property Rights in Outer Space*, 30 UNIV. MIAMI INT'L & COMP. L. REV. 42, 60 (2023).

[53] OST, art. I, ¶ 1.

[54] As discussed in Introduction, Section II of this paper, there is ambiguity with the term "celestial bodies".

[55] It is illustrative that during the debates on the Principles Treaty, predecessor to the OST, "an effort was made to clarify the meaning of the word 'use', and "France considered 'use' 'to be the equivalent of exploitation,' and subsequent State practice in space demonstrated exploitation was considered part and parcel of the Agreement." De Man, *supra* note 9, at 80-81. "The consensus in legal literature is that the use of natural resources is part and parcel of the freedom to use outer space as guaranteed by Article I(2) of the OST. The exploitation of natural resources is subsumed by the freedom of states to use outer space, and is therefore, as such, a lawful activity under the current space treaties." *Id.* at 81. *See also* Dodge, *supra* note 29, at 168.

[56] OST, art. I, ¶ 1.

[57] *See* ODUNTAN, *supra* note 41, at 209, 217; Taylor, *supra* note 10, at 656-57, 666-67.

[58] *See* DE MAN, *supra* note 9, at 85; Dodge, *supra* note 29, at 172-73, 175; Tennen, *supra* note 30, at 284-85.

[59] THE WOOMERA MANUAL ON THE INTERNATIONAL LAW OF MILITARY SPACE ACTIVITIES AND OPERATIONS 41 (Jack Beard et al. eds., 2024) (ebook) (hereinafter WOOMERA MANUAL). *See also* Blount, *supra* note 41, at 117-18.

[60] Philip De Man (2016), a prominent authority on the question, states: "the extraction of tangible resources from celestial bodies can only be legitimate if the excavating state subsequently uses the removed substance *itself* instead of transferring it to another state…as the act of sale would imply the existence of property rights." DE MAN, *supra* note 9, at 407. DeMan's argument leaves open the possibility of *private* transfer of resources. Furthermore, an interpretation of the OST that prohibits property rights broadly seems, to me, to be wrong. The best support for such a prohibition would be Article I's non-discrimination principle and Article II's non-appropriation principle. But property rights short of the absolute right to exclude would not infringe on the non-

Some have suggested that the term "shall" in the OST could represent a positive command for state parties to use outer space in the manner prescribed by the rest of Article I.[61] The more likely proper interpretation of "shall" is that it is a transitional word merely indicating the types of use that are legitimate under the OST, *should* they be undertaken. This likely is the better reading as it would place all of the non-spacefaring OST parties in continual breach.

One of the most significant phrases in the OST is the "benefit and province of all mankind:" The province of all mankind principle bedevils space law scholars. Some scholars conflate the principle with the common heritage of mankind principle, making comparisons with the Antarctica Treaty, the Law of the Sea Convention, and the Moon Agreement.[62] The common heritage of mankind principle requires a more equitable sharing of benefits than does the province of mankind principle.[63] The "province of all mankind" principle was developed in the unique context of the OST,[64] and its drafting history and textual analysis indicate that it is distinct from the common heritage principle.[65] Instructive evidence can be found in the United States' and all major spacefaring countries' non-ratification of the Moon Agreement, which sought to replace the province of all mankind principle with the common heritage principle.[66]

Article I Paragraph 2 establishes the principle of universal freedom of use of space by all states (and freedom of exploration, which is less relevant presently). It states: "Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[67] Relevant ambiguous terms include "celestial bodies,"[68] "use,"[69] "without discrimination of any kind," and "free access."

"Without discrimination of any kind" and "free access" are not inherently ambiguous terms, but are somewhat ambiguous when juxtaposed with the word "use." The OST

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discrimination principle, and the non-appropriation principle is silent on private appropriation. And given the utility of property rights in incentivizing "use," part of the purpose of Article I, the more compelling argument is that the OST does not prohibit all property rights in space resources.

[61] The "positive command" referred to is the Outer Space Treaty of 1967's use of the word "shall" in Article I Paragraph 1. Some "publicists and commentators have argued that Article 1(1) does have a normative effect. This interpretation is based on the use of the word 'shall'…which it is argued creates an imperative obligation on states." Michel Bourbonniè & Ricky J. Lee, *Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict*, 18 EUR. J. INT'L L. 873, 883 (2007).

[62] *See* KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 83, 159-62 (1998); ODUNTAN, *supra* note 41, at 18, 191-93; Tracz, *supra* note 52, at 59-60; WOOMERA MANUAL, *supra* note 59, at 44.

[63] See Brian Abrams, First Contact: Establishing Jurisdiction Over Activities in Outer Space, 42 GA. J. INT'L & COMP. L. 797, 803 (2014); Dennison A. Butler, Who Owns the Moon, Mars, and other Celestial Bodies: Lunar Jurisprudence in Corpus Juris Spatialis, 82 J. AIR L. & COM. 505, 508 (2017).

[64] *See* DE MAN, *supra* note 9, at 108, 171-72.

[65] *See supra* note 63; *see supra* note 64.

[66] *See* Elliot Reaven, The United States Commercial Space Launch Competitiveness Act: The Creation of Private Space Property Rights and the Omission of the Right to Freedom from Harmful Interference, 94 WASH. U. L. REV. 238, 239-40 (2016).

[67] OST, art. I ¶ 2.

[68] *See supra* Introduction, § II.

[69] *See supra* analysis of "use" for OST, art. I ¶ 1 above. (The concept is consistent across these provisions).

contemplates the use of space by states, but such use must be conducted without discrimination and with free access for all states. These principles come into tension at the margin: if a state is using a resource in outer space, that use will, to some extent, necessarily restrict use of the same resource by other states. Thus, the non-discrimination principle is not absolute.

ii. Article II (Non-Appropriation Principle, Sovereignty Ban, and Tension with Article I)

Article II states: "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[70] Key terms here are "national appropriation," "sovereignty," "use,"[71] and "occupation, or by any other means."[72] The non-appropriation principle of Article II shares tension with Article I, which encourages the use of space by states.

The meaning of "national appropriation" in Article II is somewhat ambiguous. The meaning of "national" is clear.[73] The meaning of "Appropriation" is less so. Experts emphasize the territoriality-proscribing intent of OST Article II.[74] Terrestrial orbits cannot be appropriated even by continual exclusive use[75] Scholars have argued that appropriation does not prohibit ownership of all sorts,[76] but the non-appropriation principle certainly prohibits territorial claims to space as exertions of sovereignty.[77]

Though the OST provides no definition of sovereignty, the concept is central in many debates about space resource extraction and use.[78] Here, sovereignty is important insofar as it relates to private property rights. This article is not concerned with public appropriation besides its employment as a conceptual first step in creation and guarantee of private property rights.[79] There is active debate over whether private appropriation is an expression of national appropriation, either by sovereign claim or under "any other means."[80] "[B]y any other means[,]" as ambiguous, list-concluding clauses tend to do, has also yielded a dynamic range of interpretations.[81]

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[70] OST, art. II.

[71] *See supra* note 69.

[72] OST, art. II.

[73] *See* VON DER DUNK, *supra* note 52, at 642. (The authors insist that "national" means the same thing in OST Articles II and VI. If this were the case, a state's nationals would necessarily be prohibited from appropriation of celestial bodies under Article II. That reading seems to fly in the face of practice, and it is a highly fringe interpretation).

[74] *See* DE MAN, *supra* note 9, at 158; VON DER DUNK, *supra* note 52, at 660.

[75] *See* DE MAN, *supra* note 9, at 82; LYALL & LARSEN, *supra* note 10, at 160, 167; VON DER DUNK, *supra* note 52, at 659.

[76] *See* LYALL & LARSEN, *supra* note 10, at 394; VON DER DUNK, *supra* note 52, at 648-49, 660.

[77] OST, art. II.

[78] *See* Brehm, *supra* note 33, at 356; VON DER DUNK, *supra* note 52, at 643; Hytrek, *supra* note 10, at 99; DE MAN, *supra* note 9, at 156, 165, 171, 287, 313, 319, 334 (2016); Taylor, *supra* note 10, at 656-57. *See generally* Willis, *supra* note 12.

[79] *See supra* body text accompanying note 28; Taylor, *infra* note 87.

[80] *See* Brehm, *supra* note 78, DE MAN, *supra* note 9, at 166; Hytrek, *supra* note 78.

[81] *See* DE MAN, *supra* note 9, at 162; Durrani, *supra* note 12, at 420; Lauren Hauck, *The Rogue One: Trump's Space Force and the Threat of a New Cold War*, 42 U. HAW. L. REV. 119, 146 (2020); Blount, *supra* note 41, at 164, 166.

Scholars who read Article II more leniently assert interpretations such as: Property rights can exist without sovereignty;[82] certain property rights could be expressed as something less than appropriation and as a function of a state's responsibility to regulate its nationals under OST Art. VI (discussed below);[83] and "sovereignty" in OST Article II aims only to limit territorial claims, rather than resource extraction.[84] This final interpretation, properly contextualizes both "national appropriation" and "occupation, or by any other means[,]" with "appropriation" and "occupation" resonating with territorialist concerns of the OST's framers,[85] and "any other means" attempting to cover any and all expressions of territorial conquest.

Scholars who read Article II more strictly assert interpretations such as: Any use of space, the Moon and, celestial bodies, would necessarily amount to prohibited sovereign appropriation if undertaken by a state;[86] any creation of property rights is barred since property rights originate in the sovereign;[87] and "sovereignty" in OST Article II was included to ameliorate the gulf of power between the victorious major powers of WWII and much of the Global South, and so applies to any resource extraction or use that results in inequitable distribution of benefits.[88]

Article II is in tension with Article I, which has engendered decades of fierce debate that has reached a crescendo with contemporary demand for space exploitation.[89] Article I outlines how states should use outer space: "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."[90] It further establishes freedom of use of space for all states and prohibits "discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[91] Article II circumscribes the use of outer space, the Moon, and other celestial bodies by prohibiting "national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[92] Article I recognizes the state's legitimacy in using space, "including the Moon and other celestial bodies"[93] and Article II prohibits any use of the same that amounts to national appropriation. States cannot claim things in space, and so their free use of space is necessarily constrained, reducing the likelihood of Article I's objective of the "exploration and use of space," which "*shall* be carried out[.]"[94] While acknowledging this facial tension, some scholars offer ways in which Articles I and II might not conflict or may even complement each other.[95]

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[82] *See* Blount, *supra* note 41, at 113; Willis, *supra* note 12, at 372, 382.
[83] *See* Blount, *supra* note 41, at 165-66; Taylor, *supra* note 10, at 672.
[84] *See supra* note 74; *infra* notes 148, at 158-60.
[85] *Id.*
[86] *See* ODUNTAN, *supra* note 41, at 217.
[87] *See* Taylor, *supra* note 10, at 666.
[88] *See* ODUNTAN, *supra* note 41, at 184-85, 190.
[89] *See* LYALL & LARSEN, *supra* note 10, at 392.
[90] OST, art. I.
[91] *Id.*
[92] OST, art. II.
[93] OST, art. I.
[94] *Id.*
[95] For example, *see* DE MAN, *supra* note 9, at 85; Dodge, *supra* note 29, at 170-71.

iii. Article VI (Regulation and Private Actor Attribution)

Article VI of the OST states that: "States Parties to the Treaty shall bear international responsibility for national activities in outer space," and further specifies that "[t]he activities of non-governmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State[.]"[96] Article VI thus contemplates non-governmental, or private, actors in space as well as state responsibility for regulation of those actors' activities in space.

Some have inferred that Article VI contains a direct, unique principle of attribution of state practice and *opinio juris*:[97] If a private actor of a state acts or produces *opinio juris* in space, unless the government refutes, disclaims, or constrains their behavior or speech, that production is attributable to the state itself. Professor Melissa Durkee calls this phenomenon "attributed lawmaking."[98]

iv. Article VIII (Jurisdiction and Control)

Article VIII offers limited support for the creation of property rights in space. It enables states to exert limited jurisdiction and control over its space objects, which is a function of sovereignty,[99] albeit a narrow one. Article VIII states: "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object . . ."[100] Article VIII has seen implementation primarily in the realms of rocket launches and satellite activities.[101] But it could be made to apply to space resource extraction operations, too. Some have suggested, and this article suggests, that Article VIII can confer limited "rights" akin or equivalent to property rights in space.[102]

B. The Moon Agreement

The Moon Agreement (MA) was established in 1979 with the partial intent of clarifying ambiguities in the wake of the OST.[103] It applies beyond the Moon and attempted to clarify OST Articles I and II and the framework governing resource extraction.[104] MA Article 11 states:

> 1. The moon and its natural resources are the common heritage of mankind . . . .
> 3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of the State, international organization, national organization or non-governmental entity or of any natural person . . . .

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[96] OST, art. VI.
[97] *See* Durkee, *supra* note 4, at 429, 443-47.
[98] See *id.*
[99] *See* Willis, *supra* note 12, at 370.
[100] OST, Art. VIII.
[101] *See* Blount & Robison, *supra* note 23, at 180-81.
[102] *See* ODUNTAN, *supra* note 41, at 279; Tracz, *supra* note 52, at 54; Wood, *supra* note 7, at 36.
[103] *See* DiMaria, *supra* note 23, at 423.
[104] *See* Blount, *supra* note 41, at 117-18.

> 5. States Parties to this Agreement hereby undertake to establish an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.[105]

The MA is much more specific than the OST about private property rights in space: they are prohibited on the Moon and Mars,[106] and exploitation of resources requires the undertaking of establishment of an international regime.[107] The MA's utility for resolving the private property rights question is limited.[108] Compared to the OST, the Moon Agreement has not been widely ratified. It has just eleven signatories and seventeen parties, and none of the major spacefaring powers are among them.[109] The MA represents a possible, and for some countries preferred,[110] evolution of the OST, but not much more.[111]

Many scholars misconceive the utility of the Moon Agreement. Some conflate the OST's province of mankind principle with the more equity-oriented common heritage principle in the MA.[112] Some apply the Moon Agreement's principles to ambiguities in the OST, seeking clarity.[113] This approach is particularly misleading for the question of private property rights. The United States did not ratify the MA specifically because of its prohibition of private property rights in space resources.[114] The opposition of the country with the most activity in space[115] shows the limited nature of the MA's authority, particularly

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[105] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 21 [hereinafter M.A.].

[106] *See* Butler, *supra* note 63, at 508.

[107] The wordiness here is (mostly) intentional. Establishment of an international regime is not required for exploitation, but mere undertaking of establishing the regime, implying that exploitation could occur before the regime comes into being. *See* M.A., Art. II .

[108] Blount, *supra* note 41, at 96 ("[T]he Moon Agreement, while positing a workable system for the use and exploitation of extraterrestrial resources, has not been widely accepted and serves a minor role in the contemporary regime.").

[109] United Nations, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, Office for Disarmament Affairs Treaties Database (Dec. 5, 1979), https://treaties.unoda.org/t/moon.

[110] *See id.*

[111] WOOMERA MANUAL, *supra* note 59, at 64-65 ("Some confusion on the part of writers in interpreting the international law applicable to military activities on the Moon and other celestial bodies is due to the inappropriate interposition of terms found in the Moon Agreement. The Moon Agreement does not reflect customary international law and thus is binding on only the 18 States that are Parties to that Treaty."); *see also* Blount, *supra* note 41.

[112] *See* BALSAR, *supra* note 62; *see also* ODUNTAN, *supra*, note 62; *see also* Tracz, *supra*, note 62; *see also* WOOMERA MANUAL, *supra*, note 62.

[113] *See* Francesca Giannoni-Crystal, *Cyberattacks on Lunar (And Other Non-Earth Orbiting) Satellites: Legal Issues*, 57 CREIGHTON L. REV. 663, 713-14 (2024).

[114] *See* BASLAR, *supra* note 62, at 159-162, 175, 188; Joanne Irene Gabrynowicz, *Crisis of the Commons: A Turning Point*, 31 PROC. ON L. OUTER SPACE 29, 29 (1988); GEORGE D. KYRIAKOPOULOS & MARIA MANOLI, THE SPACE TREATIES AT CROSSROADS, 191 (2019); Myers, *supra* note 46, at 124; Reaven, *supra* note 66, at 239.

[115] Joshua Robin, *Space is Getting Crowded: The Laws Governing the New Commercial Space Race*, 22 LOY. MAR. L.J. 93, 109 (2021) ("Currently, the official position of the United States is that the Moon Agreement is not the correct framework to utilize space and its resources. In 2020, President Donald Trump signed an executive order explicitly stating that the Moon Agreement is not 'an effective or necessary instrument to guide nation states regarding the promotion of commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies.'"); *see also* Abrams, *supra* note 63, at 803; Blount, *supra* note 41, at 117-18; Butler, *supra* note 63, at 508. The Artemis Accords, the most recent multilateral international space law effort by the United States and space policy allies, advances something like the opposite interpretation of the MA regarding space resources, affirming that extraction does not constitute national appropriation. *See* Haywood, *supra* note 7, at 820. While not going so far as establishing private property rights

on the question of private property rights.[116] Some scholars use such examples, including broad rejection of the MA, to illustrate that ambiguities in the OST should not be resolved through reliance on MA principles, since many OST parties have the option of ratifying the MA and have chosen not to.[117]

C. The Commercial Space Launch Competitiveness Act of 2015

In 2015, Congress passed the Commercial Space Launch Competitiveness Act (CSLCA) "[t]o facilitate a pro-growth environment for the developing commercial space industry by encouraging private sector investment and creating more stable and predictable regulatory conditions, and for other purposes."[118] CSLCA § 51303 entitles U.S. citizens to property rights in space resources if they are engaged in the commercial recovery of the resources.[119] The CSLCA alleges that this provision, as well as the rest of the Act, do not constitute an assertion of sovereignty[120] and are constrained by all applicable U.S. international obligations.[121] "Asteroid resource," defined as "a space resource found on or within a single asteroid," is distinguished from "space resource," which is defined as "an abiotic resource in situ in outer space" that also "includes water and minerals."[122]

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like the CSLCA, the Accords represent an attempted international nudge in that direction. *See* Serena Cansler, *To Infinity and Beyond the Scope of International Space Law: A Survey of the Law Governing Private Commercial Space Activity*, 25 CURRENTS: J. INT'L ECON. L. 65, 68 (2023); Haywood, *supra* note 7, at 821.

[116] Francesca Giannoni-Crystal argues that the inclusion of particular issues in the MA, but not in the OST, indicates that the OST does not encompass those issues. Giannoni-Crystal, *supra* note 113, at 713. Such an argument goes too far. The MA and OST are separate treaties, drafted and ratified by distinct parties, and should not be read with significant influence on each other. The best approach for understanding the OST's meaning is analyzing what it allows, prohibits, and where the sometimes-fuzzy line is between the two in reference to its own provisions. *See* DE MAN, *supra* note 9, at 288. Juxtaposing the treaties has the most utility for determining a country's interpretation of either given their support of both, or a country's interpretation of the OST that did not sign the MA for explicit reasons. *See supra* note 114.

[117] *See supra* note 49, at 108.

[118] CSLCA, *supra* note 14. Luxembourg, the UAE, and Japan have enacted similar legislation. *See* Morgan M. DePagter, *"Who Dares, Wins:" How Property Rights in Space Could be Dictated by the Countries Willing to Make the First Move*, 1 CHI. J. INT'L L. ONLINE 2 116, 118 (2022).

[119] CSLCA, *supra* note 14 at § 51303. Some argue that this provision contravenes the OST. *See* Justin Rostoff, *"Asteroids for Sale": Private Property Rights in Outer Space, and the Space Act of 2015*, 51 NEW ENG. L. 373, 374 (2017); S*ee generally* Taylor, *supra* note 10. For arguments that the CSLCA complies with the OST, *see* Callif, *supra* note 4, at 320, 326; *See generally* Blount & Robison, *supra* note 9.

[120] CSLCA, *supra* note 14 at § 403: "It is the sense of Congress that by the enactment of this Act, the United States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body." My impression of this disclaimer is that, like the "in accordance" clause, could help nudge the CSLCA toward formal or informal amendment to comply with the OST, but it does not presently alter the noncompliant character of the right of absolute sale, possession, or ownership granted by § 51303.

[121] CSLCA, *supra* note 14 at § 51303.

[122] CSLCA, *supra* note 15 at § 51301. The difference between an asteroid resource and space resource are, for this paper's purposes, insignificant. If the reader notices a shift in language between "asteroid resource" and "space resource" in this article, they should note that they are being employed as synonyms.

i. Section 51303

CSLCA § 51303 states: "A U.S. citizen engaged in commercial recovery of an asteroid resource shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell it according to applicable law, including U.S. international obligations."[123] "Sell" within the context of the Act, when placed next to "own," seems to entitle U.S. citizens engaged in resource recovery to an absolute right to exclude others from that resource. If that is the case, § 51303 violates OST Article I (2) by enabling discriminatory activity. However, if one reads "in accordance with applicable law, including the international obligation of the United States" very broadly, it could cut the absolute right to exclude out of the right of sale in § 51303. As the statute currently stands, the notion that the "accordance with applicable law" clause significantly alters the rest of the section is unconvincing. If Congress did not mean to convey these exact property rights, it should have used different words, rather than trying to have its cake and eat it too with boilerplate disclaimers. This is not to say these disclaimers are meaningless; they do some work, just probably not enough. Part IV Section A discusses this further.

ii. Section 403

CSLCA Section 403 states that "It is the sense of Congress that the United States does not, by enactment of this Act, assert sovereignty or sovereign or exclusive rights or jurisdiction over, or ownership of, any celestial body."[124] This disclaimer is important, as it would seem that the creation of private property rights in space resources necessarily requires an initial exertion of sovereignty,[125] which would violate OST Article II. That possibility still exists even in light of the disclaimer,[126] which cannot void the fundamentals of the CSLCA. However, the OST is both silent on private property rights[127] and creates mechanisms for state jurisdiction and control of its objects in space without exerting full sovereignty.[128] These aspects of the OST show that the CSLCA's disclaimer of sovereignty probably carries at least some weight, rather than being a mere face-saving inclusion designed to skirt international law.

The OST and CSLCA both share the purpose of facilitating the use of outer space. They can work together to permit the creation of private property rights in pursuit of such use, which is the focus of the next Part.

III. How OST Articles I and II Allow for Private Property Rights in Space Resources

Textual analysis of "use" in OST Article I and its interaction with Article II as well as teleological and intent-based analyses of "sovereignty" in Article II suggest that the OST

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[123] CSLCA, *supra* note 14 at § 51303.
[124] CSCLA, *supra* note 14 at § 403.
[125] *See* ODUNTAN, *supra* note 41; *infra* note 193.
[126] CSLCA, *supra* note 14 at § 403.
[127] *See supra* note 10.
[128] *See* OST, *supra* note 1 at Art. VIII; *supra* notes 99-102.

permits limited private property rights in space resources. The limit on these rights is the prohibition of the property right of total exclusion.[129] This Part first provides a textual analysis of "use" in OST Article I and its interaction with Article II. It then moves to teleological and intent-based analyses of "sovereignty" in Article II and description of the inextricable connection between territorial security concerns and the sovereignty at the time of the OST's framing. This Part concludes with a brief survey of scholarly positions regarding valid "use" of space under the OST. These analyses are key to understanding the legal problem presented by private property rights in space and how the CSLCA accomplishes much of its purpose but stretches too far in allowing outright sale.

A. The Textual Approach: "Use" in OST Article I (2)

The internationally binding guide to the interpretation of treaties is the Vienna Convention on the Law of Treaties.[130] It provides three methods of treaty interpretation.[131] The first VCLT approach is textual, looking within the text's "ordinary meaning" to resolve ambiguities.[132] The second approach is teleological, looking to the treaty's object and purpose.[133] The third is about intention, examining, to the extent possible, the intent of the treaty drafters.[134] This last method is a supplementary one, rather than the preceding primary methods, but is somewhat inseparable from a teleological reading when applied to "sovereignty" in Article II. To discern whether the OST permits or prohibits private property rights in space resources, we first look to the text.

OST Article I (2) states: the "use of outer space…shall be carried out for the benefit and in the interests of all countries…and shall be the province of mankind…free for exploration and use by all states without discrimination of any kind."[135] "Use" can be defined as "to put into action or service, to avail oneself of, to employ, or to expend or consume by putting to use."[136] The last definition, involving expending or consuming a space resource, would run into trouble with the freedom of use principle.[137] But employing any of the other definitions of use seems permissible under the OST. Space is partly for states to act on objects within, for states to avail themselves of, and to employ the resources therein.[138] States also cannot stop each other from undertaking such use.[139]

If creation of private property rights and national appropriation are barred, how are states to "use" space under the OST? It seems there are two good answers to this question. First, an international mechanism could be the only way to achieve "use," or second, states could

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[129] *See* Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 5-6, 14-15 (2014); Willis, *supra* note 12 at 370; Blount & Robinson, *supra* note 9 at 180-81; *see* ODUNTAN, *supra* note 41, at 279; Tracz, *supra* note 52, at 54; Wood, *supra* note 7, at 36.

[130] VCLT, *supra* note 15.

[131] *Id.* at art. 3.

[132] *Id.* at art. 31(1).

[133] *Id*.

[134] *Id.* at, art. 32.

[135] OST, *supra* note 1 at art. I(2).

[136] *Use*, MERRIAM-WEBSTER, accessible at: https://www.merriam-webster.com/dictionary/use.

[137] *See* OST, *supra* note 1 at art. I(2).

[138] "Use" under the OST encompasses economic exploitation. *See* DE MAN, *supra* note 9.

[139] *See* OST, art. I(2), *supra* note 1.

"use" space on their own so long as they do not nationally appropriate celestial bodies and/or absolutely prohibit other states from using those resources. The latter interpretation seems less problematic and more feasible.[140]

Some suggest that the text of Article I (2) allows only the establishment of an international institution to achieve the use of space,[141] as the Moon Agreement contemplates.[142] This interpretation has at least two major problems.

The first problem is that if the creation of such an institution is so difficult as to remain unachievable, any "use" of space could not occur. The second problem with the international, institutional solution is best expressed as a question. If the "use" of space results in matter coming back to Earth, as much of it probably would, then would not the chain of possession eventually result in the creation of property rights in space resources at some point down the line? And if so, why not clarify the situation and reduce transaction costs by creating private property rights in the first instance by the extractor? Picture a car battery containing cobalt[143] acquired from an asteroid under the hypothetical United Nations Space Mining Council (UNS). The cobalt was mined, as the UNSMC had the first title to it under OST Article II. The UNSMC enters a manufacturing agreement, perhaps with conveyance of only minimal property rights, to a manufacturer, who makes the car battery. The purpose of the battery would be to go into an electric car. Does the UNSMC own the cobalt when it goes into the car? What about when the battery is replaced, and its driver installs a replacement battery and puts the first battery in her garage. Would it really make sense to keep the property rights to the cobalt in the garage battery in the UNSMC? Why not the individual with possession, or the company with the capability of battery creation and repair? Is not such an arrangement much more beneficial and efficient for holders of property rights? Would ownership disputes over objects like these car batteries not be a legal nightmare without private property rights for the space resource? We could alternatively foreclose the creation of any property rights in the asteroid cobalt, but that seems infeasible when the resource comes back to Earth for use, for reasons of tracking, legal compliance, and/or certainty, with these problems growing the further along the chain of "use" the space resource travels.

Now consider the approach centering the State and its private entities rather than an international institution. In compliance with OST Article II's bar on national appropriation, the hypothetical company SpaceMineCo. mines platinum from Asteroid X. Property rights to the platinum vests in SpaceMineCo. upon extraction. The company can sell its property rights to the platinum on the hypothetical regulated global market for space minerals, perhaps

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[140] With increasing geopolitical multipolarity and instability, the formation of multilateral treaties is getting harder and harder. *See* Clementine G. Starling, Mark J. Massa, Lt. Col. Christopher P. Mulder, & Julia T. Siegell, *The Future of Security in Space: A Thirty-Year US Strategy*, ATLANTIC COUNCIL STRATEGY PAPERS, 12, 45-47 (2021); Edwin C. Kisiel, *Strategic Competition Implications for Commercial Space Operations*, 51 DENV. J. INT'L L. & POL'Y 41 (2022). International law is increasingly shaped in greater proportions through non-treaty mechanisms like customary international law. *See* Durkee, *supra* note 4, at 438.

[141] *See* ODUNTAN, *supra* note 41, at 190.

[142] *See* M.A., *supra* note 105 at Art. II (5).

[143] Cobalt is an important rare metal required for the manufacture of electric cars, which could facilitate emission reduction and combatting climate change. A typical asteroid contains about ten million tons of cobalt, about two million more than the world's reserves of the mineral. *See* TRONCHETTI, *supra* note 11, at 211; *Cobalt: Powering the Green Economy*, COBALT INSTITUTE, https://www.cobaltinstitute.org/wp-content/uploads/2023/02/cobalt_institute_fact_sheet_ 2023.pdf.

to a manufacturer, or it can refine the platinum and use it for manufacturing in-house. SpaceMineCo. was able to develop the capacity for this resource extraction and use because investors felt confident that the property status of the resource would be relatively uncontested and poured their money into SpaceMineCo.. The company owned the platinum and sold it, making a profit. The only property rights limitation on the platinum was that its eventual use was required to be actualized, foreclosing rights to destruction or the absolute right to exclude. SpaceMineCo. met minimum requirements for concluding that the platinum's use would be actualized, as the next entity in the market chain is also required to in order to transfer the space resource. This hypothetical avoids the worst outcomes of the UNSMC hypothetical, where extraction and use of space resources was mandated to occur only under an international institution.

The OST would be self-defeating if its text prohibited the most practical type of action for the economic development of space, the creation of private property rights.[144] The text of Article I indicates that the Article II prohibition on sovereignty has limits that were not intended to impair the economic development of space.[145] It is reasonable to conclude that Article II could even support the creation of property rights since those rights would likely facilitate the development and "use" of space.

B. Teleological and Intent-based Approaches to "Sovereignty": Historical Territorialism

The VCLT also instructs us to look to the treaty's object and purpose[146] and, failing resolution with these prior methods, to "the preparatory work of the treaty and the circumstances of its conclusion,"[147] which allows us to analyze history and the framers' intentions. These two approaches overlap somewhat in examination of "sovereignty" in Article II. Sovereignty, in the context of the purpose of the treaty, seems strongly bound up in conceptions of territorial expansion, which was a major concern for the framers, along with wars of conquest.[148]

Sovereignty can mean many different things for different people.[149] For the framers of the OST, sovereignty was interwoven with territorial security, conflict, and expansion.[150]

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[144] *See* DE MAN, *supra* note 9, at 85.

[145] *See id.*; Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) Art. I, Jan. 27, 1967, 18 U.S.T. 2410.

[146] Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[147] *Id.* at Art. 32.

[148] *See* Blount & Robison, *supra* note 9, at 169; DE MAN, *supra* note 9, at 158-59; VON DER DUNK, *supra* note 52, at 660.

[149] *See* Legal Information Institute, *Sovereignty*, https://www.law.cornell.edu/wex/ sovereignty; Mohamed S. Helal, *Justifying War and the Limits of Humanitarianism*, 37 FORDHAM INT'L L. J. 551, 578-79 (2014); LYALL & LARSEN, *supra* note 10, at 157; ODUNTAN, *supra* note 43, at 283; Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' De Iure Praedar—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"*, 31 BROOK J. INT'L L. 741, 755 (2006); Alexander William Salter, *Ordering the Cosmos: Private Law and Celestial Property Rights*, 82 J. AIR L. & COM. 311, 331 (2017).

[150] *See supra* note 147; DE MAN, *supra* note 9, at 158: "From the writings of scholars advocating the solution, one can deduce an amalgamate of arguments predominantly grounded in the presupposition that the main purpose of the non-appropriation principle is to avoid territorial conflicts in outer space so as to guarantee the free

After the brutal human and territorial havoc of World War II, the victorious powers sought to construct an international system that would guarantee the sovereignty of individual states[151] (and cement the victors' dominant geopolitical status).[152] The OST was a descendant of this concern.[153] Like the U.N. Charter,[154] the OST sought to deal with issues between sovereigns, and hoped to limit the perennial tendency toward expansionist conquest of territory.[155] National sovereignty, though, was further legitimated in the OST as the central source of governance authority over human beings.[156] Sovereignty went to space, albeit in a limited mode. The preeminence of sovereignty and the aspirations of purging territorialist incentives in the international system was part of what made it possible to contract away, through treaty, many sovereign powers of sovereigns in the domain of outer space, including blanket prohibitions of sovereignty as employed for national appropriation.[157]

The OST framers may have understood sovereignty and territorialism as linked when they drafted Article II and its prohibition of national appropriation.[158] The emphasis was on preventing territorial conquest, not space resource extraction, which the drafters aimed to facilitate through Article I.[159] Private property rights are separable from the territorial concerns that animated Article II's creation.[160]

C. Scholarly Commentary: Interpretations and Mechanisms for the Use of Space

Scholars have advanced a variety interpretations of the OST that allow for private property rights in space resources that either reconcile Articles I and II[161] or focus solely on

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exploration and use thereof in accordance with Article I OST. Further support for a territorial interpretation of Article II OST is then derived from the atypical formulation of Article II OST and its textual omission of natural resources. The proscription of 'national' appropriation in particular appears to address public sovereignty rather than private property rights, and the former is typically associated with entire territories rather than specific resources. Further, the reference to 'sovereignty' as a banned means of national appropriation in Article II OST is offset by the observation that outer space as a region is not entirely free from all forms of sovereignty, as states retain exclusive control and jurisdiction over space objects launched on their registry, as well as the personnel on board manned spacecraft. Hence, it could be argued that the reference to sovereignty in Article II OST should be read as territorial sovereignty, and that the scope of Article II OST should be limited commensurately."

[151] *See* STUART CASEY-MASLEN, JUS AD BELLUM: THE LAW ON INTER-STATE USE OF FORCE 13-14, 18 (2020); Bourbonniè & Lee, *supra* note 61, at 885; Helal, *supra* note 149, at 578-79, 604.

[152] *See* Helal, *supra* note 149, at 584.

[153] *See supra* note 147; DE MAN, *supra* note 9, at 158 (*see also*, quoted material at DE MAN, *supra* note 150).

[154] *See* United Nations, United Nations Charter, https://www.un.org/en/about-us/un-charter; Blount & Robison, *supra* note 9, at 169: "The Outer Space Treaty brings space technology into international law, and Article II is an attempt to maintain the spatial order constructed by the United Nations Charter."

[155] *See supra* note 148; DE MAN, *supra* note 9, at 158 (*see also*, quoted material at DE MAN, *supra* note 150).

[156] *See* OST, Art. VI: "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty."

[157] *See* OST, Arts. I and II; Blount & Robison, *supra* note 9, at 169; DE MAN, *supra* note 9, at 159.

[158] *See supra* note 148; DE MAN, *supra* note 9, at 158 (*see also*, quoted material at DE MAN, *supra* note 150).

[159] DE MAN, *supra* note 9, at 158 (*see also*, quoted material at DE MAN, *supra* note 150).

[160] *See supra* note 148; DE MAN, *supra* note 9, at 158 (*see also*, quoted material at DE MAN, *supra* note 150).

[161] *See* DE MAN, *supra* note 9, at xxxiii, 140: "To the extent that the non-appropriation provision is considered an obstacle to the exploitation of space resources, a discriminatory approach to its application requires

Article II compliance.[162] Some scholars have advanced opposing views, including advocating for mechanisms allowing for use without traditional property rights[163] and asserting that property rights in space resources or celestial bodies are necessarily prohibited by the OST.[164] Discussion of this scholarship may veer from this article's primary analysis of OST Article 1 (2) "use," Article II "sovereignty," and the CSLCA.

Consideration of the following approaches should inform any evaluation of proffered solutions. This Section is not a comprehensive scholarship review, but a quick survey meant to contextualize this article's thesis.

i. Pro-Space Property Arguments

William M. Callif asserts that the statutory construction principle of *unius est exclusion alterius* (the mention of one thing is the exclusion of another) indicates "that the OST does not forbid nations from recognizing private ownership" in space resources.[165]

P.J. Blount and Christian J. Robison assert that the OST "was written in contemplation of innovation"[166] and is meant to evolve with technological development.[167] Blount and Robison assert that Article II has multiple valid interpretations, the proper choice of which cannot be determined in reference to the text itself.[168] They offer a solution much like this article, noting that Article VIII of the OST has laid out mechanisms for exertion of space use short of national, sovereign appropriation[169] and conclude that the CSLCA is something like this, and is a valid interpretation of Articles I and II of the OST and representative of "one small step" in the OST's evolution regarding space resource extraction and use.[170] Blount & Robison further state that "[u]nless States reject the [U.S. CSLCA] interpretation, the howls of 'illegality' coming from numerous academics will be like trees falling in empty woods."[171]

ii. Anti-Space Property Arguments

Gbenga Oduntan asserts that "if ownership is to have relevance at all in certain respects as in outer space, we would have to adopt a conceptualization that does not equate exactly

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a creative interpretation of the scope of Article II OST. An exhaustive overview of legal literature broadly reveals a number of ways to do so. A first approach conceives of natural resources in space, or some categories thereof, as a third category of physical phenomena separate from the celestial bodies or outer space *sensu stricto* expressly mentioned in the space treaties."

[162] *See* DE MAN, *supra* note 9, at 152; Thurston, *supra* note 4, at 14-15.

[163] De Man concludes that parties could not acquire a legitimate right to sell space resources, since such an action would not be "using" the resource in the way that Article I allows. DE MAN, *supra* note 9, at 407. Gbenga Oduntan suggests that the closest a private entity might get to property rights could be a license for use, with which the entity could still make a profit off space resources. *See* ODUNTAN, *supra* note 41, at 188.

[164] *See* ODUNTAN, *supra* note 41, at 8, 55.

[165] Callif, *supra* note 4, at 324-25.

[166] Blount & Robison, *supra* note 9, at 162.

[167] *See id.* at 162, 169, 177, 186.

[168] *See id.* at 180.

[169] *See id.* at 180-81.

[170] *See id.* at 182, 186.

[171] Blount & Robison, *supra* note 23, at 181.

with property"[172] such as a license to conduct space activities,[173] citing his finding that ownership is necessarily an exertion of sovereignty, which is barred by OST Article II.[174]

Frans G. von der Dunk, E. Back-Impallomeni, S. Hobe, and R.M. Ramirez de Arellano conclude that the use of the word "national" in OST Article VI, which encompasses entities subordinate to a state's jurisdiction, applies in the same way to Article II.[175] If "national" is interpreted the same in both articles, then Article II explicitly prohibits private property rights in proscribing "national appropriation[,]"[176] as the "national" entity would refer to a third party subject to the jurisdiction of its state. This is a fringe view.

iii. Other Arguments for the Use of Space

Space law scholars have offered a wide range of other ways to facilitate the use of space without violating OST Article II.[177] Asteroids could be treated as chattel.[178] Exclusive economic zones[179] or common pool resource (CPR) zones could be established on the Moon.[180] Terrestrial mining laws could be exported to space,[181] with the caveat that they would need to be conceptually disentangled from sovereignty.[182] Space could be a "commons," incapable of being owned in any traditional sense of the word.[183] Insurance regimes could be implemented.[184] A non-property form of "hotelism" could be put in

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[172] ODUNTAN, *supra* note 41, at 181.

[173] *Id.* at 188.

[174] *Id.* at 180-81.

[175] *See* VON DER DUNK, *supra* note 52, at 642.

[176] OST, Art. II.

[177] Leslie Tennen argues that the centering of property rights in debates about the OST's potential prohibition of certain forms of economic space development is "misplaced." "First, it does not substantively address the legitimate interests of entrepreneurs that require legal protection in order to conduct business. Second, claims of ownership of areas of celestial bodies or resources in place are irrelevant to commercial products or services derived from those areas and resources. Third, such claims are unnecessary to protect commercial ventures on celestial bodies. Fourth, imparting traditional forms of property rights to space, especially fee simple types of claims, violates the non-appropriation principle. Such forms of property rights would only be relevant where there is an intention to profit from the alienation and conveyance of the fee simple claim and/or subsidiary interests derived therefrom." Tennen, *supra* note 30, at 285. I do not perceive of any conflict between Tennen's points and my present article's thesis, save for potential conflict with her first point, as this article does not aim to detail other protections for the interests of entrepreneurs due to scope constraints. I also believe that there is some level of mischief being perpetrated by semantics here. My present article advocates for private property rights in space resources short of the absolute right to exclude, which seems close to the jurisdictional and control elements of OST Article VIII. Many of the arguments of those who "focus on 'property rights'" talk around them somewhat, recommending something more in between the terrestrial property regimes including fee simples and the trickier status of acquired resources in space that cannot be owned in such a traditional sense. Tennen advocates for such "rights", terming them "enterprise rights," or the "rights of entrepreneurs to conduct business in space relate[d] to the legal ability to use and exploit extraterrestrial areas and materials for commercial gain." *Id.*

[178] *See generally* Andrew Tingkang, Comment, *These Aren't the Asteroids You are Looking For: Classifying Asteroids in Space as Chattels, Not Land*, 35 SEATTLE U. L. REV. 559 (2012).

[179] *See* Tracz, *supra* note 52, at 63.

[180] *See* Bennett, *supra* note 10, at 241-42.

[181] *See id.* at 233.

[182] *See* ODUNTAN, *supra* note 172.

[183] *See* Blount & Robison, *supra* note 9, at 170-73.

[184] *See* Abrams, *supra* note 63, at 809; Salter, *supra* note 149, at 230-32.

place.[185] Property rights could be the subjects of public auction.[186] Property rights in general could be prohibited on the basis that they are unnecessary for efficient extraction and use of space resources.[187]

IV. The Mechanical Problem, Solutions, and Implementation

OST Article II, when read alongside Article I (2), prohibits the outright sale of space resources, which is likely grounded in an absolute right to exclude. The CSLCA may breach OST Article II by granting the right of outright sale. The CSLCA should be amended, and international law should be shaped according to these factors.

A. The OST's Prohibition on Outright Sale, the Absolute Right to Exclude, and the CSLCA's Breach of OST Article II

OST Article I (2)'s non-discrimination principle is not absolute.[188] Drawing the exact line between non-discriminatory use of space resources and discriminatory use is difficult, but the OST prohibits use that involves creation of an absolute right to exclude. An absolute right to exclude would necessarily substantively discriminate against every entity that does not hold the right and would block others' use of that resource according to the whims of the right holder. The absolute right to exclude would be required for outright sale of space resources (again, an outright sale here is such a sale involving traditional, comprehensive notions of possession and ownership that include the right to exclude), meaning that such sales would violate the OST. Potential legal structures explicitly prohibiting outright sale of space resources should also facilitate incentivization of space development and provide OST-compliant mechanisms for sales of property rights other than the right of exclusion, possession, or ownership. Something like leases or manufacturing agreements could work.[189] Whatever the mechanism, private parties should be able to make a profit to develop space resource extraction and use at scale, furthering part of the purpose of OST Article I.

i. The CSLCA's Creation of a Right to Sell Violates OST Art. II, Especially as it Relates to the Absolute Right to Exclude

The U.S. tried to fix the incentivization problems of space mining under the OST by passing the CSLCA in 2015. CSLCA § 51303 confers many property rights[190] to incentivize space entrepreneurship, but also violates OST Article I (2) and OST Article II. CSLCA § 51303 "entitle[s]" any "United States citizen engaged in commercial recovery of an asteroid resource" to "sell the asteroid resource[.]"[191] Article I (2) prohibits discrimination of freedom

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[185] *See* VON DER DUNK, *supra* note 52, at 657–-9; Willis, *supra* note 12, at 382-83.

[186] *See* Michael Abramowicz, *The Law-and-Markets Movement*, 49 AM. U. L. REV. 327, 335 (1999).

[187] *See* Blount, *supra* note 41, at 123; DE MAN, *supra* note 9, at 333; VON DER DUNK, *supra* note 52, at 657-59, 663-64; Willis, *supra* note 12, at 382-83.

[188] *See* The Outer Space Treaty 1967 *supra* Part II, § 1 (1).

[189] *See supra* note 187.

[190] CSLCA § 51303.

[191] *Id.*

of use of space of all states by any particular state, meaning that a possessor of a space resource under § 51303, with the absolute right to exclude, violates OST Article I and II.

There are two criticisms of this argument that need to be addressed. First, it could be argued that the CSLCA does not vest the absolute right to exclude in the possessor of a space resource because of the clause that follows the right of sale in § 51303: A possessor under the CSLCA is entitled to sell her resource, but that sale must be "in accordance with applicable law, *including the international obligations of the United States*."[192] The international obligations clause could be interpreted to reduce both the right of outright sale and the absolute right to exclude into something lesser, forcing the CSLCA into compliance with the OST (a similar argument could be made for the CSLCA's disclaimer about sovereignty; my argument for criticism grounded in that clause would be the same as the international obligations clause).

A second important criticism of CSLCA § 51303's breach of the OST through the sale mechanism is that this breach is something of a secondary problem. The problem is that CSLCA § 51303, in granting *any* property rights, contravenes OST Article II's prohibition of national appropriation through exertions of sovereignty. Property rights originate in the sovereign,[193] so national appropriation would necessarily occur before any private property rights could vest.

To respond to these criticisms in the order in which they are presented: first, the CSLCA's "accordance with applicable law" qualifier likely does not overcome the other text in § 51303, especially the phrase "shall be entitled to any asteroid resource . . . obtained, including *to possess*[.]"[194] Possession and the other rights created in § 51303 likely draw on the corpus of U.S. property law, as there is no indication in the statute that the section was meant to apply as a unique and discrete regime to space, with the exception of the "accordance with applicable law" clause, and arguably in the sovereignty disclaimer.[195] It seems that one would have to judge the "accordance with applicable law" clause to be so relatively significant that it could transmogrify or eliminate other provisions of the section to bring the statute into compliance with OST Article I.

The right of possession (of chattel, which I think is the most likely classification of a typical "space resource"),[196] also conferred by CSLCA § 51303, encompasses the right to exclude.[197] It is difficult to imagine "possession" having a different context without qualifying words surrounding it: if the rules say you cannot stop other people from taking your thing, do you really possess that thing at any time? Calling this right "possession" seems like a stretch. Section 51303's creation of the right to "own" similarly pushes against generous interpretation of the "applicable law" clause.[198]

The tougher argument is why this all matters given that property rights originate in the sovereign, and so the creation of property rights in space resources may necessarily violate

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[192] *Id.* Italics added.

[193] *See supra* note 28; Taylor, *supra* note 87.

[194] CSLCA § 51303. Italics added.

[195] *Id.*

[196] *See* Blount & Robison, *supra* note 9, at 175; *See generally* Tingkang, *supra* note 178.

[197] *See* Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 5-6, 14-15 (2014).

[198] *See id.*

OST Article II.[199] However, three features of the OST, already mentioned, overcome this prohibitory finding.

First, "sovereignty" has a particular connotation in the OST. This connotation is distinguishable from present use of the term as a positivist source of property rights. Article II means to bar territorial expressions of sovereignty, akin to conquest, not to bar private economic development.[200]

Second, Article VIII of the OST suggests that sovereign states can exert jurisdiction and control over objects in outer space without national appropriation, which could facilitate creation a limited property rights regime that excludes the absolute right of exclusion.[201]

Third, facilitating the "exploration and use" of space is a primary purpose of the OST.[202] If property rights can incentivize private investment by increasing investor certainty, they further the OST's purpose and fulfill Article I. And until economic development of outer space through use of space resources begins in earnest, it seems harmful to the purpose of the treaty to bar the creation of such incentivization mechanisms.

Creation of limited private property rights, excluding the absolute right to exclude and grounded in the jurisdictional control principles of Article VIII, is a viable solution to the private property regime problems under OST Articles I and II. Such an approach could help facilitate development of space by increasing certainty for investors and vest the OST with renewed relevance. This regime would be beneficial to incorporate into the CSLCA. It would bring the statute into compliance with the OST and it would encourage an incremental and internationally agreeable approach to the development of space resource extraction and use capabilities for the U.S. and the world.

B. Amending the CSLCA

Congress should amend CSLCA § 51303 to incorporate the above recommendations. This would lead to more legal certainty and therefore more certainty for space investors. Failing formal amendment, a more OST-compliant interpretation than is apparent from § 51303's plain text should be asserted by private entities engaged in shaping practice under the CSLCA.

i. Formal Amendment

Congress can amend the CSLCA to bring it into more certain compliance with the OST with a minor alteration, maintaining the heft of the § 51303 property rights regime while increasing international certainty in those rights. For reference in comparison to the proffered amendment, here is the full text of § 51303:

> A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space

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[199] *See supra* note 28; Taylor, *supra* note 87.
[200] *See supra* notes 74, 148, 158-60.
[201] *See* Willis, *supra* note 12, at 370; *supra* notes 102, 169.
[202] OST, Art. I.

> resource obtained in accordance with applicable law, including the international obligations of the United States.[203]

An amended § 51303 could read:

> A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource, **without the absolute right of exclusion**, obtained in accordance with applicable law, including the international obligations of the United States.

Inclusion of these six words would make a positive difference. The explicit prohibition of the absolute right of exclusion would transitively prohibit outright sale of space resources. This would make § 51303 fully compliant with OST Articles I and II. The inclusion of these words would also cabin the rights to "possess" and "own" space resources, restricting the terms to domains of rights short of absolute exclusion and thus outright sale. Such certainty would tend to percolate internationally, inviting fence-sitting nations into the U.S.'s emerging space policy bloc. Resultant certainty would tend to further encourage widespread use of the OST to feasibly accomplish the goals of Article I, which could further facilitate certainty for space investors through what hopefully becomes a positive feedback loop.

The space lobbying industry might be an obstacle to amending the CSLCA. It seems unlikely that space companies would desire this change since it constrains their behavior while providing them with little short-term benefit. On the other hand, increased certainty for space investors, hopefully brought by the amendment, could win industry support. This legal change can help build space economies of scale and Congress, in adding just six qualifying words, might face much lower costs in overcoming its built-in collective action problem than it did when passing the nineteen-page CSLCA.[204]

ii. Informal Amendment

Some scholars have suggested, apart from whether the CSLCA pushes past the bounds of the OST, that the CSLCA represents a valid interpretation of ambiguous parts of the OST and is a step forward in the OST's evolution.[205] If this assertion is correct, it seems the incremental step would go further with broader consensus,[206] likely assisted by good faith compliance with the OST. But if amendment of the CSLCA is not possible, it could be informally molded by the actions of the parties operating under the statute.

Space mining has not happened yet, so § 51303 has not seen application. The first private space mining entities may have the opportunity to shape the practice of the CSLCA by

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[203] CSLCA § 51303.

[204] While the Senate passed its amended version of the House of Representatives' CSLCA unanimously, the House passed the CSLCA with under two-thirds of the vote. James Rathz, *Law Provides New Regulatory Framework for Space Commerce*, THE REGULATORY REVIEW (Dec. 31, 2015), accessible at: https://www.theregreview.org/2015/12/31/rathz-space-commerce-regulation/.

[205] *See* Michael Dodge, *The U.S. Commercial Space Launch Competitiveness Act of 2015: Moving U.S. Space Activities Forward*, 29 NO. 3 AIR & SPACE LAW. 4, 7-8 (2016); Hytrek, *supra* note 10, at 113; Blount & Robison, *supra* note 23, at 177, 186.

[206] *See* LYALL & LARSEN, *supra* note 10, at 195.

asserting that the clause "sell the asteroid resource or space resource obtained in accordance with applicable law, including [ ] international obligations"[207] should be interpreted to stop short of outright sale and the vestment of an absolute right to exclude in the acquiring entity. However, this route may be an unlikely one, as a space mining company is likely to prioritize more immediate profits and rapid establishment of economies of scale over geopolitical concerns of international comity and treaty compliance, which are the province of states.

C. Shaping International Law

Moving outside of the national domain, establishment of a limited private property rights regime in space resources would be highly beneficial in the international legal context. It could both increase international legal certainty for investors and clarify international space law relating to space resource extraction and use.[208] This article's recommendation of modifying the CSLCA is also in the service of creating international investment certainty in space.

There are several avenues for creation of a limited private property regime in international space law. Countries could make new treaties and/or participate in evolution of the OST through either formal amendment, treaty practice, and/or customary international law. Private entities can also participate in the evolution of OST principles, speaking and acting for their states through a process called attributed lawmaking.

i. Treaties: A New Agreement or Reworking the OST

The simplest doctrinal method of establishing international space law creating limited private property rights in space resources would be by treaty. Ideally, the treaty would see broad buy-in. However, a treaty may not be feasible. The current international environment is seeing less emphasis on treaties against a backdrop of decreasing breadth of cooperation between states and the enlargement of the scale and incidents of armed conflict.[209] That same phenomenon, though, could alternatively enhance the incentives for construction of a space property treaty. In considering the feasibility of the treaty option, one should take care to remember the context in which the OST was formed: a tense Cold War standoff amid a space race that involved real space-military fears, and a desire by the major parties to see those fears relegated to the realm of memory.[210]

Alternatively, the meaning of the OST could be modified.[211] While this could occur via formal amendment, there are alternatives. The Vienna Convention on the Law of Treaties allows for the shaping of treaty meaning through consideration of treaty parties subsequent to the treaty's ratification.[212] The meaning of the OST could also be shaped by either

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[207] CSLCA § 51303 (2015).
[208] *See* Brehm, *supra* note 33, at 370-71; DiMaria, *supra* note 23, at 440.
[209] *See supra* notes 35, 37.
[210] *See supra* notes 34, 74, 148, 158-60.
[211] *See supra* note 205.
[212] VCLT, art. 31(3)(a).

customary international law or the actions of private actors, which are attributed to those actors' states under the OST.[213]

ii. Customary International Law

The OST principles are so widely ratified, practiced, and espoused that some of its provisions have entered into customary international law.[214] While it might be analytically murky given that the OST is a binding treaty, molding of parallel customary international space law through the traditional channels of state practice and *opinio juris* may be possible.[215] Such molding could be all the more feasible given the unique relation between space law and customary international law. It is argued that customary international space law crystallizes faster than other customary international law. This quick crystallization is the result of quickly advancing technology, with which international law has trouble keeping up.[216] Many criticize the seemingly paradoxical nature of "instant customary international law,"[217] but evidence points to such a legal phenomenon's historic occurrence in the space domain.[218] To assert the existence of limited private property rights through this method, space actors (not necessarily states, though assertions by non-states would always "pass through" states to achieve legitimacy) would need to act according to the property regime's elements and framework and acknowledge that it is the law.[219]

iii. Private Attributed Lawmaking

Melissa Durkee has pointed out that, under the attribution mechanism of OST Article VI, private actors can influence their states' interpretations of the OST, perhaps in concert with the mechanism of customary international law development.[220] This mechanism might be very important, given that the majority of actors in space are now private entities, a trend which is accelerating.[221] If a private entity asserts their own OST practice and propounds its own *opinio juris* on OST interpretation, this interpretation and practice would be attributed to the entity's home state unless the state asserts a different view and regulates the entity's space activities accordingly.[222]

The reader need not stretch their imagination far in contemplating how companies in the space sector could assert the existence of private property rights in accordance with the

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[213] *See* OST, art. VI; Durkee, *supra* note 4, at 443-47.

[214] *See* Durkee, *supra* note 4, at 428-29, 460-62.

[215] *See* Durkee, *supra* note 4, at 436.

[216] *See* MICHAEL SHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 1-8, 134-37 (2013).

[217] *See* Helal, *supra* note 149, at 608; Arpit Gupta, *Regulating Space Debris as Separate from Space Objects*, 41 U. PA. J. INT'L L. 223, 244 (2019).

[218] *See* SHARF, *supra* note 216.

[219] *See* Durkee, *supra* notes 4.

[220] *See* Durkee, *supra* note 4.

[221] *See* Durkee, *supra* note 4, at 425, 438; Durkee, *supra* note 34, at 13-15; Alex Gilbert, *Mining in Space Is Coming*, MILKEN INST. REV. (Apr. 26, 2021), accessible at: https://perma.cc/HHP9-MGFJ; JAKHU ET AL., *supra* note 8, at 2-6, 112; Jason Krause, *The Outer Space Treaty Turns 50. Can it Survive a New Space Race?*, 103-APR A.B.A. J. 44, 50 (2017); Leach, *supra* note 34, at 52, 74. *See generally* VANCE, *supra* note 4.

[222] *See supra* notes 213-15.

CSLCA as a valid interpretation of the OST. It is highly unlikely that the United States would object to such a development, given how pro-industry its space law is.[223] Such a company would be engaging in attributed lawmaking regarding the OST, and while its effects would theoretically be limited to the U.S., a single country in the international arena, the company would be adding more weight to the U.S.'s interpretation and putting a heavy thumb on the international scale.[224]

A potential problem with this method is the likelihood that a company or another private entity that first achieves the very costly capability of engaging in space mining would use attributed lawmaking to advance ultimate property rights to space resources, including an absolute right to exclude and transitive outright sale. The cost savings of such rights might outweigh the abstract principles of the OST from the private entity's perspective. Hopefully, the home state would jump in and regulate such conduct by removing the absolute right to exclude from the private entity's property rights or by clarifying that such a right never existed and/or could not exist.

iv. Soft Law

A limited private property rights regime could be constructed informally, through agreements or actions of multiple parties.[225] This option might be the most feasible, and might even emerge organically, due to the physical characteristics of outer space. Sovereignty or control is difficult to extend the further from home it goes.[226] Space is about as far from home as one can get and requires immense technological and scientific effort for environmental interaction of any significance.[227] States, if they intend to assert sovereignty outside of Earth's orbit, may find that the harshness of the space vacuum overcomes their efforts, and a permissive and pliable property regime may emerge among the third parties who are capable of operating in the space environment.[228]

V. Conclusion

Creation of limited private property rights is receiving more attention and argumentative force partly due to new external pressures,[229] and such arguments cannot be divorced from these macro-processes. But advocacy for a limited private property rights regime against a no private property rights regime is also a distinct and normative legal argument. It is an urgent question.

This article recommends amendment of the CSLCA to exclude sale of space resources grounded in the absolute right to exclude and the assertion of this interpretation, along with the CSLCA's creation of private property rights, into international law. Such a course is compliant with the OST, as shown by a textual analysis of Article I "use" and its interaction

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[223] *See* CSLCA (2015).

[224] "The United States, given its global hegemony and its emerging goal of commercial space supremacy, plays a major role in upholding the strong foundation laid by the OST." Callif, *supra* note 4, at 342.

[225] *See* Gupta, *supra* note 217, at 245-46.

[226] *See* Tennen, *supra* note 30, at 292.

[227] *Id.*

[228] *See* Shackelford, *supra* note 35, at 432-44, 464-65, 510.

[229] *See* Tracz, *supra* note 52, at 62; VANCE, *supra* note 4.

with Article II, as well as teleological and intention-based analysis of "sovereignty" under Article II. The recommended amendment of the CSLCA and development of international law would serve to reify and encourage evolution of the OST and its Article I principles. This course is feasible and would likely increase legal and investment certainty.


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FISHING IN TROUBLED WATERS: CHINESE VIOLATIONS OF FILIPINO FISHERS' RIGHT TO FOOD

Andrew Parco[*]

ABSTRACT

This Article explores the current maritime dispute between China and the Philippines through a human rights lens, focusing on the right to adequate food for small-scale Filipino fishers. Fishing in the Southeast Asia Sea holds a distinct place in Filipinos' culture, tradition, and economic wellbeing, but it is most important as a food source for coastal communities. Despite this crucial role—and despite the decision of an arbitration tribunal—China's coast guard and maritime militia have continued to harass and intimidate Filipino fishing vessels. The right to adequate food is recognized in multilateral agreements, United Nations resolutions, and customary international law, but China blatantly disregards its responsibilities through its ongoing aggression. The human rights of Filipino fishers are routinely violated when China fails to respect, protect, fulfill the right to food, and in response, this Article suggests filing a formal complaint with the Special Rapporteur on the Right to Food and raising the issue during the next periodic review at the Human Rights Council.

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I. Introduction

What best describes the South China Sea: an ecologically diverse body of water that serves as the ancestral food source for rural fishing villages, or a geopolitical hotspot overwhelmed by military ambition and national pride? Arguably the most consequential water mass in the world, the South China Sea is internationally known as the epicenter of a fraught standoff between competing states.[1] However, in Southeast Asia itself, the real answer depends on who is asked.

Beijing authorities maintain that the People's Republic of China has the only legitimate claim to territory and waters in the South China Sea, an area that "incorporate[s] vast areas of the Exclusive Economic Zone [("EEZ")] of five neighboring States—Vietnam, the Philippines, Malaysia, Indonesia, and Brunei—approximately 1.2 million square miles of 1.4 million square miles."[2]

To enforce this claim, China uses both official and unofficial branches of its state authority.[3] First, the China Coast Guard patrols outside the area of its internationally recognized maritime boundaries, using hostile and intimidating tactics to repel what it views as vessels impinging on its routes.[4] These tactics include aggressive commands, water cannons, and near collisions with other vessels.[5] Second, Chinese authorities have offered tacit permission to civilian boats to patrol the area and intimidate others.[6] Official Chinese sources claim these civilian vessels are used for commercial fishing. However, in reality, many of these vessels do not have basic equipment for fishing nor conduct any tasks expected of fishers.[7] When the vessels are, in fact, used for fishing, their illegal fishing tactics contribute to the aggressive and expansionist behavior that has become characteristic of any

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[1] Daniel Yergin, *The World's Most Important Body of Water*, ATLANTIC (Dec. 15, 2020), https://www.theatlantic.com/international/archive/2020/12/south-china-sea-us-ghosts-strategic-tensions/617380 (calling the South China Sea both "the most important" and "most dangerous body of water in the world").

[2] James Kraska, *The Exclusive Economic Zone and Food Security for Developing Coastal States in the South China Sea*, *in* BUILDING A NORMATIVE ORDER IN THE SOUTH CHINA SEA: EVOLVING DISPUTES, EXPANDING OPTIONS 117 (Tran Truong Thuy et al. eds., 2019).

[3] Agnes Chang & Hannah Beech, *Fleets of Force*, N.Y. TIMES (Nov. 16, 2023), https://www.nytimes.com/interactive/2023/11/16/world/asia/south-china-sea-ships.html.

[4] *Id.*

[5] Aaron-Matthew Lariosa, *Chinese Ships Ram Philippine Vessels, Hits Crews with Water Cannons in Series of South China Sea Incidents*, USNI NEWS (Dec. 10, 2023, 10:43 AM); *China Conducts Patrols in South China Sea amid Ongoing Run-ins*, REUTERS (Jan. 3, 2024, 10:02 PM), https://www.reuters.com/world/china/china-conducts-patrols-south-china-sea-amid-ongoing-run-ins-2024-01-03.

[6] Chang & Beech, *supra* note 3.

[7] *Id.* (reporting that the purported fishing vessels "often lack nets or crews big enough to fish"); Ellie Studdard, *Illegal, Unreported, and Unregulated Fishing: A Maritime Security Threat in the Western Pacific*, AT 17 (CTR. ON L., ETHICS & NAT'L SEC., Essay No. 5, 2021) ("The vessels spend nearly all of their time anchored in large clusters, and many of the vessels rarely have their fishing gear deployed. These are unusual behaviors for commercial vessels, since remaining anchored and not actively engaged in fishing is the antithesis of profitable behavior." (citation omitted)).

Chinese vessel in the South China Sea.[8] When Chinese-flagged industrial fishers exhibit a hostile attitude, they are frequently guarded by the China Coast Guard.[9] Though the civilian contingent does not fall in the traditional military command structure, it functions as a coalition of "militarized fishing boats" that receive encouragement and funding from official sources, becoming known as China's maritime militia.[10] Collectively, the Chinese force is the world's largest government-sanctioned maritime militia, and it uses many of the same tactics as designated defense vessels to attempt to ensure Chinese exclusivity.[11]

The aggressive actions taken by the Coast Guard and maritime militia have targeted any vessel that strays into the waters claimed by China, but most forcefully impacted have been Southeast Asian fishers from states littoral to the South China Sea.[12] Most locals run out by Chinese vessels are subsistence or small-scale fishers who provide food necessary to nearby island communities. Most often, locals have depended on these areas for generations, and as a direct result of Chinese aggression, "they can no longer access traditional fishing grounds because of what is in effect a Chinese blockade."[13]

Because of both official and encouraged harassment of Filipino fishers, this Article argues that the international community should recognize that China is violating Filipino fishers' right to adequate food recognized under treaties and customary international law. The Special Rapporteur on the Right to Food has described the right as

> the right to have regular, permanent and unrestricted access—either directly or by means of financial purchases—to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.[14]

This Article lays out the analysis for these claims, brings light to these legal issues, and hopes to inform potential future actions, such as diplomatic measures related to trade, objections raised during a periodic review with the Human Rights Council, or even direct legal action between the Philippines and China.

Aggression in the South China Sea is properly explored through the lens of human rights. While international media and transnational organizations have primarily prioritized the interplay between state actors, it is worthwhile to recognize the harm suffered by

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[8] *See* Studdard, *supra* note 7, at 14 ("The highly aggressive and predatory nature of China's fishing fleet is indicative of China's larger geopolitical aspirations in the Western Pacific.").

[9] *Id.* at 16 ("The commercial fishing vessels engaging in . . . aggressive behavior are often shadowed by armed Chinese Coast Guard vessels.").

[10] Chang & Beech, *supra* note 3.

[11] James Kraska, Professor, U.S. Naval War Coll., & Raul Pedrozo, Professor, U.S. Naval War Coll., Maritime Law and Global Security Panel at the 29th Annual National Security Law Conference, held by Duke University Law School's Center on Law, Ethics and National Security (Feb. 23, 2024) (notes on file with author); Studdard, *supra* note 7, at 15 ("Not only is China's fleet of [distant water] fishing boats the largest in the world, they are particularly predatory . . . .").

[12] *See infra* Part III.

[13] Chang & Beech, *supra* note 3.

[14] OFF. HIGH COMM'R HUM. RTS., ABOUT THE RIGHT TO FOOD AND HUMAN RIGHTS, https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights (last visited May 3, 2024).

individuals in the region. International law has increasingly sought to acknowledge the responsibilities shouldered and the mistreatment endured by individuals, rather than states alone.[15] Not only is it important to the affected peoples themselves, but the underlying framework of international law is reinforced by pursuing justice for individuals.[16] Focusing on the struggles of small-scale fishers falls into this growing movement of highlighting and addressing international legal violations on a micro-scale.

Existing literature has suggested taking a human rights approach to improving small-scale fishing on a general level,[17] but no previous research has extensively explored violations of the right to adequate food in the South China Sea. Human rights work pertaining to small-scale fishers commonly encounters issues with obtaining officially compiled figures and verifying anecdotal information.[18] By nature of their work, artisanal fishers[19] largely operate independently, and due to their independence at sea, corroborating evidence of their accounts is sparse, if existent at all.[20] Like previous work, this Article will attempt to overcome those deficiencies by heavily relying on international wire services and papers of record for individual accounts, which are subject to rigorous standards of journalism.[21]

Although Chinese aggression also has the potential to impact Vietnam, Indonesia, Malaysia, and Brunei, international media outlets frequently spotlight disputes between China and the Philippines,[22] and the Philippines is one of the states "most affected by Chinese

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[15] Tara J. Melish, *Beyond Human Rights: The Legal Status of the Individual in International Law*, 113 AM. J. INT'L L. 654, 655 (2019) (book review) (assessing "'the phenomenon of the growth of individual rights and duties under international law,' particularly over the last thirty years").

[16] *See* Preston D. Mitchum, *Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework*, 19 WM. & MARY J. WOMEN & L. 585, 600 n.138 (2013) (referencing the "the legitimacy of international human rights law" and its reliance on "fundamental principles of justice that transcend culture, society, and politics" (quoting Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 211 (1999))).

[17] *See, e.g.*, Chandrika Sharma, *Securing Economic, Social and Cultural Rights of Small-Scale and Artisanal Fisherworkers and Fishing Communities*, 10 MAR. STUD. 41, 44 (2011) ("There is a strong case for adopting a human rights approach for improving life and livelihood in fisheries and fishing communities"); Kraska, *supra* note 2, at 118 (noting that, before the creation of the EEZ, commercial fishing vessels sailing far from their flagged states "displaced local fishermen around the world, undermining the human right of food security" (citing U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., 20th Sess., Gen. Comment 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5 (May 12, 1999))).

[18] Ha Anh Tuan, *The Tragedy of Vietnamese Fishermen: The Forgotten Faces of Territorial Disputes in the South China Sea*, 5 ASIA J. GLOB. STUD. 94, 95 (2013).

[19] "Fishers" will be used to refer to anyone engaged in fishing, irrespective of sex or gender. *See, e.g.*, Sharma, *supra* note 17, at 42. Additionally, "'[a]rtisanal fishing' is a term that is used in contrast to 'industrial fishing.'" Kraska, *supra* note 2, at 127. The term does not foreclose the use of any advanced technology or equipment, but it purposely "excludes large-scale commercial or industrial fishing." *Id.*; *see also* The S. China Sea Arb. (The Republic of Philippines v. The People's Republic of China), PCA No. 2013-19, ¶ 797 (Perm. Ct. Arb. 2016) ("Its distinguishing characteristic will always be that, in contrast with industrial fishing, artisanal fishing will be simple and carried out on a small scale, using fishing methods that largely approximate those that have historically been used in the region.").

[20] Tuan, *supra* note 18, at 95 ("[I]t is almost impossible to validate information provided by fishermen concerning what actually happens to them at sea.").

[21] *See, e.g.*, *id.* (depending on "one of the most popular and reliable newspapers in Vietnam" as a "major information source").

[22] Rebecca Wright, Ivan Watson & Kevin Broad, *What It's Like on Board an Outnumbered Philippine Ship Facing Down China's Push to Dominate the South China Sea*,

assertiveness."[23] The Philippines has been the most vocal and visible state actor harnessing media attention and leveraging "lawfare" to protect its sovereignty.[24] Lawfare is the use of international legal systems to bolster a country's foreign affairs claims and pursue its military objectives; while lawfare has been weaponized by some states attempting to legitimize illegal campaigns, it is used by others, such as Ukraine and the Philippines, to push back against militarily dominant nations.[25] Because it is designated as a major non-NATO ally by the United States, the Philippines plays an outsized regional role amid ratcheting U.S.-Sino tensions.[26] This Article will primarily focus on Filipino actors and institutions as a case study, but it is worth noting that the Philippines is far from the only interested or affected state involved in the South China Sea dispute.[27]

Even the name of the area itself can raise controversy. While "South China Sea" is frequently used in academic and media articles alike, it does connote an inherent bias by using China as the sole reference point for a body of water that is bordered and contested by several different states.[28] Each involved country has an interest in centering the water mass around itself.[29] Accordingly, the geographic feature is officially called the "West Philippine Sea" in the Philippines, "East Sea" in Vietnam, and "North Natuna Sea" in Indonesia.[30] To avoid language that suggests partiality,[31] this Article will adopt the neutral recommendation of some scholars and refer to the body of water as the "Southeast Asia Sea."[32]

CNNhttps://www.cnn.com/2024/03/06/asia/philippines-china-south-china-sea-confrontation-intl-hnk-dst/index.html (Mar. 6, 2024, 10:40 AM).

[23] Tuan, *supra* note 18, at 95; Studdard, *supra* note 7, at 17 ("Observers have reported that the behaviors of some of China's fishing fleet, especially in contested areas like the Spratly Islands off the coast of the Philippines, cannot adequately be explained as that of normal commercial fishing vessels.").

[24] Teresa Chen & Alana Nance, *Water Wars: The Philippines Calls for a South China Sea Paradigm Shift*, LAWFARE (Jan. 30, 2024, 10:59 AM), https://www.lawfaremedia.org/article/water-wars-the-philippines-calls-for-a-south-china-sea-paradigm-shift.

[25] *See* Jill Goldenziel, *An Alternative to Zombieing: Lawfare Between Russia and Ukraine and the Future of International Law*, 108 CORNELL L. REV. 1, 15 (2022) ("Only time will tell whether Russia's lawfare will bolster the legitimacy of Putin's actions. . . . Meanwhile, Ukraine's ability to undermine Russia's legitimacy in international tribunals is helping Ukraine garner Western support.").

[26] *See* Carlyle Thayer, *Chinese Aggression Ramps Up in the South China Sea*, E. ASIA F. (Mar. 13, 2024), https://eastasiaforum.org/2024/03/13/chinese-aggression-ramps-up-in-the-south-china-sea (noting that the Philippines has recently "becom[e] the main focal point of maritime tensions" for China).

[27] *See, e.g.*, Tuan, *supra* note 18, at 98 ("Fishing in the SCS plays an important part in the overall fishery industry in Vietnam.").

[28] *In the South China Sea, Even the Name Is Disputed*, RADIO FREE ASIA (Feb. 7, 2022) [hereinafter *Even the Name*], https://www.rfa.org/english/news/vietnam/southchinasea-name-02072022145513.html (quoting a former Filipino congressman: "If you keep on calling a site the 'South China Sea', it subliminally connotes some kind of 'possession' by China.").

[29] *See* Bryan Lynn, *What's in a Name? South China Sea Claimants Seek to Remove 'China'*, VOICE OF AM. (July 24, 2017), https://learningenglish.voanews.com/a/whats-in-a-name-south-china-sea-claimants-seek-to-remove-china/3953830.html (noting that geographic "names can have symbolic value" because they "could show more of a unified effort to resist Chinese moves").

[30] *Id.*

[31] *See* Rachel Stabler, *All Rise: Pursuing Equity in Oral Argument Evaluation*, 101 NEB. L. REV. 438, 468 (2023) ("Research has shown that people are better able to avoid biases when they are not just aware that they exist, but also encouraged to work against them.").

[32] *See Even the Name*, *supra* note 28 (quoting a Vietnamese scholar: "The name 'Southeast Asia Sea' is more acceptable for countries in the region and also more accurate, in terms of the geography . . . ."); Yang Razali Kassim, *South China Sea: Time to Change the Name*, RSIS Commentary No. 102, at 2 (2015) ("[Another]

From a practical standpoint, even if it is recognized that China is violating the human rights of Filipino fishers, it is unlikely that Beijing will change course. After an arbitration tribunal ruled against China and in favor of the Philippines in 2016, Chinese authorities rebuked the decision and, to this day, refer to the decision as "a piece of wastepaper."[33] However, that does not mean that there is no purpose to future litigation. Despite its smaller size and influence, the Philippines has been waging a lawfare campaign against China, pursuing international rulings and wielding negative press coverage to bring attention to China's illegitimate legal position.[34] While China has downplayed the tension as mere "political drama"—even while it conducts its own lawfare activities[35]—a Philippine Coast Guard official explained that "the best way to address Chinese 'gray zone' activities in the West Philippine Sea is to expose" them.[36]

This Article proceeds in five parts. First, it provides background about fishing in the Philippines and describes the role it plays for Filipinos' diet, culture, and economic opportunities. Next, it outlines the tensions in the Southeast Asia Sea, focusing on the ways the dispute affects fishers before exploring the 2016 arbitration decision. Third, this Article narrows into a human rights lens, discussing why it is crucial to consider human rights in the situation, which rights are implicated, how the right to adequate food is codified in international law, and what obligations that right imposes on states. Fourth, this Article recommends how to rely on lawfare techniques in the human rights space, and it offers potential remedies for the breached human rights. Fifth, this Article identifies areas for future research concerning human rights in the Southeast Asia Sea and ends with a brief conclusion.

II. Small-Scale Fishing in the Philippines

Employing more fishers than commercial or industrial fishing,[37] small-scale fishing provides valuable employment to workers, and it dominates in developing states.[38] Because many coastal communities remain rural and cannot take advantage of a robust job market, fishing is frequently a key component of the community's economy.[39]

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challenge is how to defuse, on a long-term basis the South China Sea disputes at the mindshare level. Perhaps the time has come for the South China Sea to be renamed. One appropriate alternative - is to call it the *Southeast Asia Sea*.").

[33] Zhao Lijian, Spokesperson, Ministry of Foreign Affs. of the People's Republic of China, Press Conference (July 12, 2021), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202107/t20210712_9170783.html.

[34] Chen & Nance, *supra* note 24.

[35] Patrick M. Renz and Frauke Heidemann, *China's Coming 'Lawfare' and the South China Sea*, DIPLOMAT (May 8, 2015), https://thediplomat.com/2015/05/chinas-coming-lawfare-and-the-south-china-sea.

[36] Jim Gomez, *Philippines Launches Strategy of Publicizing Chinese Actions*, ASSOCIATED PRESS (Mar. 8, 2023, 6:33 AM), https://apnews.com/article/philippines-publicize-aggression-south-china-sea-724c054eb155982a1d363a257334dd13.

[37] Sharma, *supra* note 17, at 42.

[38] *Id.* at 53 ("[E]stimates suggest about twenty-three million income-poor people, plus their household dependents rely on small-scale fisheries for their livelihoods.").

[39] *Id.* at 42 ("In many rural areas with few employment opportunities, fisheries are often the main drivers of local economies."); *see also* Studdard, *supra* note 7, at 17 ("[M]any nations, and millions of people within those nations, rely on the fishing industry from the South China Sea for their food and livelihoods.").

But even then, it is rarely just a job.[40] Fishers sustain an entire sector and provide so many products that they nearly comprise their own food group . It is estimated "that fifty percent of all food fish originates from small-scale fisheries, and almost all fish from small-scale fisheries is used for food."[41] Small-scale fishers are often taking their catch just to put the fish on their own table.[42] Moreover, entire coastal communities connect to fishing as an irreplaceable part of their traditional culture.[43] With the longest discontinuous coastline in the world, the Philippines is no exception.[44]

A. Culture and Tradition

For Filipinos, fish products are not only a substantial part of the country's cuisine; fish are "culturally enshrined as a dietary staple."[45] In the Philippines, one in ten calories comes from fish.[46] Almost half of the animal protein digested in the country is fish or a fish product.[47] While fish consumption per capita was 7.5 kg in the United States and 14.3 kg in urban China, it reached 40 kg in the Philippines.[48] Because fishing provides such crucial food to the region, it is unsurprising that areas with reduced fish stocks have led to rocketing malnutrition rates.[49]

In coastal communities, small-scale fishing is connected to distinctive ways of life and social structures.[50] Like coal miners[51] or factory workers[52] in the United States, fishing provides a unifying identity for broad swaths of territory. Generally speaking, "[c]ustoms,

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[40] Sharma, *supra* note 17, at 43 ("It is important not to reduce fisheries to an economic activity.").

[41] *Id.* at 42.

[42] Jose Graziano da Silva, *Forward* to FOOD & AGRIC. ORG. OF THE U.N., VOLUNTARY GUIDELINES FOR SECURING SUSTAINABLE SMALL-SCALE FISHERIES IN THE CONTEXT OF FOOD SECURITY AND POVERTY ERADICATION, at v (2015) [hereinafter FISHERIES GUIDELINES] ("Many small-scale fishers are self-employed and usually provide fish for direct consumption within their households or communities.").

[43] Sharma, *supra* note 17, at 4; FISHERIES GUIDELINES, *supra* note 42, at v ("The small-scale fisheries sector tends to be firmly rooted in local communities, traditions and values.").

[44] Michael Hall, *Fishermen for Foot Soldiers: Repercussions of the War for South China Sea Fisheries*, 4 SAIS EUR. J. GLOB. AFFS. 38, 43-44 (2021).

[45] *Id.* at 40.

[46] *Id.* ("Fish and fish products accounted for 12.8% of total caloric intake.").

[47] *Id.*

[48] *Id.* While the Philippines tries to merely sustain its intake, China is shouldering for an increase. World Bank projections expect Chinese consumption to skyrocket to 41 kg by 2030. WORLD BANK, REP. NO. 83177-GLB, FISH TO 2030: PROSPECTS FOR FISHERIES AND AQUACULTURE 45 (2013), https://www.fao.org/3/i3640e/i3640e.pdf.

[49] Michelle Lim & Nengye Liu, *Condominium Arrangements as a Legal Mechanism for the Conservation of the South China Sea Large Marine Ecosystem*, 2 ASIA-PAC. J. OCEAN L. & POL'Y 52, 73 (2017). While aquaculture has been suggested as an alternative to traditional fishing, the option is not without its own setbacks. Hall, *supra* note 44, at 44-45. Moreover, the United Nations guarantees not only the right to adequate food but to obtain food according to a people's traditions. *See infra* Part III.

[50] Sharma, *supra* note 17, at 49.

[51] Nadia Ahmad, Uma Outka, Danielle Stokes & Hannah Wiseman, *Synthesizing Energy Transitions*, 39 GA. ST. U. L. REV. 1087, 1108 (2023) ("Communities that historically relied on fossil fuels for jobs and tax revenue are often deeply bound to these industries—not just economically but also from a cultural perspective.").

[52] James Rhodes, *Youngstown's 'Ghost'? Memory, Identity, and Deindustrialization*, 84 INT'L LAB. & WORKING-CLASS HIST. 55, 55 (2013) ("For some, the city's steelmaking heritage was to be maintained and celebrated, continuing to offer a sense of local identity and pride moving forward . . . .").

food habits, rhythm of life, rituals, spiritual beliefs, value systems, traditions and social organization are all closely linked to fisheries, and to the aquatic milieu on which they depend."[53] The traditions around fishing are especially true in the Philippines, where small-scale fishers carry out about 80% of the country's fishing.[54]

The importance of fishing to Filipino culture is reflected throughout day-to-day life in the country. Mythical sea creatures scattered throughout Philippine folklore include the *sirena*, an ocean enchantress, and the *kasili*, a colossal eel whose squirming causes earthquakes, according to legend.[55] Aquatic-themed festivals abound throughout the islands; there is the Alimango Festival in Lanao del Norte celebrating crabs and the Bangus Festival in Dagupan commemorating the harvest of milkfish.[56] The biggest is the Tuna Festival in General Santos City, where there is a tuna conference and tuna competition capped by a rousing tuna parade.[57] Rituals steeped in fishing tradition influence modern-day cultural developments.[58]

To maintain fishers' tradition, it is crucial to maintain the aquatic environment itself. Small-scale fishing promotes a culture that is more sustainable than that propped up by industrial operations.[59] Despite efforts to reduce the impact of commercial fishing, subsistence fishing is still unmatched at preserving the environment on which fishers and their communities depend.[60] With biodiversity that surpasses the Great Barrier Reef and the Caribbean Sea, sustainability is key in the Southeast Asia Sea.[61]

B. Economic Benefits

In Southeast Asia, fishing is crucial not just to consumption and culture but to economic activity in the region.[62] For many families, small-scale fishing is simply essential for their livelihood.[63] That perspective and the impact of fishing are not isolated to individual families. Because fishing communities in states littoral to the Southeast Asia Sea are predominantly low-income, entire towns and villages largely depend on the economic

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[53] Sharma, *supra* note 17, at 43.

[54] Hall, *supra* note 44, at 44.

[55] Jean Karl M. Gaverza, The Myths of the Philippines 117-18 (2014) (B.A. thesis, University of the Philippines) (on file with author).

[56] *Alimango Festival*, TOURISM PROMOTIONS BD. PHIL., https://www.tpb.gov.ph/events/alimango-festival (last visited May 3, 2024); *Bangus Festival*, CITY OF DAGUPAN, https://www.dagupan.gov.ph/category/bangus-festival (last visited May 3, 2024).

[57] STEVEN ADOLF, TUNA WARS: POWERS AROUND THE FISH WE LOVE TO CONSERVE 317 (Anna Asbury & Suzanne Heukensfeldt Jansen trans., Springer Nature Switz. 2019) (2009).

[58] Leandro C. Torreon & Allan S. Tiempo, *Ritual Practices in Fishing*, 9 ASIA PAC. J. MULTIDISCIPLINARY RSCH. 12, 14 (2021) (noting that agricultural and fishing rituals have become ingrained in Philippine culture); Ramel D. Tomaquin & Retsy Tomaquin-Malong, *Fishing Ritual in a Rural Fishing Village of the Philippines: An Anthropological Economics Construct*, 8 INT'L J. BUS. ECON. & MGMT. RSCH. 18, 24 (studying an "indigenous fishing ritual embedded in [rural Philippine] culture").

[59] *See* Sharma, *supra* note 17, at 42.

[60] *Id.* at 43.

[61] Tuan, *supra* note 18, at 95.

[62] Lim & Liu, *supra* note 49, at 70 (explaining that subsistence fishing is "a core economic activity for coastal communities of the South China Sea").

[63] *Id.*

activity created by local fishers.[64] Nowhere is that truer than the Philippines, where over two million people are employed by the fishing industry.[65] Households sustained by fishing are on average among the lowest income in the country,[66] and fishers in the Philippines are likely to support more family members and reach lower educational outcomes compared to other occupations.[67]

The result is that, in the face of aggression by the China Coast Guard and maritime militia, these coastal communities often must continue their fishing while enduring Chinese harassment.[68] Despite the risks, low-income fishers in the Southeast Asia Sea have no choice but to "continue a long tradition of fishing due to a lack of alternative economic and employment opportunities."[69]

Its importance as food is what connects each of the different roles that fishing plays in Filipino society. A national reliance on fish products, an emphasis on the ocean throughout culture and traditional life, and a limited market for jobs all come back to its crucial function of providing adequate food for fishers and their families. Because of its irreplaceable contribution as a food source, fishers keep going out to the water—straight to the frontlines of the dispute in the Southeast Asia Sea.

III. Dispute in the Southeast Asia Sea

For more than a decade, political and military leaders have had their focus and resources trained on the region,[70] far from the days when Beijing refused to acknowledge that dominance in the Southeast Asia Sea was a "core interest."[71] That focus has manifested in both a legal stance and a maritime presence that is more robust and assertive than ever before.[72]

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[64] *See* Tuan, *supra* note 18, at 98-99.

[65] BUREAU FISHERIES & AQUATIC RES., DEP'T AGRIC., PHILIPPINE FISHERIES PROFILE 2021, at 21 (2021).

[66] Hall, *supra* note 44, at 44 ("Fishermen are on average the poorest in the Philippines . . . ."); Nelson Turgo, *A Taste of the Sea: Artisanal Fishing Communities in the Philippines*, *in* THE WORLD OF THE SEAFARER: QUALITATIVE ACCOUNTS OF WORKING IN THE GLOBAL SHIPPING INDUSTRY 9, 11 (Victor Oyaro Gekara & Helen Sampson eds., 2021) ("Poverty remains a constant defining feature of many, if not all, fishing communities in the Philippines.").

[67] Hall, *supra* note 44, at 44 ("[Fishers'] households tend to be larger, and their educational attainment lower (relative to other sector averages).").

[68] Tuan, *supra* note 18, at 99 (noting that many Vietnamese fishers have "no alternative [to fishing], as a large part of their household income comes from fishing activities").

[69] Lim & Liu, *supra* note 49, at 73.

[70] Xiangning & Ji, *supra* note 70, at 52 ("Under Xi China's South China Sea policy has undergone a major adjustment. His predecessor's passive adherence to the South China Sea status quo has been abandoned and China's core interests are being stressed more vigorously.").

[71] Edward Wong, *China Hedges over Whether South China Sea Is a 'Core Interest' Worth War*, N.Y. TIMES (Mar. 30, 2011), https://www.nytimes.com/2011/03/31/world/asia/31beijing.html; Wu Xiangning & You Ji, *China's South China Sea Strategy and Sino–US Discord*, *in* BUILDING A NORMATIVE ORDER IN THE SOUTH CHINA SEA: EVOLVING DISPUTES, EXPANDING OPTIONS, *supra* note 2, at 47, 51 (explaining that a 2012 change in government is regarded as one of the key factors that led to a "policy change from a measure of passivity to proactive maneuvering" in the Southeast Asia Sea).

[72] Studdard, *supra* note 7, at 18 ("China has invested in an ever-increasing fleet known to engage in highly predatory and aggressive behaviors."); Tuan, *supra* note 18, at 95 ("The country's navy has been modernized and its five civilian authorities in charge of protecting its claims in the SCS have been rapidly expanded. As the

A. Legal Background

In 2013, the Philippines commenced action against China under the U.N. Convention on the Law of the Sea ("UNCLOS").[73] It challenged, *inter alia*, the "nine-dash line" that China used to prop up its claim to the Southeast Asia Sea.[74] China's foundational position, though strategically ambiguous at times, was that a 1948 cartographical line outlining much of the Southeast Asia Sea gave it exclusive access to everywhere encompassed by the line.[75] Under this pretense, it harassed vessels from neighboring states to defend its historic rights. In an additional challenge, the Philippines claimed that China violated international law when it impeded Filipino traditional fishing in the Southeast Asia Sea.[76]

Though it usually found itself outnumbered and outmatched on the water by Chinese vessels, the Philippines dedicated thousands of pages to its fight in court.[77] China, for its part, never showed up. Chinese authorities denied the arbitral court's jurisdiction, instead embarking on a worldwide counterinformation campaign.[78] China bought space in major Western newspapers, such as the *Washington Post* and *San Francisco Chronicle*, to discredit the Philippines and defame the court.[79] Before a ruling was made, it was already attempting to delegitimize the impact of the decision.

On July 12, 2016, the Permanent Court of Arbitration issued its ruling and summarily rejected China's nine-dash line.[80] It explained that any previous claim that China had to areas outside its exclusive economic zone were extinguished and superseded when it consented to UNCLOS.[81] It went on to recognize that generations of Filipino fishers had frequented geographic features in the Southeast Asia Sea for their spear and net fishing,[82] and affidavits reviewed by the court revealed that Filipino fishers had been intimidated, targeted with water cannons, and turned away by the China Coast Guard from their traditional fishing grounds.[83] Because of the long history of fishers in the Southeast Asia Sea and the effect of aggressive Chinese behavior, the court agreed that China "unlawfully prevented Filipino fishermen from engaging in traditional fishing."[84]

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country's military might and civilian control capabilities grow, China has developed a much harder position towards the dispute.").

[73] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Case No. 2013-19, Award of July 12, 2016, Permanent Court of Arbitration, ¶ 4.

[74] *Id.* at ¶ 192 at 80 ("[T]he Philippines submits that international law did not historically permit the type of expansive claim advanced by China's 'nine-dash line' and that, even if China did possess historic rights in the South China Sea, any such rights were extinguished by the adoption of the Convention.").

[75] *Id.* ¶¶ 180-87 at 71-74.

[76] *Id.* ¶ 758 at 299.

[77] CAITLIN CAMPBELL & NARGIZA SALIDJANOVA, U.S.-CHINA ECON. & SEC. REV. COMM'N, SOUTH CHINA SEA ARBITRATION RULING: WHAT HAPPENED AND WHAT'S NEXT? 2 (2016).

[78] *Id.*

[79] *Id.*

[80] *The South China Sea Arbitration*, ¶ 261.

[81] *Id.* ¶¶ 261-62 at 111-112.

[82] *Id.* ¶¶ 762-63 at 300-301.

[83] *Id.* ¶¶ 766-70 at 302-304.

[84] *Id.* ¶ 814 at 318.

As expected, China denounced the court and its ruling in no uncertain terms.[85] It accused the Philippines of acting in bad faith, and it refused to recognize any award or decision.[86] Rather than winding down its harassment, Chinese aggression has only increased since 2016.[87] While the Philippines holds annual celebrations to commemorate the day the arbitration was decided—which it has declared National West Philippine Sea Day[88]—China has continued to deny any recognition of the court's judgment.[89] It makes regular statements protesting the arbitration,[90] and it continues to make unsupported claims over the Southeast Asia Sea.[91]

B. Current Tensions

Though the ruling in the arbitration was issued over eight years ago, tensions on the ground have only continued to grow. Philippine vessels legally operating in their EEZ are still regularly subjected to water cannon blasts by the China Coast Guard, at times incurring severe damage.[92] As geopolitical tension in the region is further exacerbated, it has been suggested that the use of force is appearing unavoidable to Beijing, no matter how harmful a conflict would be to China's ascension as a leading global power.[93]

All the same, the dispute in the Southeast Asia Sea has strained the relationship between the United States and China, and the arbitration's decision marked a peak of the "rapidly rising tension between the two countries."[94] In contrast, the American-Filipino

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[85] Press Release, Ministry of Foreign Affs., Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (July 12, 2016) (asserting "that the award is null and void and has no binding force").

[86] *Id.*

[87] *China Gets Increasingly Rambunctious in South China Sea*, ECON. TIMES https://economictimes.indiatimes.com/news/defence/china-gets-increasingly-rambunctious-in-south-china-sea/articleshow/108946833.cms?from=mdr. (Apr. 1, 2024, 5:31 PM).

[88] Jojo Riñoza & Gerard Carreon, *Philippines Marks 7th Anniversary of South China Sea Ruling*, BENAR NEWS (July 12, 2023), https://www.benarnews.org/english/news/philippine/sea-anniversary-07122023141123.html.

[89] *China Blasts US for Forcing It to Accept South China Sea Ruling*, REUTERS https://www.reuters.com/world/asia-pacific/china-says-it-does-not-accept-philippines-2016-south-china-sea-arbitration-win-2023-07-12 (July 12, 2023, 11:20 AM).

[90] Zhao Lijian, Spokesperson, Ministry of Foreign Affs. of the People's Republic of China, Press Conference (July 12, 2021), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202107/t20210712_9170783.html ("The arbitration has major fallacies in fact-finding and application of law and violates UNCLOS and international law.").

[91] *See, e.g.*, Christopher Bodeen, *China Publicizes for the First Time What It Claims Is a 2016 Agreement with Philippines*, ASSOCIATED PRESS (May 3, 2024, 9:45 AM), https://apnews.com/article/china-south-china-sea-philippines-alleged-agreement-0006abb98502727972872bcecfd49a51.

[92] Armed Forces of the Philippines (@TeamAFP), X (Mar. 22, 2024, 10:19 PM), https://x.com/TeamAFP/status/1771361081233150318.

[93] Xiangning & Ji, *supra* note 70, at 52.

[94] Xiangning & Ji, *supra* note 70, at 47.

diplomatic relationship "fully recovered" after a fraught couple of years,[95] and its military partnership appears stronger than ever. Throughout the 2020s, the Philippines opened the doors of four more bases to American troops.[96] Amid Chinese harassment in the Southeast Asia Sea, U.S. and Philippine military forces practice island-hopping exercises to train for a hypothetical war in the region.[97]

Throughout this volatile region, "the most affected group" in the Southeast Asia Sea dispute "is fishermen and their families, whose lives are highly dependent on safe, stable and secure access to resources in the region."[98] In other words, "[f]ishermen are the foot soldiers in the war over the Southeast Asia Sea's fisheries,"[99] which exposes the reality that the "right to food security is the lost dimension of the maritime boundary disagreements in the [Southeast Asia Sea]."[100] For its part, China is engaged in "a heavy-handed demonstration of its economic, political, and military might" through its behavior by attempting to "dominat[e] the region's fisheries,"[101] and its resulting aggressive behavior "adversely affects the subsistence and artisanal fishing of nearby States."[102]

The role that fishing plays in the region's tensions is self-evident, cyclical, and critical to understand. Conflict in the Southeast Asia Sea is exacerbated—possibly even outright caused—by insufficient fish stocks.[103] This conflict manifests through vessel posturing and resource extraction, which then contributes to "the rapidly deteriorating health of the marine environment."[104] A damaged marine environment further reduces fish stocks, which in turn predictably continues fueling the conflict.[105] It is clear that the Southeast Asia Sea's "abundant natural resources" represent a key factor driving geopolitical tension between Southeast Asian states.[106]

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[95] Derek Grossman, *America's Indo-Pacific Alliances Are Astonishingly Strong*, FOREIGN POL'Y (Dec. 5, 2023, 2:00 PM), https://foreignpolicy.com/2023/12/05/us-china-alliances-allies-geopolitics-balance-power-asia-india-taiwan-japan-south-korea-quad-aukus.

[96] Ellen Nakashima, *Preparing for a China War, the Marines Are Retooling How They'll Fight*, WASH. POST (Mar. 29, 2024, 11:55 AM), https://www.washingtonpost.com/national-security/2024/03/29/us-china-taiwan-marines.

[97] *Id.*

[98] Tuan, *supra* note 18, at 97.

[99] Hall, *supra* note 44, at 38.

[100] Kraska, *supra* note 2, at 116. From a historical perspective, the importance of—and controversy surrounding—fish stocks in global politics is illustrated by the late twentieth century's "Cod Wars" between European states and the "tuna war" in the Americas. *Id.* at 119-20.

[101] Hall, *supra* note 44, at 38; Studdard, *supra* note 7, at 14 ("IUU fishing is a means for China to exert maritime dominance.").

[102] Kraska, *supra* note 2, at 127; Studdard, *supra* note 7, at 16 ("It is unquestionable that the [fishing] fleet helps assert control over China's territorial claims, pushing back foreign fishermen and even the governmental forces that challenge Chinese sovereignty on the South China Sea.").

[103] Hall, *supra* note 44, at 41; Adam Greer, *The South China Sea Is Really a Fishery Dispute*, DIPLOMAT (July 20, 2016), https://thediplomat.com/2016/07/the-south-china-sea-is-really-a-fishery-dispute.

[104] Hall, *supra* note 44, at 41; Ryan McNamara, *The Environmental Collateral Damage of the South China Sea Conflict*, NEW SEC. BEAT (Oct. 13, 2020), https://www.newsecuritybeat.org/2020/10/environmental-collateral-damage-south-china-sea-conflict ("Increased military activity and commercial fishing in the South China Sea have taken a heavy toll on the region's biodiversity."); *see also* Lim & Liu, *supra* note 49, at 74-75 ("Competing territorial claims and the escalation of disputes in the South China Sea have impeded cooperation on environmental and fisheries issues and impacted marine habitats, fisheries resources and livelihoods.").

[105] *See* Hall, *supra* note 44, at 41-42.

[106] Tuan, *supra* note 18, at 95.

Some commentators complain that "China's fishing bans and sustainability efforts are commonly ignored by foreigners,"[107] but that is only because China had no legal authority to institute bans in the first place. The unilaterally imposed annual fishing prohibitions throughout the Southeast Asia Sea can best be described as "unlawful, ineffective, and perverse."[108] Even assuming *arguendo* that China could legally announce fishing prohibitions throughout the Southeast Asia Sea, the bans impose a disproportionately high burden on subsistence fishing communities that do not have other realistic options for food or money.

Others have suggested that Chinese activity in the Southeast Asia Sea is primarily "reactive and retaliatory" in response to the provocations of other states.[109] Chinese restraint is purportedly demonstrated by decisions like declining to build oil rigs in the region and allowing material support to reach Filipinos stationed on a remote outpost in disputed waters.[110] This latter example allegedly "struck a subtle balance between upholding sovereignty claims and humanitarian considerations."[111] However, "humanitarian considerations" appeared to be the least of Beijing's concerns, due to its repeated attacks on Filipino fishers and its all-around dismal human rights record.[112]

China's incursions into other EEZs creates a situation "incompatible with the original design and structure of UNCLOS to protect food security for developing coastal States."[113] Neighboring states have felt the pressure and are increasing their inflammatory rhetoric in kind.

IV. Human Rights Perspective

Though international humanitarian law is the chief legal framework that has governed the dispute in the Southeast Asia Sea, international human rights law can play an important role as well. Though the Philippines does not have the military might to rival China,[114] it has used lawfare tactics, such as the arbitration decision, to reinforce its claim over its own territorial waters.[115] Human rights law can be used as another tactic.

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[107] Greer, *supra* note 103.

[108] Kraska, *supra* note 2, at 125.

[109] Xiangning & Ji, *supra* note 70, at 53-55.

[110] *Id.* at 55.

[111] *Id.*

[112] *China Attempts to 'Gaslight' International Community at UN Human Rights Review,* AMNESTY INT'L (Jan. 23, 2024), https://www.amnesty.org/en/latest/news/2024/01/china-attempts-to-gaslight-international-community-at-un-human-rights-review.

[113] Kraska, *supra* note 2, at 2; *id.* at 118 ("[L]arge parts of the EEZs of Vietnam, the Philippines, Malaysia, Indonesia, and Brunei are at risk of being stripped away, circumventing subsistence rights of coastal fishing communities in Southeast Asia and diminishing the regime of the EEZ worldwide.").

[114] Studdard, *supra* note 7, at 10 (noting that, compared to China, "few other nations have close to sufficient maritime capacity to attempt to enforce their rights in their EEZs in the [Southeast Asia Sea]").

[115] *See* Chen & Nance, *supra* note 24 (describing the Filipino legal efforts intended to "gradually 'chip[] further away' at China's international image"); *see also* Chad de Guzman, *Why the Philippines May Take China to Court—Again—Over the South China Sea*, TIME (Sept. 29, 2023, 8:00 AM), https://time.com/6318671/philippines-south-china-sea-international-court (discussing the possibility of future litigation).

Highlighting the human rights violations China has made against Filipinos strengthens the geopolitical position and legal legitimacy of the Philippines to rebut Chinese aggression.

A. Scope of Potential Human Rights Implicated

China's actions, and the consequences they create for artisanal fishers, implicate various human rights. The right to health can be breached by a lack of access to vital nutrients.[116] The right to life is endangered when people do not have basic necessities to sustain themselves.[117] The right to take part in cultural life is violated when people cannot join in traditions that are rooted in their community.[118]

For fishers, there is one human right that is tightly interwoven with each of these other guarantees: the right to adequate food. The right to adequate food not only promises access to purchase or obtain safe, sufficient food, but it ensures that food is procured in accordance with a community's cultural practices and traditions.[119] Like the right to health, the right to food protects against a lack of healthy nourishment. If it rose to the level of starvation, a breach of the right to adequate food could, by definition, double as a breach of the right to life.[120] The right to food is a fisher's livelihood, and because economic opportunities are so few in rural coastal communities, losing the ability to fish imperils a fisher's right to work. Subsistence fishing is a tradition throughout the Philippines, so the right to adequate food works directly in tandem with the right to take part in cultural life.

B. Right to Food

Though the right to food stands alone in paramount importance,[121] "the international community violates the right to food more often than any other right."[122] Those violations are not grounded in drought or logistical shortcomings. Instead, human-made factors are the

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[116] *See Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*, OFF. HIGH COMM'R FOR HUM. RTS. (July 27, 2020), https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning ("The right to health is an inclusive right extending . . . to the underlying determinants of health, such as an adequate supply of *safe food and nutrition*." (emphasis added)).

[117] *See* U.N., Hum. Rts. Comm., General Comment 36, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) ("The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. . . . The measures called for to address adequate conditions for protecting the right to life include . . . essential goods and services such as food, water, shelter, [and] health care . . . ." (citation omitted)).

[118] *See* U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., General Comment 21, ¶ 13, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) (noting that the scope of the right to take part in cultural life includes "natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity").

[119] *About the Right to Food and Human Rights*, *supra* note 14 (outlining the right to food "corresponding to the cultural traditions of the people to which the consumer belongs").

[120] *See* Diana Kearney, *Food Deprivations as Crimes Against Humanity*, 46 N.Y.U. J. INT'L L. & POL. 253, 255 n.7 (2013).

[121] Anthony Paul Kearns, III, *The Right to Food Exists via Customary International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 223, 240, 249 n.124 (1998) (noting that the "pursuit of international human rights will remain futile as long as the right to food remains unprotected").

[122] *Id.* at 224.

drivers of hunger around the globe.[123] People starve in peacetime and wartime alike, when food is turned into "a weapon as opposed to a right."[124] The right to adequate food is grounded in international treaties, but after several decades of recognition, it has spread to customary international law too.

i. Recognition of the Right to Food in International Law.

The right to food is briefly described in the Universal Declaration of Human Rights,[125] and it is detailed in the International Covenant on Economic, Social and Cultural Rights.[126] The Committee on Economic, Social and Cultural Rights further outlined the right to food in a general comment.[127] It explained that the right to food is subject to progressive realization and that it will be achieved when "every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[128]

The United Nations regularly reaffirms its commitment to the right to food. Every session for the last twenty years, the U.N. General Assembly has passed a resolution calling on all nations to respect and uphold the human right to food.[129] In the 2023 iteration, the resolution stressed that international cooperation was crucial to the access and availability of food.[130] After the draft resolution passed through committee by consensus, one state representative identified "unilateral coercive measures as 'an insurmountable obstacle' to the right to food."[131] Fishers, in particular, play a key role in the annual resolution. Starting in 2007, the General Assembly underscored assistance for fishing communities,[132] and since 2012, the resolution has specifically called out "the contribution of small-scale fishers to the local food security of coastal communities."[133]

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[123] *Id.* at 242.

[124] *Id.* at 255.

[125] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948).

[126] International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

[127] U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., General Comment 12, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

[128] *Id.* ¶ 6.

[129] G.A. Res. 78/198, (Dec. 19, 2023); G.A. Res. 77/217, (Dec. 15, 2022); G.A. Res. 76/166, (Dec. 16, 2021); G.A. Res. 75/179, (Dec. 16, 2020); G.A. Res. 74/149, (Dec. 18, 2019); G.A. Res. 73/171, (Dec. 17, 2018); G.A. Res. 72/173, (Dec. 19, 2017); G.A. Res. 71/191, (Dec. 19, 2016); G.A. Res. 70/154, (Dec. 17, 2015); G.A. Res. 69/177, (Dec. 18, 2014); G.A. Res. 68/177, (Dec. 18, 2013); G.A. Res. 67/174, (Dec. 20, 2012); G.A. Res. 66/158, (Dec. 19, 2011); G.A. Res. 65/220, (Dec. 21, 2010); G.A. Res. 64/159, (Dec. 18, 2009); G.A. Res. 63/187, (Dec. 18, 2008); G.A. Res. 62/164, (Dec. 18, 2007); G.A. Res. 61/163, (Dec. 19, 2006); G.A. Res. 60/165, (Dec. 16, 2005); G.A. Res. 59/202, (Dec. 20, 2004); G.A. Res. 58/186, (Dec. 22, 2003).

[130] G.A. Res. 78/198, *supra* note 130, ¶ 11.

[131] Press Release, Third Committee, Third Committee Approves 12 Draft Resolutions, Including Texts on Mercenaries, Unilateral Coercive Measures, Indigenous Peoples and Right to Food, U.N. Press Release SHC/4398 (Nov. 7, 2023), https://press.un.org/en/2023/gashc4398.doc.htm.

[132] G.A. Res. 66/158, *supra* note 130, ¶ 12; G.A. Res. 65/220, *supra* note 130, ¶ 11; G.A. Res. 64/159, *supra* note 130, ¶ 11; G.A. Res. 63/187, *supra* note 130, ¶ 11; G.A. Res. 62/164, *supra* note 130, ¶ 10.

[133] G.A. Res. 78/198, *supra* note 130, ¶ 17; G.A. Res. 77/217, *supra* note 130, ¶ 17; G.A. Res. 76/166, *supra* note 130, ¶ 17; G.A. Res. 75/179, *supra* note 130, ¶ 17; G.A. Res. 74/149, *supra* note 130, ¶ 16; G.A. Res. 73/171, *supra* note 130, ¶ 16; G.A. Res. 72/173, *supra* note 130, ¶ 16; G.A. Res. 71/191, *supra* note 130, ¶ 16; G.A. Res.

The resolution is a mainstay every December. Not once has China ever voted against or even abstained from voting on the right to food resolution.[134] Other states have regularly voiced their dissent,[135] but the Chinese delegation has never raised a complaint about the right to food. Because China has failed to make timely, repeated objections,[136] it long-ago forfeited any claim as a persistent objector.

The right to food is similarly upheld in customary international law. Grounded in one of "the most basic needs necessary for human existence,"[137] the right to adequate food can be found written into norms and legal protections throughout cultures and historical eras.[138] Therefore, even if China had not already consented to the authority of the ICESCR, the right to adequate food has transcended treaties and assumed binding status on all states under customary international law.[139]

70/154, *supra* note 130, ¶ 15; G.A. Res. 69/177, *supra* note 130, ¶ 14; G.A. Res. 68/177, *supra* note 130, ¶ 14; G.A. Res. 67/174, *supra* note 130, ¶ 14.

[134] Press Release, Third Committee, *supra* note 132; U.N. GAOR, 77th Sess., 54th plen. mtg. at 18, U.N. Doc. A/77/PV.54 (Dec. 15, 2022); U.N. GAOR, 76th Sess., 53d plen. mtg. at 15, U.N. Doc. A/76/PV.53 (Dec. 16, 2021); U.N. GAOR, 75th Sess., 46th plen. mtg. at 16, U.N. Doc. A/75/PV.46 (Dec. 16, 2020); U.N. GAOR, 74th Sess., 50th plen. mtg. at 21-22, U.N. Doc. A/74/PV.50 (Dec. 18, 2019); U.N. GAOR, 73d Sess., 55th plen. mtg. at 28, U.N. Doc. A/73/PV.55 (Dec. 17, 2018); U.N. GAOR, 72nd Sess., 73d plen. mtg. at 18-19, U.N. Doc. A/72/PV.73 (Dec. 19, 2017); U.N. GAOR, 71st Sess., 65th plen. mtg. at 27, U.N. Doc. A/71/PV.65 (Dec. 19, 2016); U.N. GAOR, 70th Sess., 80th plen. mtg. at 17, U.N. Doc. A/70/PV.80 (Dec. 17, 2015); U.N. GAOR, 69th Sess., 73d plen. mtg. at 14, U.N. Doc. A/69/PV.73 (Dec. 18, 2014); U.N. GAOR, 68th Sess., 70th plen. mtg. at 22, U.N. Doc. A/68/PV.70 (Dec. 18, 2013); U.N. GAOR, 67th Sess., 60th plen. mtg. at 16, U.N. Doc. A/67/PV.60 (Dec. 20, 2012); U.N. GAOR, 66th Sess., 89th plen. mtg. at 15, U.N. Doc. A/66/PV.89 (Dec. 19, 2011); U.N. GAOR, 65th Sess., 71st plen. mtg. at 23, U.N. Doc. A/65/PV.71 (Dec. 21, 2010); U.N. GAOR, 64th Sess., 65th plen. mtg. at 18, U.N. Doc. A/64/PV.65 (Dec. 18, 2009); U.N. GAOR, 63d Sess., 70th plen. mtg. at 24, U.N. Doc. A/63/PV.70 (Dec. 18, 2008); U.N. GAOR, 62nd Sess., 76th plen. mtg. at 22-23, U.N. Doc. A/62/PV.76 (Dec. 18, 2007); U.N. GAOR, 61st Sess., 81st plen. mtg. at 18, U.N. Doc. A/61/PV.81 (Dec. 19, 2006); U.N. GAOR, 60th Sess., 64th plen. mtg. at 16-17, U.N. Doc. A/60/PV.64 (Dec. 16, 2005); U.N. GAOR, 59th Sess., 74th plen. mtg. at 24, U.N. Doc. A/59/PV.74 (Dec. 20, 2004); U.N. GAOR, 58th Sess., 77th plen. mtg. at 22-23, U.N. Doc. A/58/PV.77 (Dec. 22, 2003).

[135] Interestingly, the state that has objected most frequently to the right to food resolution is a vocal supporter of the right of Filipinos to fish in the Southeast Asia Sea: the United States. During two periods in the last twenty years, 2003-08 and 2017-21, the United States voted against every right to food resolution, adding up to eleven times. *See supra* note 130. The U.S. delegation has explained its nay votes, in part, by denying "that States have particular extraterritorial obligations arising from any concept of a 'right to food.'" Sofija Korac (Advisor for Econ. & Soc. Affs.), *Explanation of Vote of the Third Committee Adoption of the Right to Food Resolution*, UNITED STATES MISSION TO THE UNITED NATIONS (Nov. 9, 2021), https://usun.usmission.gov/explanation-of-vote-of-the-third-committee-adoption-of-the-right-to-food-resolution/. The country with the second most votes against the resolution was Israel at six times, and it abstained twice more. *See supra* note 130. Palau voted against the resolution once in 2004, and the Marshall Islands and the Democratic People's Republic of Korea each abstained once in 2003 and 2007, respectively. *See supra* note 130.

[136] *See* Shelly Aviv Yeini, *The Persistent Objector Doctrine: Identifying Contradictions*, 22 CHI. J. INT'L L. 581, 594 (2022) ("For a state to receive [persistent objector] status, its objection must satisfy three requirements: a temporal requirement, a persistency requirement, and a consistency requirement.").

[137] Kearns, *supra* note 122, at 240.

[138] *Id.* at 225-26

[139] *Id.* at 255 ("The legal right to food does exists according to the principle of *jus cogens*, therefore, all nations, states, governments and sovereignties regardless of whether they endorse the United Nations Charter, declarations, or covenants, remain obligated to honor the right to food."); *see also id.* at 249 ("If a right or obligation assumes the character of a norm of general international law, a state can neither dissent from nor avoid the obligations of the norm, even if the state never consented to such a norm.").

The specific rights of fishers have likewise been solidified in international law. Early international agreements, such as the Santiago Declaration and the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, started the process of safeguarding the subsistence fishing rights of local coastal communities.[140] These documents recognized that coastal communities were entitled to "the necessary conditions of subsistence" in order to "secure a maximum supply of food and other marine products."[141] But fishing rights were not recognized and codified on a large scale until the passage of the United Nations Convention on the Law of the Sea ("UNCLOS").

UNCLOS has been called "the second-most important multilateral treaty after the Second World War, surpassed only by the United Nations Charter."[142] According to UNCLOS, coastal nations "are entitled to a 12 nautical mile (nm) territorial sea over which they exercise sovereignty, a 24 [nautical mile] contiguous zone for customs purposes, a 200 [nautical mile] EEZ for exclusive access to living and non-living resources, and a continental shelf of 200 [nautical miles] or more, over which the coastal State has rights to seabed oil minerals."[143] While most maritime boundaries were derived from customary law, the EEZ was a result of a widespread "mood of decolonization and national sovereignty." Moreover, "the drive for food security and economic development" played a key role in the formation of the EEZ in international law.[144]

Rather than functioning "as a zone of national aggrandizement or offshore industrial development," the EEZ was created "principally to give coastal States competence to protect subsistence coastal fishing populations."[145] The original purpose of the EEZ is clear considering that "90 percent of all fish stocks are within 200 miles of shore."[146] That does not mean that no other vessel may fish whatsoever in a state's EEZ. Rather, coastal states must respect the reasonable efforts of other countries "to take the balance of the allowable catch" in a state's EEZ, but only that which is "not harvested by the local industry."[147] In short, "the EEZ was designed to safeguard a basic human right to food security."[148] For local fishers, the formation of the EEZ "represented more food, more jobs and higher standards of living."[149]

When it became a signatory to the treaty, "China relinquished its former high seas freedom to fish in areas now enclosed within other States' EEZs, while it acquired exclusive rights in its own EEZ."[150] In fact, each sovereign state laying claim to a portion of the

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[140] Kraska, *supra* note 2, at 118-19.

[141] *Id.*

[142] Felipe Kern Moreira, *The Fishing Rights of Indigenous Peoples in the Context of the Global Governance of the Seas*, 34 OCEAN Y.B. 136, 136 n.2 (2020) (Among developing states, the treaty holds added significance because it exhibits a "democratic character of multilateralism" without equal); *id.* at 136.

[143] Kraska, *supra* note 2, at 116.

[144] *Id.*

[145] *Id.* at 117; *see also id.* at 116 ("The EEZ was created to ensure that coastal subsistence fishing communities had access to offshore fish stocks adjacent to their coast."); Hall, *supra* note 44, at 40 (outlining that the purpose of the exclusive economic zone is "to protect coastal economies and communities").

[146] Kraska, *supra* note 2, at 116.

[147] Kraska, *supra* note 2, at 123.

[148] *Id.* at 116.

[149] *Id.* at 121.

[150] Kraska, *supra* note 2, at 122. Though it sounds obvious, it is nonetheless important to note that longstanding international norms urge China to uphold the agreements it has signed. *Id.* at 128 ("The doctrine of

Southeast Asia Sea is a signatory to UNCLOS.[151] Though some claim that "UNCLOS fails to provide adequate governance" in the Southeast Asia Sea,[152] the reality is that the treaty itself presents straightforward guidance; the actual issue lies in adherence to UNCLOS by its own signatories. What has become more and more clear is that "the founding purpose and function of the regime of the EEZ has been virtually ignored in the Southeast Asia Sea disputes, to the detriment of the human rights and subsistence of coastal fishing communities."[153]

However, there are limitations to the ability to address the right to food and other human rights. Because governments set policies and engage institutions at such a high level, there is the risk that they are less attenuated to individual human rights concerns.[154] Nongovernmental bodies face notable setbacks as well. In Southeast Asia, the region's transnational human rights watchdog is operated by the Association of Southeast Asian Nations ("ASEAN"), known as the ASEAN Intergovernmental Commission on Human Rights ("AICHR"). A key obstacle to human rights progress in Southeast Asia is that the AICHR is limited to operating as "a consultative body and does not have the capacity to investigate and pinpoint human rights issues in member states."[155]

ii. State Obligations Stemming from the Right to Food

Like every human right, the right to adequate food imposes obligations on states. Governments must respect, protect, and fulfill the right to food—not only for their own citizens, but for people outside their borders.[156] In practice, states respect the right by ensuring that their actions do not interfere with the ability of people to obtain food.[157] At its core, the most basic responsibility "is simply the obligation to 'do no harm.'"[158] To protect this right, states must restrain individuals and other third parties under their jurisdiction from restricting extraterritorial access to food.[159] Finally, fulfilling this right does not mandate that states dole out international aid except in emergency situations, but countries should nonetheless support global infrastructure that promotes the right to food.[160]

A state is not alone in providing food for its people; rather, "international cooperation" is critical "to ensure the equitable distribution of world food supplies."[161]

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pacta sunt servanda ('agreements must be kept') is a cornerstone principle of international law, and is reflected in Article 26 of the Vienna Convention on the Law of Treaties.").

[151] *Id.* at 117. The only caveat is that, because it is not a member of the United Nations, Taiwan cannot be a signatory to UNCLOS. Lim & Liu, *supra* note 49, at 76 n.150.

[152] Greer, *supra* note 103.

[153] Kraska, *supra* note 2, at 118.

[154] Tuan, *supra* note 18, at 96 ("[G]overnments generally take a state-centric approach, concerning issues at a macro level in managing national affairs, which may overlook human security issues at the individual level.").

[155] *Id.*

[156] Jean Ziegler (Special Rapporteur on the Right to Food), *Report of the Special Rapporteur*, ¶ 34, U.N. Doc. E/CN.4/2006/44 (Mar. 16, 2006).

[157] *Id.* ¶ 35.

[158] *Id.*

[159] *Id.* ¶ 36.

[160] *Id.* ¶ 37-38 ("[A]ll countries should cooperate to provide an enabling environment for the realization of the right to food in all countries.").

[161] Kearns, *supra* note 122, at 252.

Meeting all the obligations necessarily requires international cooperation, and in total, the right to food amounts to "the most important and clearest commitment of member States to cooperate."[162] In particular, fishing demands special attention between states, since migratory fishers following traditional routes can cross over national borders.[163]

C. China's Violations of the Right to Food

When Chinese vessels illegally fish Filipino waters for marine resources, Filipino fishers are precluded from obtaining those resources themselves.[164] The breached right to food is underscored when Philippine vessels are rammed by larger ships,[165] attacked with water cannons,[166] and harassed with lasers and sound blasts in well-documented and internationally reported incidents.[167]

Though national sovereignty is most frequently highlighted during clashes between China and the Philippines, officials readily acknowledge that the concern for food security is interwoven throughout the dispute. On December 9, 2023—ten days before the United Nations passed its annual right to food resolution, which highlighted subsistence fishers and coastal communities[168]—Chinese vessels used water cannons to damage Philippine ships attempting to supply low-income fishers with fuel and food.[169] Condemning the confrontation, a Philippine task force emphasized that China's actions risk "the lives and livelihood of Filipino fishermen who have traditionally fished in the area,"[170] a sentiment that the U.S. State Department and U.S. Ambassador to the Philippines both echoed.[171] Years

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[162] Jean Ziegler (Special Rapporteur on the Right to Food), *Report of the Special Rapporteur*, ¶ 32, U.N. Doc. E/CN.4/2006/44 (Mar. 16, 2006).

[163] FISHERIES GUIDELINES, *supra* note 42, at 9; *see also id.* at 16 ("States should promote enhanced international, regional and subregional cooperation in securing sustainable small-scale fisheries.").

[164] *See, e.g.*, Hall, *supra* note 44, at 39 (recounting a 2012 incident where Chinese vessels were found with "illegally collected giant clams, corals, and live sharks" from the Filipino exclusive economic zone).

[165] Jim Gomez, *Philippine and Chinese Vessels Collide in Disputed South China Sea and 4 Filipino Crew Are Injured*, ASSOCIATED PRESS, https://apnews.com/article/philippines-china-south-china-sea-collision-e69d9506e85d1d23685db4f220b50d71 (Mar. 5, 2024).

[166] Aaron-Matthew Lariosa, *China Attacks Philippine Ship, Injures Crew in Latest Escalation of South China Sea Standoff*, USNI NEWS (Mar. 23, 2024), https://news.usni.org/2024/03/23/china-attacks-philippine-ship-injures-crew-in-latest-escalation-of-south-china-sea-standoff.

[167] Chad de Guzman, *Philippines Coast Guard Accuses China of Blinding Crew With 'Military-Grade' Laser*, TIME, https://time.com/6255012/philippines-laser-south-china-sea-tensions-escalate (Feb. 14, 2023, 9:45 PM); Kurt Dela Pena, *China's Use of Sound as Weapon in West Philippine Sea Aggression Brings LRAD into Focus*, PHILIPPINE DAILY INQUIRER (Jan. 18, 2024), https://asianews.network/chinas-use-of-sound-as-weapon-in-west-phillipine-sea-aggression-brings-lrad-into-focus.

[168] G.A. Res. 78/198, *supra* note 130, ¶ 17 (acknowledging "the contribution of small-scale fishers to the local food security of coastal communities").

[169] Jim Gomez, *US and Philippines Condemn the Chinese Coast Guard's Water Cannon Blasts on Fisheries Vessels*, ASSOCIATED PRESS, https://apnews.com/article/south-china-sea-philippines-disputed-scarborough-shoal-5e7b105b1b0a65471776e3cba79b5324 (Dec. 9, 2023, 9:58 PM).

[170] Jay Tarriela, *Statement of the National Task Force for the West Philippine Sea*, TWITTER (Dec. 9, 2023, 3:12 AM), https://twitter.com/jaytaryela/status/1733399217136427048.

[171] Press Release, Matthew Miller, Spokesperson, U.S. Dept. of State, U.S. Support for the Philippines in the South China Sea (Dec. 10, 2023) ("Filipinos are entitled to traditional fishing rights around Scarborough Reef."); MaryKay L. Carlson (@USAmbPH), TWITTER (Dec. 9, 2023, 3:15 AM),

earlier, the Philippine Senate's former president pro tempore presciently warned that Chinese aggression does not merely damage sovereignty; it decimates fishing ability.[172] He put it in blunt terms: "It's a formula for starvation. More than a national security question, it involves food security."[173]

Fishers around Southeast Asia have found themselves spotlighted for their role in the dispute. In widely publicized remarks, a Filipino fishing captain forced to dump his catch decried Chinese harassment.[174] He specifically noted that it was "inhuman because that was food which people should not be deprived of."[175] A Vietnamese captain was described by coast guard authorities as not only a "proficient fisherman" but "a real soldier in the course of protecting Vietnamese islands and waters."[176]

V. Recommended Next Steps

Because the dispute is so high-profile, recommendations are coming from all sides. One scholar has asserted that the confrontations should be definitively "settled in light of the food security impetus that drove the initial UNCLOS negotiations."[177] Other scholars have suggested a multilateral agreement between Southeast Asian states that could hold strong normative power to combat Chinese aggression.[178] In other regions, bilateral agreements have specifically been drafted—and successful—protecting the rights and livelihoods of subsistence fishers.[179]

From a lawfare perspective, the Philippines can continue to leverage international law to its benefit. Scholars suggest that lawfare tactics could be routed through United Nations bodies.[180] For example, every time that a Chinese vessel rams a Filipino fishing boat, the Philippines could file a new report against China for violating the Convention on the International Regulations for Preventing Collisions at Sea.[181] Additionally, because China is

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https://twitter.com/USAmbPH/status/1733399888002732211 ("This PRC behavior violates international law and endangers lives and livelihoods.").

[172] Press Release, Senate of the Philippines, PH to Lose P200 M a Day in Fish Catch if China Puts Up 'No Fishing' Sign in WPH (July 9, 2015), https://legacy.senate.gov.ph/press_release/2015/0709_recto1.asp.

[173] *Id.*

[174] Jim Gomez, *Filipino Fisherman to China's Coast Guard on Disputed Shoal: 'This Is Philippine Territory. Go Away'*, ASSOCIATED PRESS, https://apnews.com/article/china-philippines-disputed-scarborough-shoal-south-china-sea-13cf6ee1b11136ae79c949cd8e7237a0 (Jan. 23, 2024, 10:53 AM).

[175] *Id.*

[176] Tuan, *supra* note 18 (quoting Thanh Hải, *"Cột mốc" dọc biển Đông*, LAO ĐỘNG (June 12, 2011, 1:00 PM), https://vietnamnet.vn/cot-moc-doc-bien-dong-25218.html.

[177] Kraska, *supra* note 2, at 127.

[178] Kraska & Pedrozo, *supra* note 11.

[179] Sharma, *supra* note 17, at 48.

[180] Kraska & Pedrozo, *supra* note 11.

[181] *Id.*; Convention on the International Regulations for Preventing Collisions at Sea r. 8, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16 (requiring that vessels make efforts, such as reducing speed and changing direction, to avoid collisions at sea) [hereinafter COLREGs]; *see also* Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257, 259 (2020) (explaining that the 2016 arbitral court found that "China's maritime law enforcement actions directed towards Philippine vessels and Filipino fishermen" violated COLREGs).

considered the worst offender perpetrating illegal fishing,[182] the Philippines could call on the Food and Agriculture Organization to investigate China for consistently breaching the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.[183]

To specifically bolster their human rights claims, Filipino fishers could directly contact the Special Rapporteur on the Right to Food and file a formal complaint about harassment from Chinese vessels. They could encourage Special Rapporteur Michael Fakhri to highlight the dispute in the Southeast Asia Sea in his annual report to the General Assembly. The Special Rapporteur could embark on a country mission to the Philippines and, based on his findings, draft an allegation letter to China.[184]

The Philippines could request that the Human Rights Council raise the issue during China's next universal periodic review. Though it would be unlikely to take center stage during a complete review of human rights abuses perpetrated by China, the harm suffered by fishers is still valuable to discuss, and the issue would likely receive an added boost just by virtue of the Human Rights Council's stature.

VI. Areas for Future Research

Future research could explore additional human rights that are implicated by disputes in the Southeast Asia Sea. Though some are briefly mentioned in this Article, the right to adequate food is also connected to the right to water, right to adequate housing, right to education, right to take part in public affairs, right to information, and freedom from torture.[185] Each right is especially relevant for rural and low-income populations, such as Filipino fishers.

Additionally, it would be useful to conduct a comparative analysis of fishers from different states throughout the Southeast Asia Sea. Most research thus far has been disjointed, and the information that has been compiled about each nationality of fishers has not been synthesized in any type of meta-analysis. Because these groups likely share common difficulties and face similar harassment from Chinese vessels, a comparison could illustrate overarching trends or patterns in international human rights law. This kind of information

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[182] Graeme Macfadyen et al., *The IUU Fishing Index,* GLOB. INITIATIVE AGAINST TRANSNAT'L ORGANIZED CRIME, 27-28 (2019), https://globalinitiative.net/wp-content/uploads/2019/02/IUU-Fishing-Index-Report-web-version.pdf; *see also* Studdard, *supra* note 7, at 2 ("China is far above any other nation as the worst performer when it comes to [the IUU Fishing Index].").

[183] *See* Food & Agric. Org. [FAO], *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, at 2 (2001) (broadly defining illegal fishing as any practice that violates national regulations or international responsibilities); *see also id.* at 24 ("FAO should . . . further investigate the issue of IUU fishing."). FAO would hopefully be receptive to claims about human rights violations, since it has previously issued guidelines on small-scale fisheries that used "a human-rights approach" in order to "support the progressive realization of the right to food." Food & Agric. Org. [FAO], *International Guidelines for Securing Sustainable Small-Scale Fisheries*, at 9 (2012), http://www.fao.org/cofi/2388509a60857a289b96d28c31433643996c84.pdf; Brian Wilson, *Human Rights and Maritime Law Enforcement*, 52 STAN. J. INT'L L. 243, 303 (2016) (discussing human rights and FAO's small-scale fisheries guidelines).

[184] *See* U.N. High Comm'r for Hum. Rts., *The Right to Adequate Food: Fact Sheet No. 34*, at 37-38 (2010) (explaining specific actions the Special Rapporteur on the Right to Food can take).

[185] *Id.* at 5-6.

sharing would also allow researchers to compare the tactics of different Southeast Asian countries. While the Philippines, for example, has taken a firm and vocal approach toward combatting Chinese aggression, it is possible that it could learn something and combine strategies with a country that is taking a more subversive stance.

Finally, while this Article focused on the impact that the conflict has had on human rights, it would be beneficial to determine the ways those human rights could play into the dispute going forward. For instance, do other countries, even those that are not treaty allies with the Philippines, have a responsibility to protect against the violations of Filipino human rights by China? How could the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on the Right to Food use their political clout to influence China's decision-making? How could the recognition of breached human rights help deescalate tensions in the region?

VII. Conclusion

While tensions continue to rage in the Southeast Asia Sea, it is important not to lose sight of the people that fish, eat, and live there. Taking a human rights approach to address Chinese aggression opens up a new opportunity to analyze this developing situation. An approach based in international human rights law may not end the conflict, but it could set new standards for understanding it.


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DON'T CAST(E) ME OUT: THE CASE FOR MANDATING CASTE DIVERSITY ON INDIA'S CORPORATE BOARDS

Sarina Bhargava

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I. Introduction

India's Companies Act of 2013 was an "[a]ct to consolidate and amend the law relating to companies."[1] As part of this amendment, India enacted board diversity requirements, recognizing the importance of diversity in the board room. Section 149 of the Companies Act of 2013 and subsequent amendments call for at least one woman director to serve on the boards of publicly-traded companies and companies meeting certain statutory specifications.[2] For the top 1,000 listed companies in the country, this woman is required to be independent, meaning she cannot be related to individuals in the company through familial or marriage ties.[3]

While the enactment of Section 149 represents a positive change for Indian society, it suffers from a fatal flaw: its definition of diversity includes only women. Now, a little over ten years since the Companies Act of 2013 was first enacted, this Note proposes it is time to amend the law to mandate the top 1,000 listed companies in India to include one Scheduled Caste individual on their boards. In 2025 and beyond, the government cannot allow the caste system to continue cast(e)ing lower caste individuals out from the board room.

This Note argues that India should amend Section 149 and other relevant provisions of the Companies Act of 2013 to mandate adding one Scheduled Caste individual to the boards of the top 1,000 listed companies. Part II explains the caste system and its significance to Indian culture. Part III provides background on board diversity law in India. Part IV discusses the business benefits of caste diversity on boards. Part V addresses why shareholder activism is insufficient to motivate companies to place Scheduled Caste individuals on their boards without a mandate. Part VI proposes such a potential mandate, discussing both possible formation and implementation as well as specific language. Finally, Part VII discusses how to ensure the continued success of such a mandate.

II. What is Caste?

Caste is a South Asian social system that is over 3,000 years old.[4] The system divides individuals into a hierarchy at birth, based on surname.[5] There are four groups in this hierarchy: the Brahmins, Kshatriyas, Vaishyas, and Shudras.[6] A fifth group, known as the "Scheduled Castes" (also called Dalits or "untouchables", though politically incorrect) is at the very bottom of the caste hierarchy.[7] In the caste system hierarchy, the first three castes

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[1] The Companies Act, 2013, (Act No. 18, Acts of Parliament, 2013 (India)).

[2] *Id.* § 149.

[3] SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 (last amended 2020), Reg. 17(1).

[4] Vina M. Goghari & Mavis Kusi, *An Introduction to the Basic Elements of the Caste System of India*, FRONTIERS IN PSYCH. 1, 2 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10764522/pdf/fpsyg-14-1210577.pdf.

[5] Ajay Dayanandan et. al, *The Role of Caste for Board Membership, CEO, and Interlocking*, 54 PAC. BASIN FIN. J. 29 (2019).

[6] *What is India's Caste System?*, BBC (June 19, 2019), https://www.bbc.com/news/world-asia-india-35650616.

[7] Reina Patel, *Caste Out: India's Unjust Health-Care System*, THINK GLOB. HEALTH (Apr. 8, 2023), https://www.thinkglobalhealth.org/article/caste-out.

(also called "forward castes") are considered superior to the last two castes (called "backward castes").[8] Individuals are often confined to their caste, as "social mobility within the system is next to impossible after birth."[9]

Historically, each caste has been associated with an established occupation.[10] Brahmins are the priestly caste, Kshatriyas are the warrior caste, Vaishyas are the farmer/merchant/trader caste, and Shudras are the laborer caste.[11] Scheduled Caste individuals, on the other hand, often perform the most menial work, including as "domestic workers, daily wage laborers, and sanitation workers who handle human waste directly."[12]

In addition to creating sharp labor distinctions, the caste system influences almost all other aspects of daily life to such an extent that it has been described as "omnipresent."[13].The pattern of caste "can be noticed in the house one lives in, the acquaintances one makes, the place and form of worship, in love and marriage, in attire, language, food and so on."[14] The caste system "thrives on the principle of purity and pollution, social hierarchy and categorization *[sic]* of the so-called upper caste and lower caste."[15]

In 1950, the Indian government outlawed caste discrimination.[16] Subsequently, the government has taken several steps to reduce caste discrimination against individuals, including creating a reservation system based on quotas, similar to affirmative action.[17] These quotas focus mainly on Scheduled Caste individuals and increasing their representation in the "public and government sector, namely education, employment, and legislative bodies."[18] While at first these provisions were only intended to be in place for ten years, they are now considered a "necessity with no sign of dissipating."[19] Despite this, the quotas have been a point of contention in Indian society, having been called an "apocalyptic menace"[20] and "fundamentally unfair" to those who do not belong to the reserved caste categories, denying them opportunities in education and government despite their qualifications.[21]

Overall, the reservation system has helped Scheduled Caste communities gain more representation in both public sector employment and higher education.[22] For example,

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[8] Dayanandan et. al, *supra* note 5, at 30.

[9] Simran Jeet Singh & Aarti Shyamsunder, *Bringing Caste into the DEI Conversation*, HAR. BUS. REV. (Dec. 5, 2022), https://hbr.org/2022/12/bringing-caste-into-the-dei-conversation.

[10] *Id.*

[11] BBC, *supra* note 6.

[12] Singh & Shyamsunder, *supra* note 9.

[13] Angel Sophan & Arya Nair, *Decolonising Caste in the Indian Context: The Psyche of the Oppressor*, 35(1) PSYCH. & DEVELOPING SOCIETIES 110, 111 (2023).

[14] *Id.*

[15] *Id.*

[16] Goghari & Kusi, *supra* note 4, at 4.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Rushil Gupta, *False Polarity: On Reservation System*, TIMES OF INDIA: READER'S BLOG (Oct. 2, 2022, 16:59 IST), *https*://timesofindia.indiatimes.com/readersblog/contemporary-addict/false-polarity-on-reservation-system-45388/.

[21] Indranill Basu Ray, *Re-Evaluating Reservation: Balancing Meritocracy and Fairness in India's Education System*, Swarajya Mag. (July 8, 2023, 11:42 AM IST), *https*://swarajyamag.com/ideas/re-evaluating-reservation-balancing-meritocracy-and-fairness-in-indias-education-system.

[22] Goghari & Kusi, *supra* note 4, at 4

between 1977 and 1987, the percentage of employees from Scheduled Castes rose from 11.31% to 16.81%, with many of the gains in professional and managerial jobs (10.23% to 18.63%).[23] And in the public sector, the number of Scheduled Caste rose from 7.42% to 17.44% between 1977 and 1980.[24]

However, though constitutionally outlawed, the practice of caste discrimination remains alive and well in society today.[25] For example, crimes against members of the Scheduled Caste have been increasing in recent years,[26] and despite caste quotas and gains for individuals in education and government work, Scheduled Caste individuals still face discrimination when it comes to access in these areas.[27] Caste discrimination has even trickled into the U.S. technology industry, where individuals feel exclusion in the workplace based on their caste.[28]

III. Board of Directors Requirements in India

A. Requirements Regarding Appointment and Qualification of Board of Directors

Chapter XI, Sections 149-172, of the Companies Act of 2013 (hereinafter the "Companies Act") governs India's requirements for the appointment and qualification of members on boards of directors.[29] Section 149(1) calls for "a minimum number of three directors in the case of a public company," up to a "a maximum of fifteen."[30] There are many requirements for these directors, including residency requirements (that at least one director "has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year") and independence requirements (that "at least one-third" of those on the board be independent.)[31]

Section 149(6) subsequently defines independent directors: "a director other than a managing director or whole-time director or nominee," who "is not related to promoters or directors in the company, its holding, subsidiary or associate company."[32] Additionally, independent directors cannot "hold together with [their] relatives two per cent or more of the total voting power of the company,"[33] and must not have had a "pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors,

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[23] *Id.*

[24] *Id.*

[25] Human Rights Watch, *Background: "Untouchability" and Segregation*, *in* CASTE DISCRIMINATION: A GLOBAL CONCERN (2001).

[26] Muhammad Haris, *Caste-Based Discrimination in India: A Rising Trend – OpEd*, EURASIA REV. (Feb. 10, 2023), https://www.eurasiareview.com/10022023-caste-based-discrimination-in-india-a-rising-trend-oped/.

[27] *Id.*

[28] U.S. tech companies like Apple have been trying to combat the effects of caste discrimination. Deepa Fernandes and Gabrielle Healy, *Caste Discrimination Persists in the U.S. How Are Legislators Addressing It?,* WBUR (May 3, 2023), https://www.wbur.org/hereandnow/2023/05/03/caste-discrimination-us.

[29] The Companies Act, 2013, (Act No. 18, Acts of Parliament, 2013 (India)) (hereinafter "The Companies Act").

[30] *Id.* § 149(1)(b).

[31] *Id.* § 149(4).

[32] *Id.* § 149(6)(b).

[33] *Id.* § 149(6)(e)(iii).

during the two immediately preceding financial years or during the current financial year."[34] A board member's relatives also must not have had a "pecuniary relationship or transaction with the company . . . amounting to two per cent or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year."[35]

Other relevant provisions of Chapter XI include Sections 165, 166, and 172. Section 165 limits the number of public company boards an individual can sit on to a maximum of ten .[36] Section 166 describes the duties of directors sitting on boards, who must "exercise [their] duties with due and reasonable care, skill and diligence" as well as with "independent judgment," and act in the best interests of the company at all times.[37] Section 172, which describes the penalties if any company violates any provisions of Chapter XI, is discussed in further detail below and in Part VI of this Note.[38]

B. Board Diversity Requirements

When it comes to board diversity, Section 149(1) signaled India's attempt at beginning diversification by requiring at least one woman be on each board of directors:

> in listed companies;
> or every other public company having –
> paid-up share capital of Rs. 1 crore or more
> or with a turnover of Rs. 3 crore or more.[39]

There was no explicit directive that this woman be independent ("Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director").[40] Companies had one year from the enactment of the Act—until April 1, 2015—to comply with the mandate.[41] Penalties for noncompliance, as defined in Section 172 of the Companies Act, were fines between approximately $600 to$6,000 USD when converted.[42]

Despite this, by April 1, 2015, more than 100 firms had not complied with the mandate.[43] Out of those that had, many had picked from female family members, "recruiting wives, daughters, and even stepmothers" to fill positions and achieve compliance.[44] For example, Mukesh Ambani, chairman and director of Reliance Industries, a large conglomerate headquartered in Mumbai, India, appointed his wife Nita Ambani to the Board to fulfill Section 149(1)'s mandate.[45] Similarly, the stepmother of business tycoon Vijay Mallya was

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[34] *Id.* § 149(6)(d).
[35] *Id.*
[36] The Companies Act, 2013, § 165.
[37] *Id.* § 166.
[38] *Id.* § 172.
[39] Companies (Appointment and Qualification of Directors), 2014, Rule 3 (India).
[40] The Companies Act, 2013, § 149(1).
[41] Nita Bhalla, *Indian Firms Mock Gender Diversity as Boardroom Deadline Passes – Analysts*, REUTERS (Apr. 1, 2015, 1:18 PM EDT), https://www.reuters.com/article/world/indian-firms-mock-gender-diversity-as-boardroom-deadline-passes-analysts-idUSKBN0MS4G0/.
[42] The Companies Act, 2013, § 172.
[43] Bhalla, *supra* note 41.
[44] *Id.*
[45] *Id.*

appointed to the board of Mangalore Chemicals and Fertilizers, where Mallya used to sit on the board before resigning.[46] As one analyst put it, the way companies complied was a "mockery of the law."[47]

In response to this undesired outcome, the Securities and Exchange Board of India (SEBI) enacted Listing Obligations and Disclosures Requirements (LODR) 17(1), calling for the top 1,000 listed entities to have at least one independent woman director by April 1, 2020.[48] As of January 2024, Indian companies continue to strive toward this goal, with the representation of women directors comprising 20% of the total directors' pool. [49]

While India has focused its attempts to diversify corporate boards exclusively on gender, it should now shift its focus to caste diversity as well, particularly focusing on including Scheduled Caste individuals on boards. As discussed in the next section, caste diversity on boards produces business benefits.

IV. The Business Benefits of Caste Diversity

Boards in India are very homogenous in terms of caste—286 of the 1,530 National Stock Exchange-listed (NSE) companies' directors have a surname that is a variation of Agarwal: Agrawal, Agarwala, and Aggarwal.[50] Additionally, these individuals may be serving on multiple boards, further perpetuating the homogeneity.[51] Ultimately, the world of corporate boards is "small and closed, with no caste diversity at all."[52]

Two studies both show that this lack of caste diversity on boards is problematic for business outcomes, as it is associated with lower firm value.[53] In the first study, Ajit Dayanandan, Han Donker, and John Nofsinger explored "whether firm value is impacted by having: (1) low caste diversity on the board, (2) director interlocks with the other firms with the same dominate caste, and (3) a CEO of the same caste as the board," by analyzing 4,005 Indian firms listed on the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) and using surname to determine an individual's caste.[54] The study found "that when a company is dominated by a single caste, its value is reduced."[55] This is primarily because boards dominated by a single caste are associated with a lack of weak ties—the board members are too closely linked together and are therefore more likely to receive overlapping

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[46] *Id.*

[47] *Id.*

[48] SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 (last amended 2020), Reg. 17(1) (India).

[49] Rica Bhattacharayya & Kala Vijayaraghavan, *Decade After Mandate, Indian Companies Struggle with Gender Diversity; Only Half Meeting One Woman Director Requirement*, THE ECONOMIC TIMES (Jan. 18, 2024, 8:50 PM, IST), https://economictimes.indiatimes.com/news/company/corporate-trends/decade-after-mandate-indian-companies-struggle-with-gender-diversity-only-half-meeting-one-woman-director-requirement/articleshow/106964858.cms?from=mdr.

[50] Madhura Karnik, *What's an Indian Boardroom Without an Agarwal or a Gupta?*, QUARTZ (Apr. 27, 2016), https://qz.com/india/669503/whats-an-indian-boardroom-without-an-agarwal-or-a-gupta.

[51] *Id.*

[52] *Id.*

[53] Dayanandan et. al, *supra* note 5 at 38; Suresh Bhagavatula et. al, *Social Diversity in Corporate Boards and Firm Outcomes,* 83 J. CORP. FIN. 1 (2023).

[54] Dayanandan et. al, *supra* note 5, at 29-30, 38.

[55] *Id.* at 38.

information.[56] Because of this, these boards do not get the full benefit of novel and varied information and perspectives the way they would if they were caste diverse, leading to lower firm value from a lack of "external information.".[57] The lack of connection between lower castes and forward castes on boards is "a failure to obtain the diversity and benefits of a social network with weak ties, which reduces economic efficiency."[58]

A second study found similarly, supporting the idea that homogenous caste boards do not optimize their decision making capacities.[59] Using surnames to determine individual caste and studying 1,501 firms from the period of 1999-2015, authors Suresh Bhagavatula, Manaswimi Bhalla, Manisha Goel, and Balagopal Vissa found that homogeneity at the board level has a negative association with key measures of firm value and performance, including accounting measures (operating income relative to sales), Tobin's Q (the market value of a firm divided by the replacement value of the firm's assets), and firm volatility (measured as the standard deviation of returns on a firm's security over a year).[60] This is because, as determined in the first study, "homophilous boards are likely to have overlapping perspectives, networks and information sets," thus impairing their advisory role.[61] Additionally, there is also evidence that homogeneous boards engage in cronyism, and are more likely to "appoint a CEO of the same caste as that dominant on the board."[62] Because the CEO is the same caste as that dominant on the board the board takes less care to monitor the CEO's actions, worsening firm performance.[63]

In order to capitalize on the business benefits of caste diversity, India should mandate board caste diversity for the top 1,000 listed companies by requiring at least one Scheduled Caste individual on each board. Part VI of this Note discusses the formation and implementation of such a proposed mandate.

V. The Insufficiency of Shareholder Activism Alone

Various sections of the Companies Act of 2013 give shareholders rights, including the right to receive information, the right to perform inspections, and the right to vote on matters at general meetings.[64] Yet, while shareholder activism is developing in India, it is not as established as it is in other jurisdictions like the United States and United Kingdom.[65] Further, shareholder activism is hamstrung by the structures of Indian corporations, which are dominated by "concentrated ownership and control."[66] This makes it difficult for

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[56] *Id.* at 32.
[57] *Id.* at 38.
[58] Id. at 40.
[59] Suresh Bhagavatula et. al, *Social Diversity in Corporate Boards and Firm Outcomes,* 83 J. CORP. FIN. 1, 19 (2023).
[60] *Id.* at 7-8.
[61] *Id.* at 19.
[62] *Id.* at 18.
[63] *Id.*
[64] The Companies Act, 2013, § 136, 87, 105.
[65] Kirthana Singh Khurana, *Shareholder Activism in India – Reality or Mirage?, in* DYNAMICS OF CORPORATE AND COMMERCIAL LAWS IN A GLOBALISED WORLD 55, 59 (Ankita Sharma & Archna Sehrawat eds., 2022).
[66] *Id.*

minority shareholders to challenge a corporation's work.[67] Additionally, case law relating to corporate actions, including derivative suits, develops too slowly to provide adequate relief and is generally "sluggish".[68]

In addition to the difficulties posed by underdeveloped shareholder activism in the country, there are three reasons why shareholder activism would fail to pressure the top 1,000 listed companies to add a Scheduled Caste individual to their boards. First, given the few studies referenced above that address the business benefits of caste diversity, it is likely that stakeholders are not aware of these benefits and therefore cannot address them appropriately. Second, even assuming shareholders are aware of the benefits of caste diversity on boards, it is unlikely that activists would try to pressure boards to add Scheduled Caste individuals due to their own discriminatory caste perspectives.. Lastly, the latest case of shareholder activism concerning the appointment of board directors did not focus on the caste of these members but instead focused on whether the company at issue was required to call a shareholder's meeting about the proposed changes to the board.[69]

While the first argument is relatively straightforward (many shareholders are not currently concerned with caste diversity), the second and third require expansion, explored in sections A and B below.

A. Shareholder Activists Responding to Business Benefits

As stated above, even with the assumption that shareholders know of the business benefits of caste diversity, such benefits are not enough to pressure companies to add Scheduled Caste individuals to their boards. This is because, although caste discrimination has been outlawed and the reservation system is helping Scheduled Caste individuals' representation in society, this discrimination is still pervasive. Two examples demonstrate this. First, lower castes still face discrimination, with higher rates of crimes perpetrated against these individuals;[70] for instance, in 2021, there were 50,900 cases of violence against Scheduled Caste individuals, translating to "a staggering average" of 140 crimes committed against them every day.[71] Further, though India has a special statute to deal with crimes against Scheduled Caste individuals, that allows for speedy trials, special courts, and strict punishment fewer than 50% of the cases go to court and "the conviction rate has been as low as 50%."[72]

In a second example, when a father murdered his daughter's husband because he was a Scheduled Caste individual, he was celebrated for his "fatherly love" while she was "trolled as an uncaring daughter" for reporting him, showing how deeply engrained casteism remains

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[67] *Id.*
[68] *Id.*
[69] Zee Entertainment Enterprises Limited v. Invesco Developing Markets Fund, (2021) 229 CompCas 540.
[70] Haris, *supra* note 26.
[71] *Id.*
[72] *See id.*

in India.[73] This happened in 2018, almost seventy years after caste discrimination was deemed unconstitutional.[74]

Given these negative sentiments towards lower caste and Scheduled Caste individuals, it is unlikely that many shareholder activists would want to support them, and would instead choose board members from a higher caste that is perceived as having more merit.

B. Shareholder Activism Cases Regarding Appointing a Board of Directors

In *Zee Entertainment Enterprises Limited v. Invesco Developing Markets Fund*, institutional investor Invesco filed a requisition notice calling for Zee to remove three independent directors from its board and to appoint six new independent directors.[75] When Zee refused to call a shareholder's meeting to do so, Invesco filed a petition with the National Company Law Tribunal (NCLT) seeking that the meeting be called.[76] Simultaneously, Zee filed a civil suit before the High Court seeking "(i) a declaration that the Requisition [was] illegal, ultra vires, invalid and bad in law and (ii) an injunction against Invesco from taking any action in furtherance of the Requisition."[77] While the High Court sided with Zee, the Court of Appeals overturned and sided with Invesco, stating that "a requisition by a shareholder calling for a shareholders' meeting cannot be refused by the board of directors of a company or be restrained by any court or tribunal."[78]

While the *Zee* case represents a win for shareholders when it comes to boards of directors, none of it focused on the qualifications or caste of board members. Simply put, caste does not appear to be on activists' minds when it comes to corporate boards, therefore necessitating a mandate for the placement of Scheduled Caste individuals.

VI. Formation and Implementation of The Mandate: Inspiration from Norway

While there are many ways India can develop a board diversity mandate, it should begin by looking to Norway, the champion of the board diversity quota, for guidance. Implementing some of Norway's structure will help the country develop both the timeline of implementation and the penalty scheme of the mandate. Additionally, Belgium's system may also provide guidance for the penalty scheme.

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[73] Gautham Subramanyam, *In India, Dalits Still Feel Bottom of the Caste Ladder*, NBC NEWS (Sept. 13, 2020, 4:30 AM EDT), https://www.nbcnews.com/news/world/india-Scheduled Castes-still-feel-bottom-caste-ladder-n1239846.

[74] *Id.*

[75] Heer Kamdar, *Shareholder Activism in India: Analysis of Shareholders' Exercise of Their Corporate Franchise in General Meetings*, SSRN, at 5 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4378593.

[76] *Id.*

[77] Sudip Mahapatra, Aishwarya Singh & Nikhitha Tadigoppula, *Shareholder Activism in India: The Zee-Invesco Decision*, S&R ASSOC. (May 18, 2022), https://www.snrlaw.in/shareholder-activism-in-india-the-zee-invesco-decision/.

[78] *Id.*

In addition to following these countries' examples, India should increase the amount of representation of Scheduled Caste individuals on boards by limiting the number of boards they can sit on to five, as discussed below.

Norway was the first country to implement a board diversity quota aimed at bringing more women on company boards. On International Women's Day in 2002, the country announced its intent to have boards of limited public companies listed on the stock exchange comprise of at least 40% women.[79] Norway's rationale for the quota was four-fold. First, in 2002, women constituted only 6% of board membership.[80] Second, it was "a matter of diversity and democracy"[81] because "influence and benefits in society should be shared equally between men and women."[82] Third, it was "a matter of competence"[83]—to bring opportunities to 50% of Norwegian society (in other words, women). Fourth and finally, adding women to corporate boards would create value, "especially when it [came] to creativity and human resources."[84]

Section 6-11a of the Norwegian Public Limited Liability Companies Act was passed in November 2003, and came into force on January 1, 2004. It first applied to certain types of publicly owned companies, including, most importantly, wholly state-owned companies.[85] Since public limited companies needed time to make the changes necessary to comply with the law, the Norwegian government gave them until 2005 to do so.[86] If these companies achieved 40% women's representation on boards voluntarily by then, the law would not come into effect.[87] However, if they did not achieve representation, then the law would.[88] And so, Section 6-11a came into effect on January 1, 2006, and [89] companies were given until 2008 to achieve the 40% quota, which they did.[90] The rule, in pertinent part, states:

> On the board of directors of public limited liability companies, both sexes shall be represented in the following manner:
> 1. If the board of directors has two or three members, both sexes shall be represented.
> 2. If the board of directors has four or five members, each sex shall be represented by at least two members.
> 3. If the board of directors has six to eight members, each sex shall be represented by at least three members.
> 4. If the board of directors has nine members, each sex shall be represented by at least four members, and if the board of directors has more members, each sex shall represent at least 40 percent of the members of the board.[91]

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[79] International Women's Day in 2002 was March 8. Laila Davoy, *Women on Board*, *in* GETTING WOMEN ON CORPORATE BOARDS: SNOWBALL EFFECT STARTING IN NORWAY 17, 19 (Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi eds., 2013).

[80] *Id.* at 18.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 19.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Lov av 13. juni 1997 nr. 45 (Nor.), *translated in* Schjødt, Norwegian Public Limited Liability Companies Act, § 6-11a (2014), https://www.euronext.com/media/3746/download.

If a company failed to comply with the rule, it would be dissolved.[92] Though this may seem harsh, "the preparatory works emphasise[d] that dissolution is the most effective sanction, and thus also the most appropriate."[93]

If, on the other hand, a company did not want to comply with the law, it could reorganize to no longer be a limited public company.[94] After Section 6-11a was passed, some companies did in fact reorganize, though it is unclear whether this response was based on the new quota requirement.[95] It instead appears that this response was primarily tied to other rationale, including the convenience and practicality of being a private firm.[96]

To combat against company complaints that there was a lack of qualified women to appoint to boards to comply with the quota, the Norwegian government partnered with the private sector to create databases for women.[97] These databases allowed companies to search for qualified women who would meet their needs.[98]

Based on the discussion above, there are three ways in which India can implement some of Norway's board quota structure. These include: (1) timeline; (2) creation of a database of qualified Scheduled Caste individuals; (3) and penalties. Each is discussed in turn below.

A. Timeline

Just as Norway created a five-year period to allow for compliance with its quota, so too should India. India should recognize, like Norway did, that adding even just one Scheduled Caste member to the board will take time, particularly given the small number of Scheduled Caste individuals currently sitting on boards.[99] One study (referenced above) shows the mean number of Scheduled Caste individuals on boards to be less than 1% in a representative sample size of 4,005 publicly listed companies on the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE).[100] A longer time period frame is necessary to achieve compliance.

Further, India should mandate that the compliance period be five years, learning from its mandate of women directors. There, the one-year compliance period created unintended consequences, such as the appointment of non-independent women to the board.[101] While it is true that here these unintended consequences are less likely to be a concern given that board members of higher caste will not be able to appoint their family members to the board (since they are of the same caste), company responses to appointing women directors on boards still presents a cautionary tale about how these mandates can be perceived (and potentially flouted).

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[92] Beate Sjåfjell, *Gender Diversity in the Boardroom and Its Impacts: Is the Example of Norway a Way Forward*, 20 DEAKIN L. REV. 25, 31 (2015).

[93] *Id.* at 33.

[94] *Id.* at 38.

[95] *Id.*

[96] *Id.*

[97] Davoy, *supra* note 79 at 20.

[98] *Id.*

[99] Dayanandan et. al, *supra* note 5 at 34.

[100] *Id.*

[101] Bhalla, *supra* note 41.

However, unlike Norway, India should require mandatory compliance with the law up front, rather than giving companies a voluntary period to comply before deciding the mandate should go into effect. This is because even with the mandate for women, the country is still lagging in compliance—ten years after the mandate, only 50% of companies are meeting the requirement.[102] Thus, two years of mandated compliance would likely have more effect than two years of voluntary compliance. Coupled with increased penalties (discussed below), compliance with this mandate will likely be more effective than the woman director mandate.

B. Database of Scheduled Caste Individuals

Like the Norwegian government, the Indian government can work with both public and private entities to create a database of qualified Scheduled Caste individuals, preempting arguments from companies that cite a lack of qualified individuals as their reason for noncompliance. The government could use the latest census data to assist in creating this database, as well as encourage corporations to look within their walls for qualified Scheduled Caste individuals to put on their boards.

C. Penalties

Like Norway, India should implement stricter penalties for failure to elect a Scheduled Caste individual to the board within the proposed five-year timeframe. Each successive year of noncompliance, these penalties increase, culminating in the dissolution of the company as the last step in a newly adopted stepwise process.[103] The penalty scheme is described in depth below.

i. The First Year of Noncompliance: Increased Fines (Step 1)

For the first year of noncompliance, India should fine noncompliant companies an increased penalty fee. Since Section 149 of the Companies Act does not issue a specific penalty for noncompliance with its provisions, Section 172 dictates this penalty.[104] Before it was amended by the Rules in 2014, Section 172 stated, in relevant part, "the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees." This is equivalent to approximately $600 to $6,000.[105]

Historically, however, the fines were lower. When 530 companies failed to meet the woman director mandates of the Companies Act by the original April 1, 2015 deadline, the Bombay Stock Exchange (BSE) fines for noncompliance ranged from "50,000 rupees ($790)

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[102] Bhattacharayya, *supra* note 49.

[103] Mari Teigen, *Gender Quotas for Corporate Boards: A Qualified Success in Changing Male Dominance in the Boardroom*, *in* SUCCESSFUL PUBLIC POLICY IN THE NORDIC COUNTRIES 133, 146 (Caroline de la Porte ed., 2022).

[104] The Companies Act, 2013 §172 (Act No. 18, Acts of Parliament, 2013 (India)).

[105] Conversion rate to USD as of 8/8/2024.

to 142,000 rupees ($2,240) to Oct. 1, 2015."[106] After this period, noncompliant companies "would pay an additional 5,000 rupees ($78) per day until they complied."[107] While the companies were fined in accordance with Section 172 of the Companies Act at the time, the overall penalty scheme was just too low to inspire companies to really adhere to the rule.[108] The fines were an amount that would "not exactly burn a hole in their [these companies] pockets."[109]

This did not improve with the amendment to Section 172. Currently, Section 172 states that if a company is noncompliant with the provisions of Chapter XI:

> the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand, and in case of continuing failure, with a further penalty of five hundred rupees for each day during which such failure continues, subject to a maximum of three lakh rupees in case of a company and one lakh rupees in case of an officer who is in default.[110]

This is equivalent to approximately $600 for the initial failure to comply, $6 for every day for continuing failure to comply, and the maximums for failure to comply at $3,570 in the case of a company and $1,190 in the case of an individual.[111]

As applied to the case of DME Development, a residential construction company in India that failed to put a woman director on board in 2022, their penalties in accordance with Section 172 were a mere 211,000 rupees—equivalent to $2,511.[112] Like back in 2015, this amount is not high enough to drive change.

Given this, when it comes to noncompliance with putting a Scheduled Caste individual on the board, India should increase its penalties to force compliance, perhaps by doubling or tripling the amounts stated above. If a company does not come into compliance within the year of the fine, India should continue to fine the company through the following year, as well as add in the penalties of Step 2.

ii. The Second Year of Noncompliance: Removal of Board Benefits (Step 2)

In addition to continuing to fine companies in accordance with Step 1, India can suspend board benefits in response to noncompliance, taking inspiration from Belgium.

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[106] Nita Bhalla, *Indian Regulator Fines 530 Companies for Delay In Appointing Women Directors*, REUTERS (July 14, 2015 12:52 PM EDT), https://www.reuters.com/article/idUSL4N0ZU3HS/.

[107] *Id.*

[108] Bhalla, *supra* note 106.

[109] *Id.*

[110] *In re DME Dev. Ltd.*, Order for Penalty for Violation of Section 149(1) of the Companies Act, 2013, No. ROC/D/Adj/2022/Section 149(1)/6552 (Issued on Nov. 17, 2022) (India), https://www.mca.gov.in/bin/dms/getdocument?mds=2Jre8iRcel%252FHWoJvWc8fMw%253D%253D&type=open.

[111] Conversion rate to USD as of 8/8/2024.

[112] *Id.*

1. Belgium as an Example

Belgium enacted its board diversity law in 2011, stipulating "that at least one-third of the board members must be of a gender different from the other board members."[113] For noncompliance, the country stated that if the sex ratios were below the required minimum, "the first board member to be appointed shall be of the different sex;" if not, the appointment would be invalid.[114] Additional sanctions apply for publicly listed companies,[115] If the sex ratios fall below the required minimum in these companies, "the first general meeting of shareholders following such event shall appoint a board of directors in accordance with the requirements of the law."[116] If not complied with, "all financial and other benefits granted to the board, shall be suspended."[117]

Like Belgium, India can require companies subject to the mandate to suspend board benefits, if, in the year following the fines, the board does not rectify and appoint a Scheduled Caste individual to the board. If, within the year following this, the continued fines and suspension of board benefits do not result in compliance, then India can proceed to Step 3.

iii. The Third Year of Noncompliance: Dissolution of the Company (Step 3)

Finally, if after the first two years, companies are still noncompliant with the directive to add a Scheduled Caste individual to their boards, India can follow Norway's example and call for dissolution of the company as Step 3 of the stepwise process. Given the severity of this consequence, hopefully Indian companies subject to the mandate would comply either within the initial five-year period, or at maximum, within two years after the fact. Enforcement of penalties is key here; if companies perceive dissolution as an empty threat, they may be less likely to comply.

D. Number of Boards a Scheduled Caste Individual Can Sit On

Section 165 of the Companies Act allows for individuals to be on a maximum of twenty corporate boards overall, with a maximum of ten for public company boards. While there has been much debate over the optimal maximum number of boards for an individual to sit on, U.S. studies suggest that number is three, defining a busy director as one who sits on three or more boards ("empirical studies with respect to US define a busy director as one holding three of more directorships.")[118] Indeed, in a 2022 study conducted by PwC, 48% of over 700 respondents agreed that three boards should be the upper limit for independent

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[113] Abigail Levrau, Belgium: Male/Female United in the Boardroom, GENDER DIVERSITY IN THE BOARDROOM 155, 164 (C. Seierstad et. al, eds. 2017).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Jayati Sarkar & Subrata Sarkar, *Multiple Board Appointments and Firm Performance in Emerging Economies: Evidence from India*,17(2) PACIFIC-BASIN FIN. J. 1,4 (2009).

directors, so as to not compromise their "bandwidth necessary for effective board service."[119] This is especially important given that "[d]irectors can spend upwards of 250 hours per year in their role, and major events like a CEO search or an activist investor can increase that time commitment even more."[120]

One study conducted in India aligns with the U.S. view, suggesting that an appropriate number of boards for a CEO to sit on may be two.[121] The study, measuring in part whether CEO busyness impacted Tobin's Q or return on assets (ROA), found that while busyness had no impact on Tobin's Q, it positively impacted ROA. Nonetheless, the study recommended that the CEO continue to only sit on a maximum of two boards "as busyness seems to lower the effectiveness of CEOs as corporate monitoring authority and they fail to provide adequate services and value to firm."[122] However, given that the Scheduled Caste individuals joining boards will likely be independent directors rather than CEOs, this study is limited for our purposes.

But another study, focused on independent directors, supports the notion that three directorships may not be the appropriate maximum number in a country like India, given the current maximum listed in the Companies Act.[123] In fact, the study found that unlike in the U.S., "multiple directorships by independent directors may be a proxy of director quality and hence have a positive effect with firm value."[124] The study, measuring statistical significance between market-to-book value and the number of board directorships in the firm, found that there is a "strong positive relation once busyness crosses a particular threshold" (Five or more boards).[125]

Given this, Scheduled Caste individuals should not be able to sit on more than five boards. Reducing the number of boards a Scheduled Caste individual can sit on from ten will allow for companies to not only achieve the business benefits discussed in Part III but also receive the benefits of the positive correlation discerned from the study above. While it is true that the more boards an individual is on, the higher the correlation, reducing to five boards will allow for a higher minimum of Scheduled Caste individuals required on boards. If unchanged from ten, at a minimum, only 100 Scheduled Caste individuals would need to be on boards (assuming every individual took the maximum number of directorships; 1,000 divided by 10 is 100). But, if reduced to five, the minimum number of Scheduled Caste individuals needed on boards would double to 200. Thus, the benefits of reduction are three-fold: business benefits, positive correlation, and more representation of Scheduled Caste individuals with minimal to no compromise to the first two.

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[119] PwC, Charting the Course Through a Changing Governance Landscape, PwC's 2022 Ann. Corp. Dir. Survey 1, 4, https://www.corporatecomplianceinsights.com/wp-content/uploads/2022/10/pwc-2022-annual-corporate-directors-survey.pdf

[120] *Id.*

[121] Sunaina Kanojia et al., *Board Structure, Board Diversity and Corporate Governance: Evidence from Listed Indian Companies*, IUP J. CORP. GOVERNANCE 28, 49 (2020).

[122] *Id.*

[123] Sarkar, *supra* note 118, at 5.

[124] *Id.* at 8.

[125] *Id.* at 18.

E. Language of the Mandate

Following the discussion above, this section now formulates the language of the mandate.

While the scope of the mandate for women on boards is broader, calling for there to be at least woman to be on the board of directors in listed companies or public companies with a paid-up share capital of Rs. 1 crore or more or with a turnover of Rs. 3 crore or more, given the fewer number of qualified Scheduled Caste individuals, as well as the discrimination that still persists against these individuals in society today, taking a narrower approach may be better.[126] With these adaptations, the language of the mandate should read:

> The top 1,000 listed companies shall appoint at least one Scheduled Caste member to their boards by January 1 of the decided upon year. This individual cannot be appointed to more than five boards. Penalties for noncompliance shall be administered in a stepwise manner: First, a company that does not comply is subject to increased fines under Section 172 of the Companies Act. Second, for subsequent noncompliance, the board's benefits will be suspended along with continued fines. Third and finally, if compliance is not achieved after the first two steps, the company will be dissolved.

The top 1,000 listed companies will be calculated based on the prior year's market capitalization.[127]

VII. Ensuring Success of the Mandate

To ensure the success of the mandate proposed above, companies must create caste-inclusive company cultures, and the government must continue to invest in the education of Scheduled Caste individuals. If they are able to do so, employees will believe that adding a Scheduled Caste member to the corporate board is just the norm, rather than the exception. There are four main ways that Indian companies can create caste-inclusive cultures: through employee policies and codes of conduct, through training, continued education, and through corporate initiatives.

A. Employee Policies and Codes of Conduct

Perhaps one of the most effective ways to create a caste inclusive culture is to incorporate a "no tolerance" policy for caste discrimination in employee policies and codes of conduct, coupled with listed penalties for discrimination—including termination. Having such a policy written down should deter individuals from engaging in such behavior, particularly if the policy is created with all stakeholders' opinions involved.[128]

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[126] Companies (Appointment and Qualification of Directors), 2014, Rule 3 (India).

[127] SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 (last amended 2020), Reg. 17(1) (India).

[128] Edward Segal, *Code of Conduct And Ethics Can Help Guard Against and Address Crisis Situations*, Forbes, Dec. 29, 2020, https://www.forbes.com/sites/edwardsegal/2021/12/29/codes-of-conduct-and-ethics-can-help-guard-against-and-address-crisis-situations/?sh=3f2c38815e57.

However, more important than having the policies in place is enforcing them. Companies must ensure that they have the proper infrastructure in place for individuals to report wrongdoing, and that the company then takes action based on the complaints. In order to become a caste-inclusive company, a company cannot afford to become a reflection of what is occurring in Indian society, where there is low accountability for discrimination against Scheduled Caste individuals.[129]

B. DE&I Training Including Caste

In addition to implementing employee policies and codes of conduct addressing caste, Indian companies should have diversity, equity, and inclusion (DE&I) training addressing caste. Many companies in India provide DE&I training; a survey conducted by WTW found that in a study of 210 Indian companies, 84% provided such training. [130] In this training, it is imperative that companies include caste if they do not already. Providing unconscious bias training to individuals will allow individuals to confront their own prejudice and be more aware of casteism.[131] This knowledge, in turn, should make individuals more amenable to having a lower caste individual on board, in the spirit of seeking inclusion in and improvement of their company.

There may be individuals that claim that this training is ineffective. Indeed, there are studies showing anti-bias training can do more harm than good in the workplace. As authors Dobbin and Kalev point out, anti-bias training may actually activate stereotypes, rather than make them less apparent.[132] This is because "asking people to suppress stereotypes tends to reinforce them, making them more cognitively accessible."[133]

However, even if this is the case, implementing caste anti-bias training will, at the very least, allow Indian companies to show employees that caste discrimination is not an issue of the past (especially if these trainings use recent examples and statistics of this discrimination).[134] Furthermore, even if this training does bring stereotypes to the forefront, this puts managers in the position to actively address them and reaffirm that this behavior will not be tolerated.[135] In effect, even if the training leads to some of the negative consequences stated above, it will allow for there to be more open discussion about a sensitive topic that is not normally openly discussed.[136]

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[129] Subramanyam, *supra* note 73.

[130] *Inclusion and Diversity is the Top Driver of Strategy Benefits in India, WTW Survey Finds*, WTW (Mar. 30, 2023), https://www.wtwco.com/en-in/news/2023/03/inclusion-and-diversity-is-the-top-driver-of-benefit-strategies-in-india-wtw-survey-finds.

[131] Hari Bapuji et al., *What Managers Everywhere Must Know About* Caste, MIT SLOAN MGMT. REV. (Nov. 1, 2023), https://sloanreview.mit.edu/article/what-managers-everywhere-must-know-about-caste/.

[132] Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia,*10 ANTHROPOLOGY NOW, 48, 50 (2018).

[133] *Id.*

[134] Bapuji, *supra* note 131.

[135] *Id.*

[136] *Id.*

C. Pipeline Programs

Finally, in addition to implementing policies and providing more caste-focused diversity training to individuals in the company, companies can engage in creating pipeline and mentoring programs for Scheduled Caste individuals they have already employed, giving them a path to board leadership. These programs should have a similar structure to what companies have already done to uplift women, another underrepresented group in the workplace (and the other group that the Companies Act currently tries to protect). For example, companies like Amazon, WeWork India, BT Group, Cummins India, Infosys, and Lowe's India have all begun to build a pipeline of female leaders through development and mentoring programs.[137] Lowe's India's initiative in particular focuses on "the development of leadership skills, strategic thinking, displaying executive presence, and so on," skills needed to be in a board room. [138] These programs have been highly successful, increasing the number of women in each company and leading to more promotions for women in each company.[139] At InfoSys, "women-centric initiatives have resulted in a 3 percentage-point growth (in female workforce) since March 31, 2019."[140] At WeWork India, "43% of the total promotions went to women" in a promotions cycle in 2023.[141]

Thus, given the rate of success of these programs, companies should invest in similar initiatives for Scheduled Caste individuals. By showing care for the progress of this community within its walls, a company will create the caste-inclusive community needed to be open to having a Scheduled Caste individual on the corporate board, as well as give the Scheduled Caste individual the skills to succeed on that board.

D. Continued Education of Scheduled Caste Individuals

In addition to having companies create a caste-inclusive culture, the Indian government needs to continue to invest in the education of Scheduled Caste individuals to ensure the continued success of the director caste diversity mandate. Though the reservation system has started to provide opportunity to Scheduled Caste individuals, these individuals have historically been denied access to education in favor of upper caste individuals.[142] In 1991, the literacy rate of these individuals was only 30%, and in 2023, the literacy rate was 66.1%.[143] While the literacy rate has increased by 30% in this thirty-year span, it remains very low compared to the national average (73%).[144]

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[137] Brinda Sarkar, *India Inc. Looks to Build Pipeline of Women Leaders*, THE ECONOMIC TIMES, Sept. 8, 2023, https://economictimes.indiatimes.com/jobs/mid-career/india-inc-looks-to-build-pipeline-of-women-leaders/articleshow/103494024.cms?from=mdr.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Erik Fraser, *The Dalits of India: Education and Development*, E-INT'L REL. (June 23, 2010), https://www.e-ir.info/2010/06/23/the-dalits-of-india-education-and-development/.

[143] Deepshikha Sharma & Rama Devi, *Democracy Denied: The Fraught Realities of Higher Education for Dalits in India*, LSE (July 10, 2023), https://blogs.lse.ac.uk/southasia/2023/07/10/democracy-denied-the-fraught-realities-of-higher-education-for-dalits-in-india/.

[144] *Id.*

While attempts have been made to increase educational access for Scheduled Caste individuals, these attempts have fallen short. The first attempt was the signing of the Caste Disabilities Removal Act in 1850, which theoretically abolished all laws affecting the rights of people converting to another religion or caste.[145] The second, as discussed above, is the reservation system. Despite these efforts, and higher initial enrollment in primary and secondary school (88.3% and 71.86%, respectively), 35.56% of Scheduled Caste primary students drop out of school, and 73.13% of Scheduled Caste students drop out of secondary school.[146] The dropout rate is driven by distance to school for Scheduled Caste individuals (many of whom live in more remote areas of the country) as well as poverty and inability to pay for education past the eighth grade.[147] Schooling up until that point is provided for free by the Right of Children to Free and Compulsory Education Act.[148]

For those Scheduled Caste individuals who do attend university, they face barriers within university walls. These include less proficiency in English (when most of the lectures are given in English) and faculty members who are unwilling to assist them.[149] Alienation and suicide rates are high, with one study showing that out of 122 student suicides on campus over a seven-year period from 2014-2021, sixty-eight were by a Scheduled Caste individual.[150]

It is against this backdrop that the Scheduled Caste individuals who graduate and make it through are coming into corporations. Due to "substandard primary and secondary education, Scheduled Caste individuals lack the personality and skills required in most of the jobs in the private corporate sector," as well as the skills needed to be in board rooms.[151]

So, both the government and corporations must amend the educational gap in order to cultivate individuals who are qualified for Board membership. For the government, this would likely be in the form of monetary investment, as well as the continued evaluation of educational initiatives that state their goal is inclusion of lower castes. For example, established in 2022, India's PM Schools for Rising India (PM SHRI) states that one of its goals is to have "the educational ecosystem become more inclusive of this group of students"—referring to students of Scheduled Castes and others.[152] While this is a noble goal,

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[145] *The Caste Disabilities Removal Act*, 1850 (India), MYANMAR LAW LIBRARY, https://www.myanmar-law-library.org/topics/myanmar-property-law/the-caste-disabilities-removal-act-1850.html#:~:text=The%20Caste%20Disabilities%20Removal%20Act%2C%201850%2C%20was%20a%20law%20passed,to%20another%20religion%20or%20caste (last visited Aug. 28, 2024).

[146] Emily Renie, *Barriers for Dalits*, THE INDIAN CASTE SYSTEM, http://castesysteminjustices.weebly.com/education.html#:~:text=Barriers%20for%20Scheduled Castes,continue%20on%20to%20secondary%20school (last visited Aug. 28, 2024).

[147] *Id.*

[148] *Id.*

[149] Sharma & Devi, *supra* note 143 ("There are reports that faculty members in public universities are prejudiced against Scheduled Castes, and adopt a patronising attitude, devaluing the abilities of Scheduled Caste students by labelling them as 'category/quota *wala*s', or those that have only earned their place at the school through affirmative action.").

[150] *Id.*

[151] Shivani Gual, *Reality Check: How Inclusive is the Corporate Sector of the Dalits?*, FEMINISM IN INDIA (Nov. 26, 2020), https://feminisminindia.com/2020/11/26/dalits-in-corporate-sector/.

[152] *PM SHRI Schools Framework on School Transformation*, INDIA MINISTRY OF EDUC., https://dsel.education.gov.in/sites/default/files/part1_pmshri.pdf.

the government needs to ensure that the funding going to this program from its $14.4 billion educational budget[153] is actually being used in furtherance of it.

When it comes to organizations helping to close this gap, they should do so in two ways: providing funding for Scheduled Caste education themselves, going straight to the root of the problem,[154] or through "systematic training and skill development."[155] With these initiatives, organizations will help create qualified Scheduled Caste individuals for board positions, whether this be from the time they are young in primary school (funding education), or from the time they set foot in the company on the first day of the job going forward (training and skill development).

If India were to continue building caste-inclusive cultures and investing in the education of Scheduled Caste individuals, the proposed mandate above may be able to be expanded from the top 1,000 listed companies to following the mandate for women. This means that India may be able to mandate one Scheduled Caste individual in listed companies or public companies with a paid-up share capital of Rs. 1 crore or more or with a turnover of Rs. 3 crore or more as more tolerant cultures and more qualified Scheduled Caste individuals develop through these investments.

VIII. Conclusion

In conclusion, Section 149(1) of the Companies Act of 2013 should be amended to increase representation of the Scheduled Caste population in the boardroom. Doing so not only has business benefits, but also advances the creation of a more equal India. It is important to ensure the continued success of such a mandate through building and maintaining caste-inclusive company cultures and continuing the education of Scheduled Caste individuals.

Such a change is long past due—a 3,000 year-old outdated social system creates corporate barriers for Scheduled Caste individuals. India can no longer afford to cast(e) these individuals out of the board room.

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[153] Sandeepa Sahay, *India's National Education Budget for 2023-24*, BRITISH COUNCIL (Feb. 16, 2023), https://opportunities-insight.britishcouncil.org/blog/india%E2%80%99s-national-education-budget-2023-24.

[154] Bapuji, *supra* note 131.

[155] Gual, *supra* note 151.


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Climate Migration in the Middle East and North Africa: Using the Right to Health as a Basis for Preventative and Remedial Policy

Anya Ek

ABSTRACT

Climate change is forcing mass displacement and migration in the Middle East and North Africa on a scale domestic and international legal regimes are unprepared to handle. This Note provides an overview of the various ways climate migration detrimentally impacts human health in the Middle East and North Africa, examining the issue from both pre- and post-displacement perspectives. It surveys, inter alia, the shortcomings of current domestic and international policies as they relate to severe weather, drought, citizenship, and political instability, and uses the right to health to identify the legal changes that would provide the greatest benefit to public health.

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I. Introduction

For a long time, Dhahran, Saudi Arabia, held the regrettable distinction of being home to the hottest wet bulb temperature ever recorded: 35° Celsius, a "feels like" temperature of 81° Celsius (178° Fahrenheit) and generally labeled the maximum wet bulb temperature for human survivability.[1] That was in 2003. Fortunately for Dhahran and unfortunately for the globe, Dhahran no longer holds that record because wet bulb temperatures of 35° C and higher have now been recorded on multiple occasions in the Persian Gulf, as well as in Mexico, Venezuela, India, and Australia.[2] Alarmingly, though 35° C is typically cited as the maximum wet bulb temperature humans can survive, a recent study found a wet bulb temperature of 31° C to be the point at which the body can no longer maintain a stable core temperature and begins to heat progressively.[3] Worse yet, wet bulb temperatures of 31° C are not uncommon and are becoming ever more frequent; Abu Dhabi, home to 1.5 million, enjoys wet bulb temperatures above 31° C multiple times a year.[4]

Unsurprisingly, given the increasing frequency and intensity of unlivable temperatures, the Middle East and North Africa (MENA) are seeing mass migration, both internal and transboundary, of people seeking to escape the detriments of climate change. This is referred to as climate migration—also sometimes called environmental migration, climate change-induced displacement, eco-migration, and crisis migration, amongst other variations— and is roughly defined as "temporary or permanent displacement due to natural disasters, drought, crop failure, and human-made changes to habitat[,]" though there is still debate about how to separate a "climate" migrant from a "weather" migrant.[5] This migration is driven by unlivable heat, growing scarcity of resources, and the resulting health dangers and societal unrest. For the Middle East, warming is happening at a pace twice as fast as for the rest of the world, meaning these effects will be felt much sooner than in other regions.[6] At the current rates of population growth, by 2050 the MENA region will be home to nearly 700 million people who will be in contention with one another for dwindling water and food

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[1] *Heat Index*, NATIONAL OCEANIC ATMOSPHERIC ADMINISTRATION https://www.noaa.gov/jetstream/synoptic/heat-index (last visited Feb. 21, 2025). Wet bulb temperature differs from ambient temperature measurements in that it includes the impacts of humidity.

[2] Colin Raymond et al., *The Emergence of Heat and Humidity Too Severe for Human Tolerance*, 16.9 SCIENCE ADVANCES (May 2020).

[3] Jennifer Vanos et al., *A Physiological Approach for Assessing Human Survivability and Liveability [sic] to Heat in a Changing Climate*, NATURE COMMUNICATIONS, Vol. 14 Article No. 7653 (2023).

[4] الإمارات العربية المتحدة الوزارة شؤون الرئاسية المركز الوطني للأرصاد [United Arab Emirates Ministry of Presidential Affairs, National Center of Meteorology], https://www.ncm.gov.ae/maps-radars/gcc-radars-network?lang=ar.

[5] Marwa Daoudy et al., *What is Climate Security? Framing Risks around Water, Food, and Migration in the Middle East and North Africa*, WIREs WATER, Vol. 9 No. 3 (Feb. 28, 2022); Elizabeth Ferris, *The Relevance of the Guiding Principles on Internal Displacement for Climate Change-Migration Nexus*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION, AND THE LAW 108 (Eds. Crepeau and Mayer, 2017); ANDREA SIMONELLI, GOVERNING CLIMATE-INDUCED MIGRATION AND DISPLACEMENT 41 (2016); Erika Weinthal et al., *Securitizing Water, Climate, and Migration in Israel, Jordan, and Syria*, 15 INT'L ENV'T AGREEMENTS: POL., L. AND ECON. 294 (2015).

[6] Karina Tsui, *The Middle East is Warming up Twice as Fast as the Rest of the World*, THE WASHINGTON POST (Sept. 7, 2022).

supplies as well as livable land; ultimately, they will need places to go.[7] The resulting mass displacement has already and will continue to impact the stability of not only MENA countries, but the globe as a whole, as these uprooted peoples seek to move internationally.

Paradoxically, the same factors contributing to increased climate migration are also factors that can prohibit it; scarcity of fundamental resources and political instability have negative economic impacts that decrease migration by making it "difficult for certain populations to 'invest' in migration."[8] For this reason, this Note looks beyond the conventional problems of displacement to the health impacts caused by climate change that contribute to these migrations—or prohibit it—so as to cover all health interferences.[9] This Note considers the problem of climate displacement in the broadest sense of the MENA region, including traditional Middle Eastern and North African countries[10] as well as Sudan and Somalia.

When it comes to protecting human health, policies of climate change mitigation should no longer be the priority. The effects of climate change are already occurring and will worsen with absolute certainty even if drastic mitigation policies were to be fully implemented today. These are no longer effects that can be prevented; the globe has reached a public health tipping point, where the cumulative effect of past policies and inaction precludes solely relying on mitigation policies going forward. Thus, focus must now shift to developing ways to adapt and build resiliency to the damages that climate change brings. Adaptive health policies will be crucial for mitigating the most detrimental consequences of climate change; as there is only so much that can be done to prevent climate migration in the Middle East and North Africa, initiatives should be in the realm of adaptive measures and public health policy to minimize the health impacts that cause displacement. Likewise, since displacement is now unavoidable, these policies must address the health impacts that occur for climate migrants as a result of their displacement.

A. Overview of Laws Implicated

Many of the ways climate change interferes with the right to health are also the primary reasons for climate migration in the MENA region because fundamentally, threats to health cause migration. Additionally, climate migration is caused and impacted by a wide variety of laws. Refugee and citizenship laws greatly impact international migrants, while laws and agreements affecting the use of resources, particularly water, play a major role in creating the overall societal conditions that foster migration. These agreements will become even more important as resources dwindle and the region becomes even more unstable, and even more politically unlikely. Domestically, local land and water use policies will need to be re-

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[7] Razieh Namdar et al., *Climate Change and Vulnerability: The Case of MENA Countries*, 10.11 INT'L. J. GEO-INFORMATION, 794 (2021).

[8] BENOIT MAYER AND FRANCOIS CREPEAU, RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION, AND THE LAW, 4 (Crepeau & Mayer, eds., 2017).

[9] There is a wide variety of displacement that falls under the banner of climate migration, so for simplicity purposes, this Note focuses on the drivers of displacement generally and cross-border migration that seems to be caused by a climate-related event.

[10] Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Tunisia, U.A.E., and Yemen.

evaluated as urban areas see unprecedented population growth due to internal migration from rural resource-poor areas most impacted by climate change and as water demand increases. Further, disaster preparedness laws are seeing more use, but are ironically unprepared for the frequency and intensity of the climate disasters now occurring. A comprehensive disaster management law is crucial for minimizing the impacts of severe weather, including displacement and negative health outcomes.

In short, no one area of law fully addresses climate migration. Efforts to prevent and deal with this migration will have to cross many areas of the law, and a full solution will have to be varied.

B. Limits of the Law

The Middle East and North Africa are not known for having robust and just legal systems. Governments are frequently inefficient and many are corrupt, making policy implementation and enforcement difficult, especially in countries with extremely large landmass—when it happens at all. Often, lacking finances and personnel shortages may mean a policy exists officially but is rarely if ever practiced; this is especially true for immigration policies and rural water regulation.

Additionally, the court systems are not widely accessible physically, economically, socially, and politically, so redress for violations of rights or law is not easily obtained. This inaccessibility and unreliability can render enforcement through litigation impossible, particularly in environmental and human rights matters.

Thus, legal solutions often do not have significant impact, particularly for rural and vulnerable groups. Similarly, reports outlining the results of certain initiatives cannot be presumed accurate, which limits the ability to analyze the efficacy of policy. In the realm of climate and environmental law, it is the people most likely to be excluded or misrepresented in these reports that need the benefits of policy the most (rural, indigenous, and poor populations, as well as vulnerable groups like women, children, and the elderly). Furthermore, there are limits to the applicability of international law here. Many countries in the region do not have leverageable political goodwill, which limits migration options for citizens and makes forming beneficial international agreements unlikely. Even within the region, longstanding grudges and ongoing conflicts make coordination of law and policy difficult. On top of that, decisions from human rights courts are not enforceable and often carry little weight in the region.

Lastly, there is only so much the law can do in the face of climate change. The earth will continue to warm and the Middle East and North Africa will continue to undergo desertification. Short of momentous international efforts and rapid technological advancements, there is nothing that can be done to supply the water necessary to keep the region inhabitable at its current and future levels. In short, the law cannot be counted on to remedy the issues of climate migration in the Middle East and North Africa. There are, however, changes that can be made to minimize the current right to health interferences and buy the region more time to relocate.

C. Climate Migration Background

There is a wide variety of displacement that falls under the banner of climate migration, so for simplicity purposes, this Note focuses on the drivers of displacement generally and cross-border migration that seems to be caused by a climate-related event.

While there are no exact figures for just how many people have already been and will be displaced due to climate change in the Middle East and North Africa, many migrants cite climate-related difficulties as at least one factor that impacted their decision to move.[11] It is often difficult to tell whether migration is climate-induced or due to the many other reasons people move, but more frequent resource shortages due to climate change will undoubtedly play central roles in future movement and be contributing factors in migration for other reasons.[12] The problem of shortages is compounded by the fact that even as resources dwindle, the population—and thus demand for resources—is growing. One estimate by the World Bank put the number of climate migrants at 19.3 million in North Africa alone by 2050.[13]

Generally, migration—climate-induced and otherwise—has been internal and reflects overall movement from rural to urban areas, particularly in lower-income countries.[14] In some instances, migration is temporary or seasonal.[15] In lower-lying countries, there is considerable movement away from coastal areas, which are now regularly flooding.[16] Migration out-of-country is more limited because of the prohibitive costs of moving internationally and so is largely confined to people of higher socioeconomic status.[17]

Statistics on climate migrations are further confounded by climate-related events that cause a secondary displacement;[18] for instance, the Alganaa refugee camp in Sudan flooded in November of 2021, resulting in the displacement of nearly 35,000 already displaced refugees.[19] Similar events have occurred in Yemen, Syria, and Somalia.[20] These secondary displacements are hard to account for in the numbers counting climate migration, but they pose some of the most serious right to health violations.

II. Why Use a Right to Health Framework?

Because the right to health via the social determinants of health encompasses nearly all aspects of life from inequality to socioeconomic status to locale, it is well-suited to become

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[11] *See generally* QUENTIN WODON ET AL, CLIMATE CHANGE AND MIGRATION: EVIDENCE FROM THE MIDDLE EAST AND NORTH AFRICA (2014).

[12] MAYER & CREPEAU, *supra* note 8, at 5.

[13] World Bank Group, *Middle East and North Africa Climate Roadmap* (2021-2025) at 9.

[14] Wodon, *supra* note 11, at 14; U.N. High Commissioner for Refugees, *Climate Change, Displacement, and Human Rights* (March 2022).

[15] *Report on the Impact of Climate Change on Migration*, The White House, 5 (Oct. 2021).

[16] *See, e.g.,* Mohamed Elsaied Abou-Mahmoud, *Assessing Coastal Susceptibility to Sea-level Rise in Alexandria, Egypt*, 17.2 EGYPTIAN J. AQUATIC RSCH., 133 (June 2021).

[17] Wodon, *supra* note 11, at 14.

[18] Report on the Impact of Climate Change on Migration, *supra* at 4 (citing Notre Dame Global Adaptation Initiative).

[19] MAYER & CREPEAU, *supra* note 8, at 4.

[20] Notre Dame Global Adaptation Initiative, *supra* note 18.

a basis for advancing policy. Much of the scholarship[21] around climate migration focuses on amending international refugee agreements, creating climate visa programs, or implementing other legal solutions to prevent migration that require international cooperation, political will, enforcement, and money, which are all things most of the Middle East and North Africa lack. For this reason, this Note approaches the climate migration plight from a public health and human rights standpoint, using the right to health to identify the areas of climate change and climate migration that pose the greatest threats to human health, and then proposing measures that will reduce (a) the detriments to life and health that drive climate migration, and (b) the health detriments that occur post-migration.

A. Defining the Right to Health

The right to health is an oft-overlooked human right, possibly because it seems so basic and possibly because it seems hopelessly idealistic; achieving "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" for everyone in the world, as the constitution of the World Health Organization defines the right to health, does seem difficult, if not outright impossible.[22] However, the breadth and universality of the right to health make it a useful tool for furthering policy and law, particularly in the realm of climate, as it encompasses the fact that there exist varying state capabilities and needs while still providing a baseline to strive for in concrete areas of public health.

The right to health, as it is understood in its current iteration, is an amalgamation of definitions and interpretations. Firstly, the World Health Organization's definition, given above, is perhaps the loftiest and vaguest standard, calling for a state of "complete" well-being, without addressing what "complete" means.[23] Secondly, the International Covenant on Economic, Social, and Cultural Rights defines the right to health as the right to enjoying the "highest attainable standard of physical and mental health".[24] This definition recognizes that the highest attainable level of health is not the same for everyone and allows for progressive (rather than all-at-once) realization. Thirdly, per the Universal Declaration of Human Rights, the right to health is the right to "a standard of living adequate for health and well-being of [oneself] and [one's] family, including food, clothing, housing, and medical care and necessary social services."[25] Again, "adequate" is not defined. Combining these three definitions provides the most effective delineation of the right to health, roughly: the right to the highest attainable standard of physical and mental health, which is not merely the absence of disease or infirmity, for oneself and one's family, including adequate food, clothing, housing, and medical care and social services.

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[21] *See, e.g.*, JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (1974).
[22] G.A. Res. 2200A (XXI) (Dec. 16, 1966).
[23] *Id*.
[24] WORLD HEALTH ORGANIZATION, [Constitution] Apr. 7, 1946, Preamble.
[25] G.A. Res. 217 (III), art 25 (Dec. 10, 1948).

B. Social Determinants of Health

Through the U.N. Sustainable Development Goals, the right to health has also been interpreted to include the equal health of women and children, as well as general environmental factors that are part of what is known as the social determinants of health.[26] The scope of the right to health was further clarified in U.N. General Comment 14, which explicitly stated that it includes the social determinants of health.[27] The social determinants of health encompass socioeconomic status, including an individual's work, wealth, and income; physical environment, including housing and the safety of the area where an individual lives; level of education; accessibility of food and the relative nutrition of that food; an individual's quality and quantity of interactions with their community, both beneficial interactions, such as with social support systems, and negative interactions, such as forms of discrimination; and lastly, the quality and accessibility of healthcare.[28]

Climate change and climate migration generally underlie all social determinants of health. Firstly, their detriments do not impact everyone equally. When it comes to climate displacement, the disadvantaged (predominantly the rural and poor) are most at risk.[29] Pre-displacement, it is the poor who bear the burden of water and food shortages most, and the economic impact of damage caused by severe weather is greater on those of lower incomes; one study found that for the MENA region, the top twenty percent in socioeconomic status were twenty percent more likely to economically recover following severe weather events.[30] Conversely, in 2014, over thirty-six percent of surveyed households in the region said they would or already had pulled children out of school in order to cope with economic losses resulting from climate change.[31] Furthermore, women, children, and the elderly are most likely to suffer negative health consequences from climate events, particularly heat, and maternal mortality has already risen during times of drought, all of which interfere with achievement of the right to health.[32]

There are more indirect economic harms as well. Increased heat is associated with lower work productivity, which results in reduced wages and incomes, further increasing the economic burden of climate change.[33] For instance, by the World Bank's calculation, forty percent of work hours lost to heat-related problems are in the construction industry, which is staffed largely by vulnerable and migrant workers.[34] Similarly, disruption to supply chains

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[26] Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health. Final Report of the Commission on Social Determinants of Health*, WORLD HEALTH ORGANIZATION (Geneva 2008).

[27] General Comment No. 14, E/C.12/2000/4, United Nations Committee on Economic, Social and Cultural Rights (2000).

[28] *Closing the Gap in a Generation, supra* note 26.

[29] Carmel Williams and Gillian MacNaughton, *Health Rights and the Urgency of the Climate Crisis*, 23.2 HEALTH & HUM. RTS. J., 75 (Dec. 2021); Heba Gowayed, *Climate Change and Migration in the Middle East and North Africa*, Arab Center Washington, D.C. (Sept. 29, 2022), available at: https://arabcenterdc.org/resource/climate-change-and-migration-in-the-middle-east-and-north-africa/

[30] Wodon, *supra* note 11.

[31] *Id*. at 123-42.

[32] *See generally Closing the Gap in a Generation, supra* note 26; Bashir Mohamed Caato, *'Hungry for Days': Drought's Cruel Toll on Pregnant Somali Women*, AL JAZEERA (Dec. 9, 2022).

[33] *Closing the Gap in a Generation, supra* note 26; World Bank Group, *supra* note 13, at 9.

[34] *Middle East and North Africa Climate Roadmap (2021-2025)*, *supra* note 29.

caused by climate-related events can also negatively impact an economy, as well as increase political instability.[35] Likewise, the relative cost of obtaining healthcare for the negative health impacts caused by climate change or displacement is greater on people of lower socioeconomic status. The secondary effect of all this is the entrenchment and exacerbation of existing societal inequalities. Because a population's overall health is worse in societies with greater socioeconomic disparities, it is to the benefit of everyone that their impacts are mitigated.[36]

III. Drivers of Climate Migration: Severe Weather

Extreme weather events attributable to climate change caused eighty-three percent of all natural disasters in the period of 2000 to 2010.[37] This figure, however, does not acknowledge that the sheer number of severe weather events has also been increasing globally. In the Middle East and North Africa, this manifests in some areas as heatwaves, sandstorms, and droughts, but also as unprecedentedly heavy rainfall and deadly flooding in others. In late April of 2024, the heaviest rainfall ever recorded fell in the United Arab Emirates (U.A.E.) and Oman, resulting in the deaths of twenty-one people.[38] Such events cause economic disruption and damage to infrastructure, straining national and familial finances alike with the greatest burden falling on the poor, who are less likely to be able to afford work disruptions and repairs. Further, extreme weather events cause directly bodily harm, as seen in the recent flooding in the U.A.E. and Oman.[39]

Encompassed within these issues is sea level rise. This is not an area of climate law generally discussed in relation to the Middle East and North Africa, with global focus on small island developing states. However, the Nile delta region, home to millions and one of the largest economies in the region, is one of the places considered most vulnerable to sea level rise.[40] Sea level rise is expected to displace 6.5 million people in Alexandria, Egypt alone by 2100.[41] Sixty million people in the general Middle East are expected to endure severe health hazards resulting from sea level rise by 2050.[42] Further, sea level rise is causing increased property damage as well as direct threats to health in the form of bodily endangerment caused by severe flooding that many areas are ill-equipped to deal with.[43]

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[35] NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, CLIMATE AND SOCIAL STRESS: IMPLICATIONS FOR SECURITY ANALYSIS (John D. Steinbruner, et al eds., 2014), 76-80, 98-105.

[36] *Closing the Gap in a Generation, supra* note 26.

[37] فاتمة الزهراء صفصاف "حماية الأشخاص من الكوارث في القانون الدولي"

[Fatima Sefsaf, "Protection of People from Disasters in International Law"] Special Issue on the Conference of "Law in the Face of Global Crises: Means and Challenges", 10 INT'L. REV. L. 95, 95-128 (2021).

[38] Livia Albeck-Ripka, *Deluge Batters U.A.E. and Oman, Killing 21*, N.Y. TIMES (Apr. 17, 2024), https://www.nytimes.com/2024/04/17/world/middleeast/dubai-airport-oman-flooding.html.

[39] *See id*.

[40] Abou-Mahmoud, *supra* note 16, at 133-141.

[41] EGYPTIAN ENVIRONMENTAL AFFAIRS AGENCY, *Egypt Second National Communication Report under United Nations Framework Convention on Climate Change* (2010).

[42] Nuha Eltinay & Mark Harvey, *Building Urban Resilience in the Arab Region: Implementing the Sendai Framework for Disaster Risk Reduction 2015-2030 at the Local Level*, UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION (contributing paper for the Global Assessment Report) (2019).

[43] *See generally* HEALTH OF PEOPLE, HEALTH OF PLANET AND OUR RESPONSIBILITY (Weal K. Al-Delaimy, et al. eds., 1st ed. 2020).

This is not surprising given the state of the Middle East and North Africa's disaster preparedness laws, when they exist at all; Afghanistan, Qatar, and the United Arab Emirates, to name a few, do not have any comprehensive disaster management policies in place. In states that do have policies, they are not always reliable, as inefficient governments, corruption, and lack of funds make meaningful response absent. In other countries that facially have comprehensive policies, such as Saudi Arabia, government data on the effectiveness of responses has not been made public.[44]

Saudi Arabia offers a good example of the sort of disaster management policies that are necessary throughout the region.[45] Its law covers the complete gambit of climate-related disasters, from dust storms and flash floods to severe heat and widespread drought, as well as all manners of preventative and restorative measures, from amended building codes to public awareness campaigns and early warning systems in crowded areas.[46] This is especially apparent in its treatment of infrastructure, where there has been a focus on implementing resiliency strategies that have a stated focus on improving communal health, thereby minimizing right to health interferences and decreasing the likelihood of displacement.[47]

This, however, may be changing. In the years following the Covid-19 pandemic, the importance of disaster response law has been highlighted, resulting in a greater push towards implementing such laws, both with eye towards future health crises and climate change.[48] This push is visible in Saudi Arabia's disaster preparedness law, which has shifted to center on community resilience in the wake of the pandemic.[49] This shift is a necessary one, as comprehensive emergency prevention and response laws are the first line of defense against harms to health and forced displacement.

IV. Drivers of Climate Migration: Heat and Water

The root of most evils in the Middle East and North Africa is heat. Soaring temperatures have evaporated water supplies, causing water shortages that in turn cause food shortages as crops burn; in some areas, the result has been famine.[50] Given the two most fundamental

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[44] Abdullah Alyami et al., *Disaster Preparedness in the Kingdom of Saudi Arabia: Exploring and Evaluating the Policy, Legislative Organisational Arrangements Particularly During the Hajj Period*, 5 EUR. J. ENV'T & PUB. HEALTH 1 (2021). The full law is part of the civil defense code and covers defense, the military, general public safety and private security, and disaster relief: Royal decree M/10 of 10-5-1406A, translated in *Business Laws of Saudi Arabia* at 1,412–1,418AH.

[45] I qualify this by saying that Saudi Arabia, as the richest nation in the region, can afford such policies; a similar endeavour by Afghanistan, per se, would not be as effective.

[46] Ahmed Al-Wathinani et al., *Driving Sustainable Disaster Risk Reduction: A Rapid Review of the Policies and Strategies in Saudi Arabia*, 15 SUSTAINABILITY 1 (2023); Alyami, *supra* note 44.

[47] Bader Alhafi Alotaibi et al., *Climate Change Concerns of Saudi Arabian Farmers: The Drivers and Their Role in Perceived Capacity Building Needs for Adaptation*, 13 SUSTAINABILITY 1 (2021)

[48] Sefsaf, *supra* note 37.

[49] Al-Wathinani, *supra* note 46.

[50] Scott Simon & Hadeel Al-Shalchi, *A Drought Triggered by Climate Change Has Led to Famine in the Horn of Africa*, NATIONAL PUBLIC RADIO (NPR) (May 27, 2023 at 8:17am EST), https://www.npr.org/2023/05/27/1178575879/a-drought-triggered-by-climate-change-has-led-to-famine-in-the-horn-of-africa.

aspects of the right to health are adequate access to food and safe water, the interferences with the right to health are obvious.[51]

Caused by rising heat, the Middle East and North Africa will become unlivable on account of water—or, more precisely, a lack of it. It is hard to look at the factors that drive someone to migrate in isolation from one another,[52] but most can be traced back to water difficulties. For instance, a family may cite food shortages as a reason for movement, but these shortages are often on account of water shortages. Likewise, regional political instability is worsened by water scarcity, but political instability is also a reason for this scarcity as ineffective governance prevents efficient water management and the creation of international agreements that regulate usage. Water scarcity itself poses direct threats to health; as of 2012, one percent of GDP in Egypt, Jordan, Lebanon, and Morocco—roughly 4.62 billion USD cumulatively—is spent each year on healthcare necessitated by lack of water; in Iran it is three percent, which in 2012 alone was over $19 billion.[53]

The problem will only worsen. According to the World Resources Institute, the five most water-stressed countries in the world are Bahrain, Kuwait, Lebanon, Oman, and Qatar, and the Middle East and North Africa region as a whole is the most water-stressed in the world with 83% of the population living in conditions of "extremely high" water stress; by 2050, this will be 100%.[54]

A. Domestic Water Policies and their Results

There are no sustainable permanent policies to solve the water crisis in the MENA region. It is almost assuredly going to become near-desert, unable to support its skyrocketing population. The focus must then be to make water supplies last as long as possible and minimize the impacts of water shortages. As such, this is one of the most heavily regulated sectors in the Middle East and North Africa; it is also one of the least effective ones, and regulations are very difficult to enforce.[55] For these reasons, the most effective water regulation policies must have a focus on laws implemented at a local level where there is a more direct line to enforcement. Further, this will help to account for the vast differences in resources and specific challenges faced across regions.

Tunisia provides a good example. Tunisian water regulations were long hailed by legal scholars as being some of the most comprehensive and most efficient.[56] That, however, has

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[51] *See, e.g.,* General Comment No. 14, E/C.12/2000/4, United Nations Committee on Economic, Social and Cultural Rights (2000).

[52] Karen Seto, *Exploring the Dynamics of Migration to Mega-Delta Cities in Asia and Africa; Contemporary Drivers and Future Scenarios*, 21 GLOB. ENV'T CHANGE S94-S107 (2011).

[53] D. Michel et al., *Water Challenges and Cooperative Response in the Middle East and North Africa*, U.S.-ISLAMIC WORLD F. PAPERS (2012), at 44.

[54] Samantha Kuzma et al., *25 Countries, Housing One-quarter of the Population, Face Extremely High Water Stress*, WORLD RESOURCES INST. (August 16, 2023).

[55] Molle Francois et al., *Governing Groundwater in the Middle East and North Africa Region*, *in* ADVANCES IN GROUNDWATER GOVERNANCE (Villholth et al. eds. 2017).

[56] See e.g., N. OMRANI AND M. OUESSAR, *Lessons Learned from the Tunisian National Water Policy: The Case of the Rehabilitation of Oases*, *in* DIALOGUES ON MEDITERRANEAN WATER CHALLENGES: RATIONAL WATER USE, WATER PRICE VERSUS VALUE AND LESSONS LEARNED FROM THE EUROPEAN WATER FRAMEWORK

changed. Strategies to rehabilitate oases, expand irrigation, price water, and otherwise decrease demand are no longer keeping up with the water stresses of climate change and increasing demand; Tunisia has now been in a drought that has lasted for over five straight years, suggesting that perhaps it is not a drought, but the new normal.[57]

For rural farmers, the combination of stringent government policy and high heat has made farming "impossible", with drastic consequences for their livelihoods.[58] This is demonstrative of a classic problem: too many restrictions make it more likely they will be ignored and increases the cost of implementation. This is precisely what is happening in Tunisia, where farmers are blatantly ignoring government water management strategies—which currently involve complete bans on agricultural use of water supplies in certain areas—simply because they have to as a matter of survival.[59] In some instances, following government restrictions has resulted in decreased or non-existent crop yield, which further imperils the nation's food security.[60] A link between drought, agricultural depletion, and migration has been clearly established.[61]

Part of the problem is that Tunisian water policy was not enacted with the long-term well-being of farmers in mind. Much of Tunisia's water infrastructure, including dams and irrigation systems, was financed by the World Bank and other outside, often private enterprise, contributors.[62] Between 2017 and 2019, of the foreign funding received, 40.7% went to the administrative costs of water management, while only .04% went towards protecting water resources, and less than 6% towards increasing drinking water accessibility.[63] Despite all this foreign funding, the price of drinking water in Tunisia has continued to skyrocket with another recent increase of 16%.[64] Across the Middle East and North Africa, the high costs of water—whether it comes from desalination, irrigation, or other processes—are money sinks when it comes to agriculture. For instance, in Qatar, one-third of water usage is agricultural in nature, yet the agricultural sector only constitutes 0.1% of the country's economy.[65] In Tunisia, this means the farming sector is encouraged, and in some cases required, to grow mainly exportable produce such as citrus fruits at the cost of

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DIRECTIVE (S. Junier et al. eds 2011) at 71-83; NATIONAL RESEARCH COUNCIL, AGRICULTURAL WATER MANAGEMENT: PROCEEDINGS OF A WORKSHOP IN TUNISIA (Laura Holliday ed., 2007).

[57] *Tunisia Extends Drinking Water Quota System, Ban on Agriculture Use*, REUTERS (September 30, 2023, at 9:04 AM).

[58] Simon Speakman Cordall, *Heatwave and Drought Leave Tunisia Farmers Struggling to Survive*, AL JAZEERA (July 26, 2023); *Tunisia Extends Drinking Water Quota System*, *supra* note 57.

[59] Cordall, *supra* note 58.

[60] *Id*.

[61] Cristina Cattaneo et al., *Human Migration in the Era of Climate Change*, 13 REV. OF ENV'T ECON. AND POL'Y, 1-20 (May 2019).

[62] سياسات البنك العالمي في مجالي الماء والصرف الصحّي بتونس: الأولوية للخصخصة على حساب الحقوق الأساسيّة

[Houcine Rhili, *The World Bank's Water and Sanitation Policies in Tunisia: Privatization at the Expense of Fundamental Rights*], TRANSNAT'L INST. (September 27, 2023)

[63] Republic of Tunisia, Ministry of Agriculture, Water Resources and Fisheries, *National Report of the Water Sector Year 2021* (2021), at 51-61.

[64] *Tunisia Raises Drinking Water Prices by up to 16% Due to Drought*, REUTERS (March 1, 2024,1:30 PM).

[65] Nayla Higazy et al., *Water Footprint Assessment and Virtual Water Trade in the Globally Most Water-Stressed Country, Qatar*, 16 WATER 1185 (Apr. 22, 2024).

more nutrition-efficient crops, making the food supply extremely susceptible to disruption and shortage.[66]

B. International Resource Agreements

International agreements—or, more likely, disputes—regarding resources can affect whether people must relocate. In a region of conflict, multilateral resource-use agreements can be difficult, as shown by the Israeli-Palestinian water disputes.[67] Discussed more thoroughly below, resource sharing agreements can be some of the most effective means of allocating and preserving the region's water supplies, but they are also very difficult to create.

The basic principle of international environmental law is Principle 21 of the Stockholm Declaration.[68] Deriving from the foundational case the *Trail Smelter Arbitration*, a cross-border dispute over air and water pollution between the United States and Canada, the principle is that a state may use its natural resources however it wishes unless the use will harm another state.[69] This principle works in theory until applied to climate change; does a country have the right to consume its oil resources when that use will harm every state, including itself? More relevantly, does a country have the right to use its water resources, particularly riparian ones, as it sees fit when that use may deprive another state of water? This is the debate at issue in the ongoing conflict between Egypt and Ethiopia over Ethiopia's damming of the Nile, and a constant source of disagreement for the region.[70]

This dependency on shared water sources gets messier as cultural and political tensions come into play. In the Middle East and North Africa, over half of the population gets their water from a source that crosses a political border. Likewise, the majority of Israel's freshwater derives from the Jordan River basin, a notoriously disputed area.[71] The potential for conflict is clear. To date, no water sharing agreement has seen particular success with the exception of the Jordan-Israel agreement over the Yarmuk and Jordan Rivers, which was part of a larger peace treaty signed in 1994.[72] The terms of this agreement, however, would most likely not be possible elsewhere as it provides for the sale of water from Israel to Jordan—many countries simply cannot afford to import water on a meaningful scale.[73] The latest iteration of the agreement, under which Jordan can purchase up to 100 million cubic

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[66] Cordall, *supra* note 58; *Value of Imports and Exports in the Agriculture and Food Sector in Tunisia from 2018 to 2021*, STATISTA (January 2022), https://www.statista.com/statistics/1190806/import-and-export-of-agriculture-and-food-in-tunisia/

[67] *See, e.g.*, WATER WISDOM (Tal and Abed Rabbo eds., 2010).

[68] G.A. Res. 2994 (XXVII), *Declaration of the United Nations Conference on the Human Environment* (Dec. 15, 1972) ("the Stockholm Declaration"), at 42.

[63] J. Read, *The Trail Smelter Dispute*, THE CAN. YEARBOOK OF INT'L L. 213-17 (1963).

[70] *Why is Egypt Worried about Ethiopia's Dam on the Nile?*, BBC (Sept. 13, 2023).

[71] Peter Gleick, *Water, War, and Peace in the Middle East*, 36.3 ENV'T: SCI. AND POL'Y FOR SUSTAINABLE DEV., at 6 (Apr. 1994).

[72] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (Wadi 'Araba Treaty), Isr.-Jordan, Oct. 26, 1994, U.N.T.S. 35325.

[73] *Id*.

meters of water (mostly desalinated) from Israel,[74] is set to expire soon and given the current tension between Jordan and Israel over Jordan's stance on the Israeli-Palestine Conflict, it is unclear whether the agreement will be extended.

C. Desalination: a Possible Solution?

Expansion and modification of desalination capabilities is probably the most impactful change that could feasibly be made. Saudi Arabia and the U.A.E. are already the largest producers of desalinated water in the world,[75] and throughout the region desalination is becoming more popular; Morocco, for example, just authorized the construction of eight new plants that will be located along its border with Algeria.[76] Qatar currently satisfies half of its water supply demand by desalinating seawater through its twelve plants, which collectively produce 500 million gallons of water a day, and nearly all household water in the country is desalinated.[77]

From a political perspective, getting water through desalination causes much less contention than relying on other water sources, such as the region's major rivers or groundwater wells, especially considering some countries like Qatar have no permanent rivers.[78] This is partially because, with the exception of Palestine, no country in the MENA region is landlocked, meaning there is decreased likelihood for conflict over shared water resources. Though some countries have very negligible coastline—Iraq's coastline is thirty-six miles long and Jordan's is less than fourteen—there is still relatively easy access to seawater and access will only get easier as sea level rise brings the water closer to home.

Desalination does have its drawbacks. For one, the desalination process is easily disrupted and comes with its own environmental problems in the form of energy consumption and marine harm.[79] It is also extremely expensive, which means that while richer states like Qatar, Saudi Arabia, and the U.A.E. can rely on it, for poorer states desalination on a meaningful scale is cost prohibitive. It also means it is not ideal for agriculture, which requires large amounts of water but offers little relative economic gain. This is an example of the ways in which climate change is exacerbating inequalities, as the poor face more difficulties in accessing even the most basic of resources.

The issue of funding for desalination will be compounded in the future by the fact that nonrenewable resources comprise significant portions of the region's economies. As developed countries transition to cleaner energy sources, revenue generated from oil and gas

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[74] Galit Cohen et al., *Thirty Years of the Peace Agreement with Jordan: Time to Upgrade Water Cooperation, INS Insight No. 1908,* THE INST. FOR NAT'L SEC. STUD. (Oct. 31, 2024).

[75] Achref Chibani, *The Costs and Benefits of Water Desalination in the Gulf*, ARAB CTR. WASHINGTON D.C. (Apr. 12, 2023).

[76] Ines Magoum, *Dessalement: l'Oriental marocain sera doté de 8 nouvelles usines pour l'eau potable*, AFRIK21: ACTUALITÉ DE L'ÉCONOMIE VERTE, DE L'ENVIRONNEMENT ET DU DÉVELOPPEMENT DURABLE (23 Avril, 2024) [*Morocco's Oriental Region to Get 8 New Drinking Water Plants*, AFRIK21: NEWS ON THE GREEN ECONOMY, THE ENV'T, AND SUSTAINABLE DEV. IN AFRICA (April 23, 2024)].

[77] Higazy, *supra* note 65.

[78] Ethiopia's dam of the Nile and Egypt's response is an example of conflict over riparian resources; Rep. of the FAO Land and Water Division, Irrigation in the Middle East region in figures: AQUASTAT Survey – 2008 (2009).

[79] Higazy, *supra* note 65.

production will shrink, further impeding states' abilities to finance desalination measures. Additionally, desalination requires immense amounts of energy that are currently being supplied by fossil fuel sources, thus ironically perpetuating a cycle in which the fossil fuel use necessary to supplement water shortages caused by climate change is causing climate change; it also makes it easier for states rich in gas to afford desalinated water, again demonstrating inequalities across levels of wealth.

There are possible solutions, however. Saudi Arabia recently began operations at al-Khafji, the first ever desalination plant powered by solar, which can produce up to 90,000 cubic meters of usable water per day.[80] Solar-powered desalination can cost up to $25 per cubic meter of desalinated water produced, and photovoltaic desalination (another form of solar) costs over $11 per cubic meter.[81] This is prohibitively expensive for most countries and a significant investment compared to fossil fuel-powered desalination, which is less than a dollar per cubic meter.[82] Wind power is likewise expensive. However, these are fuel sources that the region has in abundance.

D. Other Water Solutions

There are possibilities for minimizing the impacts of water shortages. One important measure to be taken for water resource maximization is the implementation of irrigation systems for agriculture, with a focus on drip irrigation as opposed to traditional irrigation systems. Egypt is less susceptible to drought than other MENA nations because its agriculture is predominantly watered through irrigation; despite this, it is still short roughly twenty billion cubic meters of water each year.[83] Irrigation is not used as widely or efficiently in the region as it could be and, as mentioned, agriculture eats up immense amounts of water with little economic return.[84] This again means countries spend hugely on water with little recoup of the cost.

Furthermore, water is grossly misallocated, especially in oil and gas-producing countries, to the detriment of poor and rural populations who are the most at risk for displacement.[85] Shortages in these rural areas lead to the digging of unauthorized wells, which complicates governance of water and strains resources.[86]

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[80] Enas Taha Sayed et al., *Recent Progress in Renewable Energy-based Desalination in the Middle East and North Africa MENA Region*, 48 J. OF ADVANCED RSCH. 125, 125-156 (June, 2023).
المملكة العربية السعودية: رؤية 2030 محطة الخفجي لتحلية المياه [Kingdom of Saudi Arabia: Vision 2030, al-Khafji. Available at: vision2030.gov.sa/ar/projects/alkhafji/]

[81] Taha Sayed, *supra* note 80.

[82] *Id*. at 129.

[83] Wodon et al., *supra* note 11; Ayah Aman, AL-MONITOR, مصر تبدأ فصلاً جديداً من التعاون مع الاتحاد الأوروبي من أجل حماية الأمن المائي (أغسطس 20، 2018) [Ayah Aman, "Egypt Joins with EU to Protect Water Security", AL-MONITOR (August 20, 2018)].

[84] Higazy, *supra* note 65.

[85] Hussam Hussein & Laurent Lambert, *A Rentier State under Blockade: Qatar's Water-Energy-Food Predicament from Energy Abundance and Food Insecurity to a Silent Water Crisis*, 12 WATER, No. 4 (2020).

[86] Raya Marina Stephan, *Legal Framework of Groundwater Management in the Middle East (Israel, Jordan, Lebanon, Syria and the Palestinian Territories)*, *in* WATER RESOURCES IN THE MIDDLE EAST (H. Shuval & H. Dweik eds., 2007).

Finally, although it may seem counter-intuitive, deregulation might be the solution. Focusing on the practices that promote the most efficient use of water and scrapping smaller, less impactful policies would free up personnel and funds that can be dedicated to more fully implementing other policies. When it comes to groundwater, it would also be beneficial to work from a local policy level as local governments have more direct control over implementation and are more likely to know the exact needs and capacities of their citizens. Lastly, agriculture must shift to crops that are most water efficient in terms of water use and nutrients produced. This, however, as with much of the solutions proposed in this Note, seems unlikely to occur any time soon.

V. Post-Migration

The right to health, as identified in General Comment 14, encompasses the social determinants of health.[87] All social determinants of health are all negatively implicated post-migration, as a result of international and domestic laws that are hostile to climate migrants and prevent them from enjoying benefits derived from having refugee status, citizenship, and general social acceptance.

A. Migrants, Not Refugees

The international response to the climate migration crisis in the MENA region has been lackluster, if not openly aggressive; the news abounds with stories of countries turning away Middle Eastern migrants. This is partly because there are no widely accepted international protections, such as refugee status, for people displaced due to climate change, meaning governments are not obligated to provide aid.

The United Nations definition of a refugee, which is the international legal definition, is set forth in the 1951 Geneva Convention and its 1967 amendment. Under that Convention, a refugee is someone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or . . . unwilling to avail himself of the protection of that country; or . . . to return to it."[88] By that definition, the law considers people displaced by climate change migrants, not refugees, which imposes debilitating limitations on the legal and social protections available and consequently negatively impacts migrants' social determinants of health; in essence, displaced peoples who do not fall under the U.N. definition of a refugee are only guaranteed "whatever emergency assistance is voluntarily provided for them."[89]

Unfortunately, that this definition is narrow does not matter much for transboundary migrants within the Middle East and North Africa because many MENA countries have not

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[87] General Comment No. 14, E/C.12/2000/4.

[88] United Nations Convention Relating to the Status of Refugees, *adopted* Dec. 14, 1950, 189 U.N.T.S. 150 (entered into force April 22, 1954).

[89] Olivia Magliozzi, *A Well-Founded Fear of the Climate: Utilizing Environmental Governance Structures to Protect Climate Refugees*, 46 SUFFOLK TRANSNAT'L L. REV. 123 (2023); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 132-133 (1990).

signed onto the major international refugee agreements anyway.[90] This lack of international recognition for migrants is particularly troubling for the Middle East given the magnitude of the refugee crisis there, both in terms of sheer numbers of displaced peoples and the limited resources of the region. Further, as a region prone to conflicts that will only worsen as resource availability declines, the line between climate migrants and refugees will become blurred. In short, this lacking definition means that to obtain government benefits from their host countries, migrants must rely on domestic law.

B. Stateless de jure

Former U.N. Secretary-General Ban Ki-moon is quoted as having said, "Climate change carries no passport and knows no national borders."[91] Unfortunately, this does not hold true for climate migrants because passports and national borders are some of the most significant barriers to migration and post-migration success. Often, it is not only that climate migrants cannot obtain refugee status under international treaties, but also that they cannot obtain any legal status under domestic laws, with particular barriers for children.

For example, one legal challenge for people migrating between countries within the Middle East and North Africa is the existence of *jus sanguinis* laws that are limited by parental gender, which has significant consequences for children born to displaced parents. These citizenship-by-blood laws often conspire with conflicting laws of the parents' originating states to make the child stateless as a matter of law.[92] This is problematic given the growing numbers of cross-border migrants. In Qatar, for example, a mother cannot pass her Qatari citizenship to her child, so any child born to a Qatari mother and non-Qatari father (such as, per se, a man forced to move because of climate change) may be stateless from birth.[93] The same is true in the U.A.E. Likewise, in Lebanon, nationality is passed down primarily through the father, so any child born on Lebanese soil to foreign parents does not automatically receive Lebanese citizenship.[94] These children may technically have the nationality of their parents' origin countries, but this is of little help when they are unable to return, leaving the children stateless de facto.

Worse, some migrant children are left stateless de jure. In these cases, the child may not have any nationality at all. By way of example, consider a displaced family living in Lebanon. In this family, the mother is Egyptian and the father was born in Algeria but now has Egyptian citizenship that he acquired through naturalization. Any child they have will be *completely* stateless de jure. Firstly, the child will not be able to obtain citizenship by reason of being born on Lebanese soil because Lebanese citizenship is only acquired if the father is

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[90] Susan M. Akram, *Assessing the Impact of the Global Compacts on Refugees and Migration in the Middle East*, 30 INT'L J. REFUGEE L. 691, 691-695 (2018).

[91] Gowayed, *supra* note 29.

[92] *Id.*

[93] قانون رقم ٣٨ تاريخ ٢٠٠٥ بشأن اكتساب الجنسية القطرية [Law No. 38 of 2005 on the Acquisition of Qatari Nationality].

[94] قانون الجنسية اللبنانية رقم ١٥ تاريخ ١٩ كانون الثاني ١٩٢٥ [Lebanese Nationality Law No. 15 of January 19, 1925]; الهيئة الوطنية لشؤون المرأة اللبنانية [National Commission for Lebanese Women], جنسية مش تجنيس ["Nationality, not Naturalization"] (2021), available at: https://nclw.gov.lb/wp-content/uploads/2022/09/2021_Nationality-not-Naturalization_Ar.pdf

a citizen.[95] The child cannot obtain Egyptian citizenship through his mother because Egyptian citizenship passes only through the father.[96] However, the child cannot obtain Egyptian citizenship through his father either, because for children born off Egyptian soil, the father must have been born in Egypt and not merely a citizen in order for citizenship to be inherited;[97] in this instance, the child's father was born in Algeria. Lastly, our hypothetical child cannot obtain citizenship from Algeria, his father's country of birth, because Algerian citizenship is revoked once another nationality is acquired.[98] This means the child is deprived *as a matter of law* of the benefits of citizenship, including education, the ability to work legally, own property, access healthcare, and even obtain the official identification papers that would permit them to move to a more migrant-friendly country.

Obtaining citizenship is not easy either; Middle Eastern countries have some of the strictest requirements for naturalization in the world. In the U.A.E., citizenship is only given after thirty years' residence in the country.[99] Compare that to Qatar, for which naturalization is only possible if one can show that they have lived in the country for at least twenty-five years as a *legal* resident, which is a more complicated requirement than it may seem considering legal residency for foreigners can only be obtained after living in the country and making "significant contributions" to the economy, something most forced migrants will struggle to do.[100] On top of that, an individual seeking Qatari naturalization must prove their financial stability, and that they demonstrated good conduct during the twenty-five years of living in the country, and—perhaps hardest of all—that they have sufficient knowledge of Arabic.[101]

These conflicting laws are not resolved by any multilateral citizenship agreements in the region either. Further, while the U.N. Sustainable Development Goals call for facilitating "orderly, safe, regular, and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies", this has yet to occur in the Middle East or North Africa.[102] The aim of this provision was to decrease inequalities, which is associated with better health outcomes and is an important aspect of the right to health. However, it has not been the driver for any meaningful immigration policy changes in the region.[103]

If these difficulties were not enough, there is an unwanted accompaniment to the problems of obtaining legal status, which is limited housing (and other social benefits) for

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[95] قانون الجنسية اللبنانية رقم ١٥ تاريخ ١٩ كانون الثاني ١٩٢٥ [Lebanese Nationality Law No. 15 of January 19, 1925]

[96] قانون الجنسية المصري رقم ٢٦ تاريخ ٢٩ مايو ١٩٧٥ [Egyptian Nationality Law No. 26 of May 29, 1975]

[97] *Id.*

[98] قانون الجنسية الجزائري رقم ٨٦-١٩٧٠ تاريخ ١٥ ديسمبر ١٩٧٠ [Algerian Nationality Law No. 86 of December 15, 1970]; قانون الجنسية المصري رقم ٢٦ تاريخ ٢٩ مايو ١٩٧٥ [Egyptian Nationality Law No. 26 of May 29, 1975]

[99] Abdulaziz Ali & Logan Cochrane, *Residency and Citizenship in the Gulf: Recent Policy Changes and Future Implications for the Region*, 12 COMPARATIVE MIGRATION STUDIES 11 (2024).

[100] قانون رقم ٣٨ تاريخ ٢٠٠٥ بشأن اكتساب الجنسية القطرية [Law No. 38 of 2005 on the Acquisition of Qatari Nationality]; *Id.*

[101] قانون رقم ٣٨ تاريخ ٢٠٠٥ بشأن اكتساب الجنسية القطرية [Law No. 38 of 2005 on the Acquisition of Qatari Nationality].

[102] G.A. Res. A/70/1, Target 10.7, Transforming our World: the 2030 Agenda for Sustainable Development (Sept. 25, 2015).

[103] *See, e.g.*, Michele Solomon & Suzanne Sheldon, *The Global Compact for Migration: from the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration*, 30 INT'L J. REFUGEE L. 584 (2018).

displaced peoples. In many Middle Eastern and North African countries, property can only be owned and rented by citizens.[104] Many of these countries also actively work to decrease housing opportunities for refugees and migrants alike. For instance, when IKEA offered to build pre-fabricated houses for Syrian refugees in Lebanon, the Lebanese government refused "even a trial run" for over six months because they were attempting to discourage refugees from staying in the country.[105] Furthermore, refugee camps are a right to health nightmare, often forcing migrants to endure scorching heat, extreme cold, and lack of access to food and water. Given that the right to health includes a right to adequate food, water, and housing, refugee camps are often a gross violation as they frequently lack all of these.

There are some—again, costly—measures that can be taken to improve the housing situation and safety of migrant camps. For instance, the Za'atari refugee camp in Jordan is powered entirely by solar.[106] This is not only sustainable, but also provides electricity for inhabitants, drastically improving health outcomes. Further, reports have shown that Za'atari refugees who engage with the running of the solar plant (such as in maintenance) feel increased senses of achievement and responsibility, the sort of positive community interactions that are recognized as a social determinant of health.[107] Perhaps most crucially, the solar plant has allowed the development of educational centers within the camp, thus improving long-term economic outcomes and another social determinant of health.[108]

Solar-powered migrant camps are unlikely to become a norm, however. The Za'atari plant was funded partially by the United Nations High Commissioner for Refugees and partially by an agreement between the German and Jordanian governments.[109] Such international funding cannot be relied upon and unless developed countries become more open to providing aid, improvements on this scale are unlikely.

VI. Political Violence and Instability: a Cause and a Result

All the above contributes to conflict and political instability, which are both drivers of migration and its consequence. Because this is a topic that has been covered ad nauseum in climate, migration, and Middle Eastern literature, this Note will only provide a brief overview.

There is a direct connection between resource scarcity, conflict, and migration that the Middle East has seen for millennia.[110] In fact, some particularly pessimistic scholars predict a complete collapse of global order resulting from resource scarcity caused by climate

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[104] Akram, *supra* note 90, at 691-95.

[105] Aryn Baker, *After a Long Delay, Lebanon Finally Says Yes to Ikea Housing for Syrian Refugees*, TIME, Dec. 16, 2013.

[106] UNHCR, *Climate Change and Displacement in MENA, Third Middle East and North Africa Academic Roundtable – Outcome Report* (June 2021), at 11.

[107] *Id*.

[108] *SES and SOLARKIOSK Bring Power and Internet to an Education Centre in a Jordanian Refugee Camp*, BUSINESS WIRE (May 19, 2016, 7:35 AM), https://www.businesswire.com/news/home/20160519005677/en/SES-And-SOLARKIOSK-Bring-Power-and-Internet-to-an-Education-Centre-in-a-Jordanian-Refugee-Camp.

[109] Marwa Hashem, *Jordan's Za'atari Camp Goes Green with New Solar Plant*, UNHCR (November 14, 2017), https://www.unhcr.org/us/news/stories/jordans-zaatari-camp-goes-green-new-solar-plant.

[110] Michael Brzoska & Christiane Fröhlich, *Climate Change, Migration and Violent Conflict: Vulnerabilities, Pathways and Adaptation strategies*, 5 MIGRATION & DEV. 190 (2016).

change.[111] According to the Notre Dame Global Adaptation Index, "95% of all conflict displacements in 2020 occurred in countries vulnerable or highly vulnerable to climate change."[112] This is the result of a confluence of factors. Areas with violence are often characterized by poor governance, which means less effective regulation and management that increases the scarcity of resources; this scarcity then increases conflict in a cycle. Conflict over resources is perhaps the greatest threat. Even in 1967, water played a crucial role in inciting the war between Israel, Syria, Egypt, and Jordan, and Middle Eastern and North African history has been filled for centuries with conflicts over resources.[113] Nowadays, growing regional tensions and shrinking water is only making matters worse.

However, studies have shown that migration itself is not a cause for conflict.[114] Rather, existing political instabilities often means an inability to support or integrate migrants, leading to social tensions that then cause violence.[115] The likelihood of political violence or conflict also depends on the type of migration; for instance, well-planned and voluntary migration, even if it is for climate reasons, usually does not pose a threat. Migration that is disruptive, on the other hand, often leads to conflict. Disruptive migration is defined by the National Research Council as "large-scale movements of populations that are socially, economically, or politically disruptive, either in the area of origin, the area of destination, or in sensitive border regions that may be affected by population movements."[116]

In a region already unstable, any large-scale migration can be disruptive. Potential for conflict is heightened by laws that intentionally create difficulties in obtaining legal residency or citizenship, leaving large numbers of people unable to fully integrate into society.[117] Likewise, internationally, mass migration out of the Middle East and North Africa will mostly be considered disruptive as social integration is frequently difficult, especially in countries hostile to Islamic and Middle Eastern cultures.

VII. International Law Solutions: Implausible

Aside from the fact that international law frequently lacks "teeth" for enforcement, the most beneficial changes to international law in the realm of climate migration are highly unrealistic.

Firstly, the Middle East and North Africa are home to some of the world's least democratic governments; only Israel and Tunisia rank in the top fiftieth percentile for global level of democracy.[118] The region is also not known for cooperation.[119] Thus, international

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[111] *See, e.g.,* Paul Ehrlich & Anne Ehrlich, *Can a Collapse of Global Civilization Be Avoided?*, 280 PROC. ROYAL SOC. 1 (2013).

[112] Notre Dame Global Adaptation Initiative, *supra* note 18.

[113] MARK ZEITOUN, POWER AND WATER IN THE MIDDLE EAST 3 (2008).

[114] Abel et al., *Climate, Conflict and Forced Migration*, 54 GLOB. ENV'T CHANGE 239 (2019).

[115] *Id.*; NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *supra* note 31.

[116] NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *supra* note 35, at 113.

[117] Ali & Cochrane, *supra* note 99.

[118] UNIVERSITY OF GOTHENBURG VARIETIES OF DEMOCRACY INSTITUTE, DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 9 (Vanessa A. Boese-Schlosser et al. eds., 2022).

[119] There are currently over forty-five armed conflicts going on in the Middle East and North Africa, the most of any region. *See* Geneva Academy, *RULAC* (last visited Mar. 13, 2025), https://geneva-academy.ch/galleries/today-s-armed-

agreements on resource sharing, naturalization, migration controls, and more cannot be expected, and the likelihood that MENA countries receive substantial financial aid or support from the global north is low. Solutions such as implementation of climate visa programs are likewise not likely to be effective given the ill-will toward and within the region. Some scholars have touted the idea of a global reparations fund that could be used to improve detrimental health outcomes in developing countries that are the result of climate change, but this seems, if possible, even more unlikely.[120]

As it regards food shortages, however, agricultural troubles are not at the forefront of international environmental policy because their impacts are not felt as severely by developed nations. Thus, international agreements providing for emergency food provision and supplemented agriculture are scarce and will most likely remain as such until the impacts of these droughts are felt closer to home (one *New York Times* article suggested that rising hummus prices caused by widespread drought might be the wake-up call first-world countries need as to realizing the "complexity and fragility" of the global food system).[121]

A common inclusion in international environmental law treaties is a resource or technology-sharing article that requires developed nations to provide assistance to developing nations as part of a recognition that developed countries are not only more capable of providing support but also, as the main contributors to climate change, have a moral obligation to do so. The Montreal Protocol, usually regarded as the greatest success of international environmental law, includes Article 10a, which provides for sharing of technology and resources between parties.[122] This would be most helpful with regards to provision of desalination technology, solar and wind technology, and funding for updated water systems. International aid has been given in these areas before, but it is not part of a binding international agreement. Though this would undoubtedly go a great way towards reducing the burden of water deficit in the Middle East and North Africa, it is also not a cost-friendly and therefore sustainable solution. A long-term solution would be international agreements that make migration easier and more accessible.

To this end, amendment of the definition of a refugee to include those displaced due to climate change would be a good start. However, doing so poses not only challenges of political support but of legal definition as well.[123] As legal scholars have pointed out, the generally accepted definition of a climate migrant is inherently vague. A climate migrant is:

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conflicts#:~:text=This%20is%2C%20in%20numbers%2C%20the,Turkey%2C%20Yemen%20and%20Western%20Sahara.

[120] The concept of reparations implies some immense wrongdoing, which I cannot imagine would be well-received by the U.S. and its allies, for instance. *See* Audrey Chapman & A. Karim Ahmed, *Climate Justice, Humans Rights, and the Case for Reparations*, 23 HEALTH & HUM. RTS. J., No. 2 (2021).

[121] Amie Tsang, *Rising Hummus Prices? Blame a Drought Half a World Away*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/business/hummus-chickpeas-prices.html.

[122] *Montreal Protocol on Substances that Deplete the Ozone Layer* art. 10(a), Sept. 16, 1987, 1846 U.N.T.S 412. *See also* agreements like the *ASEAN Agreement on Transboundary Haze Pollution* (Jun, 10, 2002, effective Nov. 25, 2003), which provides for technology and resource sharing between parties, a provision that is often used.

[123] Calum Nicholson, *'Climate-induced migration': Ways Forward in the Face of an Intrinsically Equivocal Concept*, *in* RSCH. HANDBOOK ON CLIMATE CHANGE, MIGRATION, & L. 49, 49-66 (Crepeau and Mayer eds., 2017).

> persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment as a result of climate change that adversely affect their living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.[124]

This leaves a lot to be desired. What is "compelling"? How is someone to prove that a change in environment is due to climate change? Refugee status or similar is unlikely to be granted to climate migrants for fear of opening the floodgates of immigration. Yet, the floodgates of immigration is exactly what will eventually be needed to ensure the health of most Middle Eastern and North African residents; sustaining a region almost entirely through artificial, bought, and gifted water supplies cannot last.

A similarly impactful change would be to lower the prohibitive requirements for naturalization and citizenship that plague the region. Again, this is not a plausible solution given the political tensions in the area, and as resources run out, states will most likely become even more concerned with keeping people out.

VIII. Conclusion

Climate change is a danger not just to our health, but "to our very survival".[125] This is true more for the vulnerable and poor in the Middle East and North Africa than it is for the upper-middle classes of developed nations, meaning international policies aimed at making survival more likely are not a political urgency. As it becomes clear that climate mitigation efforts are too little too late, priority must shift to establishing comprehensive public health policies that minimize the negative consequences of climate change on human health, particularly for climate migrants who are especially susceptible.

For the Middle East and North Africa, this means requires addressing climate migration as a matter of prevention and of post-migration remediation. The right to health provides a baseline for determining what policies should be enacted first. In this case, the gravest violations of the right to health stem from lack of water and food and severe weather pre-migration and from restrictive refugee and citizenship laws, amongst other things, post-migration. As a cause for pessimism, however, the legal remedies that would have the most benefit for climate migrants, such as amending the international definition of a refugee, coordinating citizenship laws within the region, creating resource-sharing agreements, and receiving international aid are extremely unlikely to be implemented in any near future. On a domestic level, legal solutions directly tackling water availability and migration are likewise far-fetched due to their high costs and the poor implementation and enforceability capacities of local governments. Thus, this may be an area where the law can only do so much and will remain limited in effect until there is greater political support driven by global recognition of the climate migration crisis and the plight of the Middle East and North Africa.

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[124] International Organization for Migration (2007), Discussion note: Migration and Environment; 94th Session, MC/INF/288, quoted in *id.* at 51.

[125] Anthony Costello et al., *Climate Change Threatens Our Health and Survival Within Decades*, 401 THE LANCET 85 (2022).


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RABCZEWSKA V. POLAND AND THE "PROTECTION OF RELIGIOUS FEELINGS": WHERE DOES THE FREEDOM OF RELIGION IN EUROPEAN HUMAN RIGHTS STAND TODAY?

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I. Introduction

The European Court of Human Rights ("the Strasbourg Court") is generally considered a great success by human rights scholars, at least when compared to its competition.[1] Boasting a convention securing some of the most essential rights of free and democratic societies, the fact that it gives individuals the ability to directly sue member states for violations of those rights, and forty-six members that (mostly) respect the courts' judgments, the Strasbourg court presides over one of the few international human rights systems that can be described as "effective."[2] This is not to say, however, that European Human Rights is without issues. Like all legal systems, it has its shortcomings, and one such shortcoming that no lack of scholars have pointed out is the Strasbourg court's inadequate jurisprudence on the intersection of the freedom of religion and the freedom of expression.[3]

From the very beginning of the European human rights system, when the European Convention on Human Rights ("the Convention") was created in 1950, it had included the "freedom of thought, conscience and religion" under Article 9 as one of its core rights.[4] Indeed, the freedom of religion was arguably at the center of Europe's efforts to build a human rights system, as the members of the Council of Europe had only just witnessed the wanton killing of over six million Jews for no reason other than sheer, unwarranted animosity towards their religious identity.[5] Yet despite this, after its establishment, the Strasbourg Court did not take a case on the freedom of religion for over thirty-five years as though it was afraid to touch it; it was not until 1993 that the court addressed the issue of freedom of religion for the first time in *Kokkinakis v. Greece*.[6]

In that case, Greece had arrested, charged, and convicted Kokkinakis, a Jehovah's Witness, for proselytizing his faith to others. The Strasbourg Court had very little issue determining that Greece had crossed a line here; Greece had stopped Kokkinakis from sharing his religion with others because he was attempting to convert people of Greece's state religion, Greek Orthodox, to Jehovah's Witnesses.[7] It was clear to the court that this could not stand under the freedom of religion, "one of the foundations of a democratic society[,]" which it said included the right to talk to and convince others of your beliefs, lest the "freedom to change one's religion or belief, enshrined in article 9, . . . remain a dead letter."[8] However, just one year after *Kokkinakis*, the Strasbourg Court's freedom of religion jurisprudence immediately became irreparably entangled with the freedom of expression in *Otto-Preminger Institut v. Austria* ("*Otto-Preminger*").

As the Convention guarantees the freedom of religion under Article 9 and the freedom of expression under Article 10, one might think expression on religion would be doubly

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[1] ANGELIKA NUSSBERGER, THE EUROPEAN COURT OF HUMAN RIGHTS 2 (2020).

[2] MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 2 (2007).

[3] *See e.g.,* Lasha Lursmanashvili, *Certain Skeptical Considerations on International Human Rights Law*, 15 L. & WORLD 27, 37 (2020).

[4] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, E.T.S. No. 005.

[5] Mark W. Janis, *The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law*, 4 OXFORD J. OF L. AND RELIGION 75, 75-76 (2015).

[6] *Id.* at 79.

[7] Kokkinakis v. Greece, 17 Eur. Ct. H.R. Rep. 397, ¶ 6-7 (1993)

[8] *Id.* ¶ 31.

protected.[9] However, when the Strasbourg court addressed the issue for the first time in 1994 in *Otto-Preminger*, it found that, because the countries of Europe don't share a "uniform conception of the significance of religion in society," the court should defer to the member-states' determinations regarding what restrictions on the freedom of expression are necessary to prevent harm to others' "religious feelings."[10] Accordingly, the court found that Austria's decision to prevent the showing of the Otto-Preminger Institute's film because the local Catholic diocese thought it disparaged the holy family was not a violation of the Convention.[11]

Academics decried this decision as flipping *Kokkinakis* on its head: *Otto-Preminger* transforms Article 9's freedom of religion from a tool religious minorities can use for protection into an instrument of oppression that the religious majority can use to enforce the status quo and restrict arguments against them; the freedom of religion had gone from a fundamental right to nothing more than a restriction on others right to the freedom of expression.[12] Furthermore, the concept of "protecting religious feelings" seemed absurd to scholars – whether a third party takes offense to someone's speech should be irrelevant to whether it receives protection under Article 10.[13] In fact, the Strasbourg Court itself ruled three years later in *De Haes and Gijsels v. Belgium* that the freedom of expression protects even statements that may shock or offend, and yet, despite this, the original premise of *Otto-Preminger*--that member states get great deference in restricting speech under the guise of protecting religious feelings from offense--lives on even today.[14]

However, while the Strasbourg Court has refused to let go of *Otto-Preminger*'s core premise, this is not to say it has stayed the same over the years. Indeed, so much of the original *Otto-Preminger* opinion has been readdressed in future cases that it remains a veritable Frankenstein of its former self. What is especially odd about *Otto-Preminger*'s progeny, however, is that the Strasbourg Court reaches extremely inconsistent conclusions regarding when it is and is not appropriate for a state to use "protecting religious feelings" as a reason to restrict someone's expression. Some of its cases appear to drastically expand *Otto-Preminger*'s deference while others seem to narrow it in equal proportions, and these expansions and contractions can often be in direct conflict with one another.[15]

For example, as early as 2006, the Strasbourg Court held that if a state's punishment for someone's speech on religion involved a criminal conviction threatening prison time, it was more likely to violate Article 10 as a disproportionate restriction on the person's freedom of

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[9] Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9, 10, Nov. 4, 1950, E.T.S. No. 005.

[10] Otto-Preminger-Institut v. Austria, 19 Eur. Ct. H.R. 34, ¶ 50 (1994).

[11] *Id.* ¶ 56.

[12] *E.g.,* Janis, *supra* note 5, at 82.

[13] Kende Szabo, *Pitting Freedom of Expression against Freedom of Religion: The Paradoxical Effect of Blasphemy Laws and Why One Should Be Favored over Another*, 7 MANCHESTER REV. L. CRIME & ETHICS 147, 149 (2018).

[14] De Haes and Gijsels v. Belgium, 25 Eur. Ct. H.R. 1, ¶ 46 (1997).

[15] *Compare, e.g.*, Manoussakis v. Greece, 23 Eur. H.R. Rep. 387, ¶ 47 (1997) ("The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."), *with* Murphy v. Ireland, 38 Eur. H.R. Rep. 13 (2004) (finding no violation regarding Ireland's punishment of Murphy under a law completely prohibiting broadcasting as a legitimate means for the expression of beliefs).

expression because the threat of jail time could have a chilling effect on the general public, discouraging them from publishing their thoughts on religion and thereby hindering the pluralism essential to a democratic society.[16] However, the court is wholly inconsistent in its application of this rule. It reached similar conclusions regarding the negative and disproportionate impact of convictions and jail time in *Mariya Alekhina and Others v. Russia* ("*Alekhina I*") and *Tagiyev and Huseynov v. Azerbaijan* ("*Tagiyev*"), but one year earlier in *E.S. v. Austria*, the court took no issue with the fact that Austria's criminal statute threatened an identical amount of jail time as in the original 2006 case, *Aydin Tatlav v. Turkey*.[17] The strangest part about the Strasbourg Court's inconsistent jurisprudence is that the court acts as if these decisions are completely compatible with one another; in the *E.S.* case, the court affirmatively cited *Aydin Tatlav* no fewer than nine times despite the fact that the court utterly failed to apply a core part of its holding.[18] This sort of inconsistency continues across almost every other element of the court's *Otto-Preminger* analysis as well.[19]

Why does the court do this? Well, for one, it is possible, if not likely, that the Strasbourg Court finds this waffling back and forth between the expansion and contraction of *Otto-Preminger*'s protection of religious feelings preferable. The court continues to take on comparatively few Article 9 cases each year, as though whatever apprehension kept them from applying it for the nearly thirty-five years before *Kokkinakis* still hangs over them now.[20] The court may well be worried that too progressive a decision on the freedom of religion may cause religious majorities in some countries to turn on the court, especially in view of the efforts in some member states to withdraw from the court's jurisdiction entirely.[21] This inconsistency would therefore be a product of the court attempting to have its cake and eat it too: It wants to both announce grandiose rules enshrining the rights of religious minorities while also deciding on a case-by-case basis whether applying those rules and finding a violation would cause too much outrage and backlash to be worth it. Both the outrage the court fears and its readiness to fold to it were visible firsthand in *Lautsi v. Italy* after a chamber of judges found Italy's requirement that all state classrooms display a crucifix violated Article 9 because it exhibited a lack of neutrality towards religion in public education.[22] This caused an uproar in Italy leading to widespread protests, and when Italy appealed the case to the Strasbourg Court's grand chamber, the court now decided it should defer to Italy regarding the state's choice to require crucifixes in schools, despite agreeing

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[16] Tatlav v. Turkey, App. No. 50692/99, ¶ 30 (May 2, 2006), https://hudoc.echr.coe.int/?i=001-75276.

[17] *Id.*; Alekhina v. Russia, App. No. 38004/12, ¶ 227 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666; Tagiyev v. Azerbaijan, App. No. 13274/08, ¶ 49 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705; E.S. v. Austria, App. No. 38450/12, ¶ 56 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[18] E.S. v. Austria, App. No. 38450/12, ¶¶ 17, 21, 22, 35, 42, 44-46, 57 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[19] *Compare, e.g.,* Murphy v. Ireland, 38 Eur. H.R. Rep. 13, ¶ 73 (2004) (finding Ireland's "country-specific religious sensitivities" gave it reason to restrict even the well-intentioned religious speech at hand), *with* Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 652, ¶ 49 (concluding the specific sensitivities of Turkey's strongly secularist society did not give it enough of a reason to restrict an Islamic sect's leader's vulgar rebuke of Turkish secular ideals).

[20] Janis, *supra* note 4, at 90.

[21] *E.g.*, Nick Eardley, *Tories Could Campaign to Leave European Human Rights Treaty if Rwanda Flights Blocked*, BBC (Aug 9, 2023), https://www.bbc.com/news/uk-politics-66438422.

[22] Lautsi v. Italy, App. No. 30814/06, (Nov. 3, 2009), https://hudoc.echr.coe.int/?i=001-95589

with the applicant and the original chamber that the crucifix was a religious symbol possibly conveying a lack of respect for others' "philosophical convictions."[23]

Secondly, the court seems to be deciding each case primarily based on how concerning it finds the underlying facts regardless of the standing law and establishing its ruling from there; as a result, its holdings end up varying greatly from case to case as they stretch to reach the conclusion the court sees as just, regardless of whose actions the court finds concerning.[24] This is not to accuse the Strasbourg Court of judicial activism or overreach – in some of these cases it truly is balancing much greater concerns than just misguided attempts to "protect the religious feelings" of the majority.[25] The problem is the Strasbourg Court is stubbornly attempting to build off a faulty foundation(*Otto-Preminger* and the protection of religious feelings) and the longer it does that, the more convoluted and inconsistent its jurisprudence becomes. Add to this the fact that the Court appears more concerned with reaching what it sees as the right conclusion in each individual case than enunciating a clear standard, and it results in the court seriously hindering itself from creating a uniform rule that unambiguously establishes the duties member-states should owe their citizens under the freedom of religion.

The issue this causes for the Strasbourg Court here is that its member-states have identified the court's unwillingness to take this part of the Convention seriously, and they have taken advantage of this confusion to maintain and enforce strict laws punishing expression on religion, including those that carry potential prison sentences of multiple years.[26] Even though the Council of Europe, the Strasbourg Court's founding body, and the European Union have long taken the stance that these laws restricting offensive speech about religion, the so-called blasphemy laws, unduly strain both the freedom of expression and the freedom of religion, the Strasbourg Court has refused to follow through and reliably apply a rule that effectively prevents the member states from using these laws to restrict speech merely because it does not fit their views.[27]

However, in late 2022, the court decided a new case about the protection of religious feelings, *Rabczewska v. Poland*.[28] *Rabczewska* (pronounced "Rabchevska") represents an important step forward for the case law because the court relies heavily on both sides of *Otto-*

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[23] Janis, *supra* note 4, at 87-89.

[24] *Compare, e.g.*, S.A.S. v. France, App. No. 43835/11, ¶¶ 151-59 (July 1, 2014), https://hudoc.echr.coe.int/?i=001-145466 (Finding the court should respect France's blanket ban on face coverings as an effort to preserve French citizens' ability to "live together" despite what standing law said about the relevance of breadth of the ban and the fact that nearly all other member states uniformly had no such ban), *with* Alekhina v. Russia, App. No. 38004/12, ¶ 225-29 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666 (Finding Russia in violation by disregarding what standing case law said about how much deference should be given to the state's conclusions.)

[25] *See e.g.*, Rokhaya Diallo, *What has 20 years of banning headscarves done for France?*, THE GUARDIAN (Apr. 12, 2024), https://www.theguardian.com/commentisfree/2024/apr/12/ban-headscarves-france-secularism-exclusion-intolerance (discussing the broader history of the social conflict surrounding Muslim headdresses in France leading to the 2011 face covering ban at hand in *S.A.S. v. France*); Mariya Alekhina and Others v. Russia, App. No. 38004/12 220 Eur. Ct. H. R. (2018) (concerning the conviction, excessive sentencing, and possible torture of dissidents in Russia).

[26] *See e.g.*, *Poland: Arrest Over Virgin Mary's Rainbow Halo* HUM. RTS. WATCH ((May 8, 2019), https://www.hrw.org/news/2019/05/08/poland-arrest-over-virgin-marys-rainbow-halo.

[27] EUR. PARL. ASS., *Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of Their Religion*, Recommendation 1805 (2007); EUR. PARL. DOC., (INI 2078), ¶ 35 (2013).

[28] Rabczewska v. Poland, App. No. 8257/13 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102.

Preminger's progeny–the expansive and the contractive–and it brings them closer to one rule than any of its past cases appear to.[29] Perhaps most importantly, the court found Poland to be in violation here even though the facts of the case are more similar to those that the court has historically afforded extensive deference.[30] Additionally, *Rabczewska* is likely to have great significance in the coming years as the blasphemy laws responsible for the criminalization of "improper" expression on religion continue to gain notoriety, especially in Poland.[31] With this in mind, this Note seeks to explore two main questions: (1) what, if anything, has *Rabczewska* changed about the Strasbourg Court's *Otto-Preminger* jurisprudence and where does the court's standard regarding the restriction of expression on religion lie after the case? (2) What can the court do to improve its jurisprudence and better protect expression on religion? To answer these questions, it is necessary to begin with a thorough analysis of the *Rabczewska* case and its background, including the facts that the Strasbourg Court neglected to mention.

II. Factual Background to *Rabczewska v. Poland*

Dorota Rabczewska, who goes by the stage name "Doda," is a Polish pop star who rose to fame in Poland as the lead singer of the band "Virgin," which was active from 2000 to 2007.[32] Post-2007, she continued to see success as a solo artist, with her first solo album reaching number one on the charts in Poland one week after its release.[33] Around the time the facts of this case unfolded, multiple news sources included her as one of the top ten most famous or influential women in Poland.[34] In 2009, Doda's relationship with Adam "Nergal" Darski became public.[35] Darski, a heavy metal artist, had become rather notorious in Poland at the time after he had torn a Bible to pieces on stage as a part of one of his performances, an act that Poland would later prosecute him for under the charge of "offending religious feelings."[36] On July 24 of that year, Doda gave an interview with the Polish tabloid *Dziennik.* Towards the end of that interview, she was asked: "'You say the Pope is an authority figure

[29] *Id.*

[30] *Id.* ¶ 63-65.

[31] HUM. RTS. WATCH, *supra* note 25.

[32] BBC, *Polish pop star vindicated over blasphemy case* (15 Sept. 2022), https://www.bbc.com/news/world-europe-62915672.

[33] Sprzedaż w Okresie 23.07.2007 - 29.07.2007 [Sales in the period of July 23 to 29, 2007], OLIS (Aug. 6, 2007), http://olis.onyx.pl/listy/index.asp?idlisty=409&lang=.

[34] *See e.g.*, Anouk Lorie, *Famous Poles through the Ages*, CNN (Oct. 3, 2008), https://web.archive.org/web/20160829005150/https://edition.cnn.com/2008/WORLD/europe/10/03/famous.poles/index.html?iref=24hours; FORBES, *100 najcenniejszych gwiazd polskiego show-biznesu* [100 most valuable stars of Polish Show-Business] (Apr. 20, 2010), https://www.forbes.pl/przywodztwo/100-najcenniejszych-gwiazd-polskiego-show-biznesu/m0yz8t1.

[35] INTERIA, *Doda oficjalnie z Nergalem?* [Doda Officially with Nergal?] (May 26, 2009), https://web.archive.org/web/20150722020853/http://muzyka.interia.pl/wiadomosci/news-doda-oficjalnie-z-nergalem,nId,1688970.

[36] Sean Michaels, *Polish singer faces two years in jail over Bible-tearing stunt*, THE GUARDIAN, (Oct. 31, 2012), https://www.theguardian.com/music/2012/oct/31/polish-singer-bible-tearing-stunt.

for you, you're a religious person, so why are you going out with a man who desecrates the Bible and conveys anti-Christian sentiment?'"[37]

In response to this question, Doda explained that she does not discuss religion with Darski, that each of them had a totally different opinion on "all this," and that she did not fully support the Church when it came to the actions of some priests. She added that there are certain priests with callings, such as "our Pope" and Popieluszko, but it is known that the rest only "act sideways."[38] She then went on to speak about her thoughts on the Bible, saying that there are those "awesome, kick-ass commandments" and that it has some stories which build a system of values in children and the desire to be a good person, but that she finds it hard to believe in something that is not reflected in reality because "where are the dinosaurs in the Bible? There are seven days in the creation of the world and yet there are no dinosaurs."[39] Doda continued by saying she tries to approach reality logically and that she "of course" believes in a higher power, though not necessarily called God.[40] She concluded by stating that there are different religions, every person is trying to believe in something, and she believes in something too; she tries to pray, she was raised in a religious spirit, but she has her own view, and it is unrelated to her dating Adam.[41]

At this point, the interviewer decided to push further on this notion, asking "is that to say you believe more, speaking in quotation marks, in dinosaurs than in the Bible?"[42] Doda then responded by saying she "believes in what mother Earth has brought us and what has been discovered during excavations," that it is evidence of the former, and that she finds it hard to believe in something written by "someone drunk on wine and smoking some kind of herb."[43] The interviewer followed up by asking "sorry, who are you referring to?" to which Dota replied "all those guys who wrote all those incredible stories."[44] As a final clarification, the interviewer asked "biblical (stories)?"[45] Doda's response translates roughly as "yeah, so what?"[46] This interview was published on August 3, 2009 under the title "Doda: I don't believe in the Bible."[47] After the article was published, two individuals, R.N. and S.K., complained to the prosecutor's office that she had committed an offense under Article 196 of the Polish Criminal Code, which states: "Whoever offends the religious feelings of other persons by publicly insulting an object of religious worship . . . is liable to pay a fine . . . or be deprived of his or her liberty for a period of up to two years."[48] This is the same "offending religious feelings" charge for which Adam Darski was facing trial.[49]

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[37] DZIENNIK, *Doda: Nie Wierzę w Biblię* [Doda: I Don't Believe in the Bible] 5 (Aug. 3, 2009), https://web.archive.org/web/20090819125821/http://www.dziennik.pl/zycienaluzie/gwiazdy-mowia/article423819/Doda_Nie_wierze_w_Biblie.html (Pol.) (Translated by author).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Kodeks Karny [Criminal Code] art. 196 (Pol.); Rabczewska v. Poland, App. No. 8257/13, ¶ 7 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102

[49] Michaels, *supra* note 36; Rabczewska v. Poland, App. No. 8257/13, ¶ 8, (Eur. Ct. H. R. 2022).

III. Domestic Procedural History of the Case

From there, the prosecutor issued a bill of indictment against Rabczewska in April of 2010, officially charging her with offending the religious feelings of R.N. and S.K..[50] Rabczewska pleaded not guilty and stated that she had not intended to offend anyone.[51] She also conveyed that her interview "should not have been taken seriously, as she had given it in a humorous and detached manner. . ."[52] Furthermore, she clarified that she "had replied to the journalist's questions in a sincere, subjective and frivolous manner, and her views were based on historical and scientific television programmes, of which she was a fan."[53]

In 2012, the trial court convicted Rabczewska and fined her 5,000 Polish złoty, equal to approximately $1,436.39 USD at the time.[54] In its judgment the court referenced that the Polish legislature, in passing a law to protect against offenses to religious feelings, had been trying to balance two constitutional rights, the freedom of religion and freedom of expression.[55] However, the court concluded that, because she intended her statements to offend, she had lost her protection under the freedom of expression.[56] Not finding a constitutional right, the court then discussed its reasoning in convicting her.[57] It stated that, to conclude her statement was an insult, it had to "tak[e] into account the average person's sensibilities in Poland."[58] From there, the court went on to simply accept an expert's opinion that suggesting the Bible was written by drunks and drug users debased it and that Rabczewska's "behaviour had gone beyond analysis or criticism and become a tool for hurting other persons[,] . . . display[ing] contempt of believers."[59] At that point, the court had little trouble concluding that Rabczewska's statement had been insulting and intentional, and thereby found she met all of the elements under the statute.[60]

Rabczewska appealed the conviction, arguing, among other things, that the lower court's conclusion regarding her intent to offend others' religious feelings was erroneous and that her interview, being from her perspective only a private conversation with the journalist, should not have been considered public speech.[61] The Warsaw Regional Court affirmed the trial court's decision in all respects, and Rabczewska then filed a case with the Polish Constitutional Tribunal, arguing that article 196, the statute she was convicted under, unduly restricted her freedom of expression.[62] However, the Constitutional Tribunal readily found the statute constitutional, finding that article 196 was a necessary restriction on the freedom

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[50] *Id.* ¶ 8.
[51] *Id.* ¶ 9.
[52] *Id.*
[53] *Id.*
[54] BBC, *supra* note 31.
[55] Rabczewska v. Poland, App. No. 8257/13, ¶ 11.
[56] *Id.* ¶ 11-14.
[57] *Id.*
[58] *Id.* ¶ 13.
[59] *Id.* ¶ 12.
[60] *Id.* ¶ 14.
[61] *Id.* ¶ 15.
[62] Trybunał Konstytucyjny [Constitutional Tribunal] Oct. 6, 2015, OTK ZU 9A/2015, poz. 142, at 1685-86 (Pol.).

of speech in order to protect the rights of others.[63] After this decision came down, Rabczewska pursued the case further to the European Court of Human Rights.

IV. The Case before the European Court of Human Rights

Before the Strasbourg Court, Rabczewska argued along the lines of what she had before the appellate court but tailored her language to match the standards of the Convention, rather than Polish law. She argued that she had not intended to violate public order or offend anyone's religious feelings and that her words did not reach the level of hate speech.[64] Furthermore, she argued this interference with her expression was disproportionate to the Polish government's aims of protecting religious feelings; she thought criminal law was not an appropriate tool in this regard, and that Article 196, in allowing up to two years of imprisonment for such speech, was inconsistent with the Convention.[65]

Along these same lines, the Polish government mostly repeated its same arguments from the domestic cases, claiming this was a necessary measure to balance these two rights (i.e. the right to have religious feelings protected and the freedom of expression), and that Rabczewska had intended to shock and offend to garner attention.[66] The government further argued that Rabczewska's speech did not fall under any other category deserving of greater protection; it was not artistic, and it did not contribute to a matter of public interest or broader social debate.[67] The state also repeatedly pointed out the importance of religion, specifically Catholicism, in Polish culture as proof that Rabczewska's statements were more offensive to the average Pole and thereby more likely to insult others, which is an acceptable justification for the government's response under *Otto-Preminger*'s progeny.[68]

The Strasbourg Court performed its own analysis of the law. In doing so, it reiterated much of the language from prior *Otto-Preminger* decisions, stating that under Article 9, states have a duty of impartiality to "exclude any discretion on [their] part [in] determin[ing] whether religious beliefs or the means used to express such beliefs are legitimate," a positive obligation to "ensur[e] the peaceful coexistence of all religions" which could *require* them to adopt measures to this end, and a wide margin of appreciation (the court's term for deference) on these matters because they are "liable to offend intimate personal convictions within the sphere of morals or religion" which the state is better positioned make determinations on.[69] It also referenced that Article 9 does not protect against all criticisms or denials of religion, but rather those that "go beyond . . . a critical denial of other people's religious beliefs and are likely to incite . . . intolerance[.]"[70] Along these lines, expression that "present[s] objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the

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[63] Rabczewska v. Poland, App. No. 8257/13, ¶ 19.
[64] *Id.* ¶ 36.
[65] *Id.* ¶ 35.
[66] *Id.* ¶ 39.
[67] *Id.*
[68] *Id.*
[69] *Id.* ¶ 48-49, 52.
[70] *Id.* ¶ 51.

spirit of tolerance" as protected by Article 9, landing such expression outside Article 10's protection.[71]

The court then quickly turned its attention to the only remaining dispute between the parties: whether the restriction on Rabczewska's freedom of expression was "necessary in a democratic society" as required by Article 10.[72] In analyzing the facts, the Court limited itself to discussing just a small portion of Rabczewska's interview, namely her dinosaur comment, her Bible author comment, and her mention of a higher power.[73] From this, the court concluded that Rabczewska was not participating in "any serious debate on religious matters" because her statements were "sincere, subjective, and frivolous" and because she had not spoken on religious matters before or after the interview.[74] The court went on to note that Rabczewska "did not develop her arguments [or] base them on any serious sources[,]" just TV programs that she liked, and she was simply answering the interviewer's questions about her private life in a "deliberately frivolous and colorful manner" with the hope of garnering attention.[75] The Strasbourg Court also noted that the government had not argued in any of the proceedings that Rabczewska's statement had amounted to hate speech, nor had they charged her under Poland's hate speech statute.[76]

The Strasbourg Court then went on to accost the domestic courts for a litany of errors. Firstly, the Polish courts did not engage in any analysis of whether Rabczewska's statements qualified as "factual statements" or "value judgments" under *E.S. v. Austria,* were liable to cause "justified indignation" under the same, nor whether it had violated the limits of religious criticism under the Convention.[77] Further, they did not come to any conclusion that Rabczewska's actions had "contained elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance[,]"[78] and they did not attempt to determine whether Rabczewska's statements could have led to harmful consequences.[79] Additionally, the Constitutional Tribunal had found that Article 196 did not require an additional criterion of threatening public order as was required by the statute in *E.S. v. Austria*.[80] Finally, the penalty the trial court levied on Rabczewska, convicting her in criminal proceedings and assigning her a fine of 5,000 złoty, equal to 1,160 euros, was not a proportionate restriction on her freedom of expression given the government's purported aim.[81] The court concluded by acknowledging that the domestic courts were trying to balance the freedom of expression with "the rights of others to have their religious feelings protected[,]" but, in failing to do a thorough analysis, they had not demonstrated that the interference was necessary considering Rabczewska's statements "did not amount to an improper or abusive attack on an object of religious veneration."[82]

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[71] *Id.*
[72] *Id.* ¶ 54-56.
[73] *Id.* ¶ 6.
[74] *Id.* ¶ 58.
[75] *Id.* ¶ 59.
[76] *Id.* ¶ 61.
[77] *Id.* ¶¶ 60, 62.
[78] *Id.* ¶ 61.
[79] *Id.* ¶ 62.
[80] *Id.*
[81] *Id.* ¶ 63.
[82] *Id.* ¶ 64.

There was also a concurrence and a dissent. The concurrence and dissent did not conduct much by way of separate analyses and they were rather brief. The concurrence agreed that Rabczewska's freedom of expression had been violated but argued that *Otto-Preminger* and its protection of religious feelings should be thrown out entirely and a new standard should be established.[83] It suggested these claims should be considered exclusively under the test of whether the restriction was necessary for protecting public order.[84] The dissent, written by Polish Judge Wojtyczek, applied the same logic as the majority, but, in view of the rising number of "christianophobic acts" across Europe, thought Poland's restrictions on Rabczewska's speech should have been respected under the margin of appreciation.[85]

V. What Does *Rabczewska* Mean for European Human Rights Law?

At first glance, *Rabczewska*'s impact on the Strasbourg Court's freedom of expression jurisprudence is tough to pinpoint. The difference in the Court's tone between its legal analysis and its application of the law is colossal. In considering the standing law on the issue, the court relies heavily on the language of its deferential case law expanding or affirming *Otto-Preminger*'s protection of religious feelings.[86] In fact, over half of the court's statement of law is nearly identical to its equivalent section in *E.S. v. Austria*, the court's most recent Pro-*Otto-Preminger* case.[87] Along these lines, the Strasbourg Court mentions that states' margin of appreciation to police this type of speech is particularly wide.[88] It goes on to say that this wide margin is not just because the member states disagree on the importance of religion in society, but also to give the states room to balance "two fundamental freedoms," those being the freedom of expression and what the Court calls "the right of others to respect for their freedom of thought, conscience and religion[.]"[89]

The court's statement here evidences just how strong the *Otto-Preminger* right to have religious feelings protected has remained and even broadened in the thirty years since the case was decided; much of the court's language, though slightly altered over the years, is still derived directly from *Otto-Preminger*.[90] Now, however, the court even goes so far as to divide Article 9 into positive and negative obligations, with the right to the protection of religious feelings falling under the states' *positive* obligation to "ensure the peaceful

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[83] Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 1-2 (Felici, J., concurring).

[84] Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 3 (Felici, J., concurring).

[85] Rabczewska v. Poland, App. No. 8257/13, Eur. Ct. H.R. (2022), ¶ 1-3 (Wojtyczek, J., concurring).

[86] *Compare* Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 46-53; E.S. v. Austria, App. No. 38450/12 Eur. Ct. H.R. (2018), ¶ 42-49 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[87] Rabczewska v. Poland, App. No. 8257/13, ¶ 46-53 Eur. Ct. H.R. (2022); E.S. v. Austria, App. No. 38450/12 Eur. Ct. H.R. (2018), ¶ 42-49.

[88] Rabczewska v. Poland, App. No. 8257/13, Eur. Ct. H.R. (2022), ¶ 52.

[89] *Id.*

[90] *Compare* Rabczewska v. Poland, App. No. 8257/13, Eur. Ct. H.R. (2022), ¶ 52 (". . .two fundamental freedoms, namely the right of the applicant to impart to the public his or her views on religious doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other . . .") *with* Otto-Preminger-Institut v. Austria, 19 Eur. H.R. Rep. 34, ¶ 55 (1994) (". . . two fundamental freedoms . . . namely the right of the applicant association to impart to the public controversial views . . . on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.").

coexistence of all religions."[91] This means that under the pro-*Otto-Preminger* case law, states could actually be *required* under Article 9 to adopt measures restricting such speech.[92] The court also repeatedly makes clear that the issue is the harm to religious feelings.[93] Though the court occasionally couches this issue in language claiming that it is in service of ensuring religious peace or preserving public order, the court expressly states that "presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion" may permissibly be considered intolerant by a member state and thereby restricted.[94]

However, if the Strasbourg Court had applied this standard to the facts, it is incredibly difficult to see how it found a violation here. In its own description of the facts, the court does not doubt that peoples' religious feelings were actually hurt by Rabczewska's words, nor does it doubt that her statements regarded an object of religious worship, the Bible.[95] Additionally, the court itself characterizes Rabczewska's words as "deliberately frivolous and colorful" and intended to garner attention, which sounds a lot like the definition of provocative.[96] Therefore, considering that Rabczewska's expression almost perfectly fits the bill for what the court itself said does not benefit from Article 10 protection on top of the supposedly wide margin of appreciation in these cases, how could Poland's actions reasonably be considered a violation under the court's own rule?

In the court's application of the law, however, it is clear its tone has shifted to match that of its anti-*Otto-Preminger* jurisprudence.[97] In fact, not only did the Strasbourg Court find a violation here, but its decision came across disdainful of the Polish courts and government.[98] It vitriolically accosted the domestic tribunals of committing nine different errors in their consideration of the case, and its laundry list of problems with them takes up over half of the court's application of law.[99] Furthermore, three of the nine matters the Strasbourg Court accuses the Polish courts of failing to consider were only established as a relevant part of the analysis in *E.S. v. Austria*, a case decided three years after the last Polish court heard the matter.[100] While there is nothing odd about a court applying precedent

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[91] Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 49.

[92] Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 49 (citing to S.A.S. v. France, the infamous French headdress ban case, for the premise that such restrictions may be *required* for the protection of religious peace).

[93] *Compare* Rabczewska v. Poland, App. No. 8257/13 Eur. Ct. H.R. (2022), ¶ 47 *with* Otto-Preminger-Institut v. Austria, 19 Eur. H.R. Rep. 34, ¶ 49 (1994) (describing expression about religion that is "gratuitously offensive" to others as problematic under article 10 paragraph 2).

[94] Rabczewska v. Poland, App. No. 8257/13, Eur. Ct. H.R. (2022), ¶ 51.

[95] *Id.* ¶ 57, 62.

[96] *Id.* ¶ 59; *Provocative*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/provocative_adj ("causing anger or another strong reaction, esp. deliberately; stimulating, irritating, challenging.").

[97] *Compare e.g.* Mariya Alekhina and Others v. Russia, App. No. 38004/12, Eur. Ct. H.R. ¶ 225-27 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666 *and* Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, Eur. Ct. H.R., ¶ 47-49 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705 *with* Rabczewska v. Poland, App. No.8257/13, Eur. Ct. H.R. (2022), ¶ 60-64.

[98] *See* Rabczewska v. Poland, App. No.8257/13, ¶ 62 (Sept. 15, 2022), https://hudoc.echr.coe.int/fre?i=001-219102 ("The condition for a criminal offence under Article 196 is that the persons concerned feel offended by the offender's behaviour. . . . [I]t appears that it incriminates all behaviour that is likely to hurt religious feelings").

[99] *Id.* ¶ 54-65.

[100] E.S. v. Austria, App. No. 38450/12, ¶ 52, 54 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

decided after the original trial, it is bizarre to *scold* the domestic court for failing to consider precedent which did not yet exist. All of this points towards the fact that the court is in fact applying intense scrutiny in its review of the Polish courts' and government's actions here, not extreme deference.

The court's position here, however, is not new. While the Strasbourg Court has continued to call the states' margin of appreciation wide with regards to their efforts to protect religious feelings, it had already developed a tendency from previous cases to carefully scrutinize states' actions when it was deeply concerned by how far the state had gone.[101] Particularly, in *Alekhina I* and *Tagiyev*, both of which resulted in years of prison time for the applicants, the court was appalled that the domestic courts made no attempt to balance the protection of religious feelings with the applicants' freedom of speech.[102] As a result, the court was not gentle in pointing this out, and it took advantage of the domestic courts' lack of reasoning to doubt the purported aims the member states put forward as justifications for their strict punishments.[103] From there, the court was able to use this to circumvent its usual deference and conclude both states had violated Article 10 with their actions.[104]

That said, the Strasbourg Court's use of this intense scrutiny in *Rabczewska* marks a substantial expansion in its application. Unlike the other two cases, the court did not find Rabczewska's speech was on a matter of public interest, nor was she imprisoned at all; she was given what was likely for her, one of the most successful musicians in Poland, a fairly small fine.[105] Additionally, the lower courts did, in fact, make serious attempts to balance her freedom of speech with others' freedom to practice their religion in peace, but only under the Polish Constitution, not under the Convention.[106] Therefore, the Court in *Rabczewska* has both critically, if not silently, reaffirmed its use of this scrutiny and also broadened the set of facts under which it will invoke it. Now, based on *Rabczewska*, in order for the Strasbourg Court to toss aside its usual deference, local courts must merely fail to seriously balance the applicant's rights specifically under the Convention.[107]

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[101] *See* Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 225-29 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666; Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 47-49 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[102] Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 225-26 (July 17, 2018), https://hudoc.echr.coe.int/fre?i=002-12009; Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 47 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[103] Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 225-27 (July 17, 2018), https://hudoc.echr.coe.int/fre?i=002-12009; Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 47 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705 ("the Court notes that it cannot . . . accept the reasons provided by the domestic courts . . . . It observes that the domestic courts confined themselves . . . to reiterating the conclusions of a forensic report, without giving any explanation as to why the particular remarks . . . constituted incitement to religious hatred[.]").

[104] Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 228-29 (July 17, 2018), https://hudoc.echr.coe.int/fre?i=002-12009; Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 50 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[105] Rabczewska v. Poland, App. No.8257/13, ¶ 58, 63 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102

[106] *Id.* ¶ 11, 19.

[107] *See id.* ¶ 60-64.

Beyond just its manner of analysis, the Strasbourg Court also made some bold statements in its application of law about just how bad the speech regarding religion has to be before a state can restrict it. In calling the Polish government out for implicitly recognizing that Rabczewska's statement did not amount to hate speech, the court itself recognized that hate speech is what Article 9 and the freedom of religion should really be aimed at preventing.[108] Additionally, the court nearly expressly stated that Poland's blasphemy law is incompatible with the Convention because, unlike *E.S. v. Austria*, the statute here does not require expression to threaten public order for it to become criminal, and therefore "it appears that it incriminates all behaviour . . . likely to hurt religious feelings."[109]

At first glance, this line may seem like an unambiguous rejection of the idea that states can restrict expression merely because it may offend others' religious sensitivities, and therefore in some sense, a rejection of *Otto-Preminger* itself. After all, the Strasbourg Court clearly states here that if a member state's blasphemy law is premised on anything less the protection of public order, the court will interpret it as incriminating all possibly insulting behavior. However, it is tough to be anything more than cautiously optimistic about this line's actual impact in the face of everything else the court says about permissible restrictions on speech.[110] As mentioned before, the *Rabczewska* Court already stated that expression would fall outside the protection of Article 10 and could thereby permissibly be restricted so long as it merely presented objects of worship provocatively and was capable of hurting religious feelings.[111] Even before considering the many unthreatening forms of expression the court has already previously permitted the restriction of under its *Otto-Preminger* rule, it is clear that this test allows for far more to be restricted than just active threats to public order.[112] With this in mind, is there any way to determine more concretely how *Rabczewska*'s holding here may impact the court's expression on religion jurisprudence?

Well, in stating that the statute did not have a public order element, the court directly contrasts *Rabczewska* from *E.S. v. Austria*, saying the Polish law here failed to do what the Austrian law did there.[113] In fact, this is not the only place that the Court makes a direct comparison to *E.S.*; the court clearly signals that *Rabczewska* is a factual parallel to *E.S.*, where the court found no violation.[114] It references *E.S. v. Austria* repeatedly when both stating the law and applying it to the facts in what appears to be a direct attempt to set up bright lines for member states to follow. The Polish courts failed to determine whether Rabczewska's words were value judgments or factual statements the way the Austrian courts did in *E.S.*;, the Polish courts failed to determine whether Rabczewska's statements "were capable of arousing justified indignation" the way the Austrian courts did in *E.S.;* etc.[115] From this, we can rely on *E.S. v. Austria* to help establish something of a legal dichotomy:

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[108] *Id.* ¶ 61.
[109] *Id.* ¶ 62.
[110] *See id.* ¶ 47-51.
[111] *Id.* ¶ 51.
[112] *See, e.g.*, Otto-Preminger-Institut v. Austria, 19 Eur. Ct. H.R. 34, ¶ 10 (1994); Wingrove v. United Kingdom, 24 Eur. Ct. H.R. 1, ¶ 8-9 (1996); Murphy v. Ireland, 38 Eur. Ct. H.R. 13, ¶ 8-9 (2004); İ.A. v. Turkey, 2005-VII Eur. Ct. H.R. 249, ¶ 5, 7-8.
[113] Rabczewska v. Poland, App. No.8257/13, ¶ 62.
[114] *Id.* ¶ 49, 51-52, 55, 62, 64.
[115] *Id.*

if the case is more factually similar to *E.S.*, the Strasbourg Court will find no violation under the margin of appreciation. However if it has the same issues that Poland did in *Rabczewska*, the court will find the state in violation. This can serve as a guide for determining where the law lies in the aftermath of *Rabczewska*, but to explore the contours of the court's distinction here, it is necessary to delve deeper into the factual background of *E.S. v. Austria*.

A. *E.S. v. Austria*: *Rabczewska*'s Factual Parallel

In *E.S. v. Austria*, the applicant had been offering seminars called "the Basics of Islam" on behalf of the educational institute of Austria's right-wing Freedom Party, who had advertised the lessons through their website and leaflets.[116] At two of these lectures in fall of 2009, E.S. made a handful of comments about Muhammad, the primary Prophet of Islam, for which the Vienna prosecutor's office charged her with "inciting hatred" and "disparagement of religious doctrine," the former being Austria's hate speech statute and the latter being Austria's blasphemy law.[117] The trial court acquitted E.S. of inciting hatred but convicted her of disparaging religious doctrine on the basis of three statements: that Muslims are called upon to imitate Muhammad and this is socially unacceptable "because he was warlord, he had many women, . . . and he liked to do it with children"; that the Sahih Al-Bukhari is the most important Hadith (collection of Muhammad's words and actions) according to Muslim scholars and this is the Hadith where "the thing with Aisha and the child sex is written"; and finally, that she had said: "A 56-year-old and a six-year-old? What do you call that? . . . What do we call it, if it is not paedophilia?"[118]

The trial court concluded that E.S. had been trying to suggest that Muhammad was unworthy of worship because he had pedophilic tendencies, those being that, according to the Sahih Al-Bukhari, he married his third wife, Aisha, when she was six and consummated it when she was nine.[119] The trial court then identified the common definition of pedophilia as having a "primary sexual interest in children[,]" which it used to conclude that the true intention of E.S.'s statement was to establish that Muhammad had a primary sexual interest in children beyond merely criticizing his marriage to a child, a potential acceptable use of her free speech.[120] From there, the court had little trouble finding both that E.S. had publicly disparaged a venerated religious figure and that her suggestion that Muhammad was primarily sexually interested in children's bodies was capable of arousing "justified indignation" as required by the statute.[121]

At this point, the trial court turned to E.S.'s rights under the Convention and quickly identified that E.S.'s Article 10 freedom of expression needed to be balanced with others' Article 9 right to have their religious feelings protected.[122] In doing this balancing, the court

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[116] E.S. v. Austria, App. No. 38450/12, ¶ 7 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188; *See also* John G. Wrench, *"Balancing" Free Expression and Religious Feelings in E.S. v. Austria: Blasphemy by Any Other Name?*, 52 CASE W. RES. J. INT'L L. 735, 737 (2020).

[117] E.S. v. Austria, App. No. 38450/12, ¶ 13; Wrench, *supra* note 113, at 738.

[118] E.S. v. Austria, App. No. 38450/12, ¶ 13.

[119] *Id.* ¶ 12, 14; *see generally* Wrench, *supra* note 113, at 738-39.

[120] E.S. v. Austria, App. No. 38450/12, ¶ 14; Wrench, *supra* note 113, at 739.

[121] E.S. v. Austria, App. No. 38450/12, ¶ 12, 14.

[122] *Id.* ¶ 15.

concluded that E.S. had not been making statements of fact but rather "derogatory value judgments which exceeded the permissible limits;" she had not intended to discuss the topic objectively and instead expressly meant to degrade Muhammad, and therefore the interference with E.S.'s freedom of expression was necessary in a democratic society as required by the Convention because it protected others' ability to exercise their Article 9 rights peacefully.[123] In convicting her, the court ordered her to pay the costs of the proceedings and €480.[124]

E.S. appealed, arguing her words were not value judgments but statements of fact and to that end she had referenced a historical document in her statement that verified her claim.[125] Specifically, E.S. asserted she had made a statement of fact in saying Muhammad had married a child and consummated that marriage, and then she had merely posed the question of whether we should consider this pedophilia.[126] In the alternative, she also contended that the lower court had erred in so specifically defining pedophilia; she had not intended to suggest Muhammad had a primary sexual interest in children, she had only meant the word in its everyday use, that a pedophile is a man who has had sex with a child.[127] The appellate court disagreed and affirmed the decision in its entirety.[128] E.S's appeal to the Austrian Supreme Court of Justice was equally fruitless, as the court there endorsed the trial court's methods entirely, saying it was not only permissible but necessary under Austrian law to evaluate whether the impugned statements were factual ones or value judgments in order to conclude whether they were capable of arousing justified indignation.[129]

Unfortunately for E.S., her case before the Strasbourg Court went almost identically to the appeals in Austria. The European Court did not just find that Austria had not violated the Convention in convicting and fining her, but also endorsed Austria's principle of justified indignation wholesale for balancing Article 9 and Article 10 rights under the Convention.[130] Specifically, the court found that Austria's "disparagement of religious doctrine" statute does not incriminate all expression likely to hurt religious feelings because it requires the expression be capable of arousing "justified indignation" and agreed with the domestic courts' assessment that E.S.'s statements were value judgments "subjectively labeling Mohammed with a general sexual preference for paedophilia."[131] From there, the Strasbourg Court had no issue agreeing with the trial court that E.S.'s statements were in fact capable of arousing such justified indignation. The court then concluded that because these balancing measures were properly aimed at protecting religious peace in Austria, the domestic

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[123] *Id.*

[124] *Id.* ¶ 12.

[125] *Id.* ¶ 16.

[126] *Id.*

[127] *Id.*

[128] *Id.* ¶ 17; *see also* Wrench, *supra* note 113, at 740.

[129] E.S. v. Austria, App. No. 38450/12, ¶ 21 (October 25, 2018), https://hudoc.echr.coe.int/eng?i=002-12171; *see also* Wrench, *supra* note 113, at 740-41.

[130] E.S. v. Austria, App. No. 38450/12, ¶ 52 (October 25, 2018), https://hudoc.echr.coe.int/eng?i=002-12171; Wrench, *supra* note 113, at 742.

[131] E.S. v. Austria, App. No. 38450/12, ¶ 52 (October 25, 2018), https://hudoc.echr.coe.int/eng?i=002-12171, 54, 57.

authorities had not abused their wide margin of appreciation here, and the €480 penalty, as a small fine, was not disproportionate.[132]

What does *E.S.* tell us about the impact *Rabczewska* will have on European human rights law? Well, for one, the cases are factually similar. It is hard to pinpoint just how different calling Muhammad a pedophile is from calling the authors of the Bible (which includes members of the Apostles, some of the most highly regarded Christian figures) drunks and drug users, but, even if one of these alleged actions is arguably worse than the other, it suffices to assume *arguendo* that, under the logic of *E.S.*, they would both meet the court's standard of being insulting and intolerant enough to fall outside Article 10 protection. Indeed, for the sake of argument or otherwise, this seems to be the most sensible answer, as the criteria that the Austrian courts used to conclude E.S.'s statements were capable of arousing justified indignation and which the Strasbourg Court agreed with are applicable to Rabczewska's words as well.[133] Specifically, the Austrian courts concluded that E.S.'s statements had crossed the line into justified indignation because the behavior she accused Muhammad of "was ostracised by society and outlawed," something which is also true of excessive drug possession and use. Furthermore, it concluded E.S.'s statements had not been made in an objective manner aimed at contributing to a debate of public interest, which the Strasbourg Court itself found was true of Rabczewska's statements, and E.S.'s expression had been aimed at demonstrating that the subject (Muhammad) was not worthy of worship, which is, again, true of Rabczewska's statement expressly describing why she thought the Bible was unworthy of belief.[134]

However, there are some important factual differences that the court does not state as explicitly that may have influenced its decisions in these cases.. In *E.S.*, Austria punished someone giving lectures on behalf of a far-right political party because she was saying Muslims, who compose a sizable religious minority in Austria, idolize and imitate someone who had committed something most people consider an act of sexual violence against a child.[135] Regardless of whether it was Austria's true reason, the court sympathizes with Austria's worry that E.S.'s words could cause greater animosity towards followers of Islam and may even result in a listener taking them to the extreme and assaulting Muslims.[136] This concern is only implied in the text of *E.S.* because the court doesn't need to reach the issue; it could find no violation by following its already deferential *Otto-Preminger* jurisprudence and positing it on the offense to Muslims' feelings, but the opposite shines brightly in *Rabczewska* where the court is totally unpersuaded that any similar problem exists.[137]

In *Rabczewska*, the court does not have this worry. Based on its tone in the opinion, the Strasbourg Court's view is that the Polish government indicted Rabczewska because some people of Poland's majority religion complained she had said something that did not align with their beliefs.[138] They were not anxious that non-Christians would be so offended by the

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[132] *Id.* ¶ 52, 57-58.

[133] *Id.* ¶ 14, 57; Rabczewska v. Poland, App. No.8257/13, ¶ 6 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102

[134] E.S. v. Austria, App. No. 38450/12, ¶¶ 14, 52; Rabczewska v. Poland, App. No.8257/13, ¶¶ 6, 59.

[135] E.S. v. Austria, App. No. 38450/12, ¶¶ 13-15.

[136] *See id.* ¶ 57.

[137] *Id.*; Rabczewska v. Poland, App. No.8257/13, ¶¶ 60-64.

[138] *See* Rabczewska v. Poland, App. No.8257/13, ¶ 64.

idea of authors of the Bible using drugs that they would start acting violent towards Christians.[139] This is made clear in the *Rabczewska* opinion via the court's concerns about whether the remarks were hate speech, incited violence, or were restricted for the sake of public order.[140] These concerns are derived from prior case law, though while none of them were mentioned whatsoever in the court's assessment in *E.S.,* the Court references all of them in concluding that the interference was unnecessary in *Rabczewska*. In this sense, the court sees *Rabczewska* as more similar to *Alekhina I* and *Tagiyev*, where the court similarly ignored the deference member states usually get and instead declared that the domestic courts had utterly failed to name any sufficient reason the expression needed to be suppressed.[141] The issue with this, discussed further below, is that beyond it being a prime example of the court relying on its gut rather than legal principles to determine the outcome of each case, *Otto-Preminger* is and remains premised on the harm done to the feelings of the offended religious group. However, as the court moves closer to the standards of religious peace, preventing violence, and maintaining public order in its recent case law, the court's real concern is not the expression's theoretical likelihood of emotional harm to followers of the targeted religion, but rather its actual likelihood to result in physical violence against *either* group, both the offender and the offended.[142]

B. Justified Indignation and Threats to Public Order

Having analyzed the impact the factual differences between *E.S.* and *Rabczewska* had on the court's conclusions, it remains to be discussed what substantively changed in the Court's analysis from the former to the latter. Along these lines, it makes sense to start with the distinction that necessitated the analysis of E.S. in the first place—the Strasbourg Court's observation that Poland's blasphemy law, unlike Austria's in *E.S.*, does not require "that the insult should threaten public order[,]" and thus "appears [to] incriminate[] all behaviour . . . likely to hurt religious feelings.[143] Having now reviewed *E.S.*, the peculiarity of the court's statement here should be more apparent–public order was not mentioned once in the E.S. Court's analysis.[144] While Austria did submit to the Court that it relied on both the legitimate aims of "preventing disorder" and protecting religious feelings in restricting E.S.'s speech, the court never gave any significance to the distinction.[145] Instead, the court accepted that Austria had pursued the legitimate aim of "protect[ing] religious peace" and said that

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[139] *See Id.* ("It has not been demonstrated that the interference in the instant case was required . . . to ensure the peaceful coexistence of religious and non-religious groups.").

[140] *Id.* ¶¶ 61-62.

[141] *See* Mariya Alekhina v. Russia, App. No. 38004/12, ¶¶ 227-29 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666; Tagiyev v. Azerbaijan, App. No. 13274/08, ¶¶ 47-49 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705 ("Moreover, the Court cannot accept the Government's assertion that the domestic courts struck the right balance between the rights protected under Articles 9 and 10 of the Convention, as the domestic courts in their decisions did not even try to balance the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on the grounds of their beliefs.").

[142] *See* discussion *infra* section VI.

[143] Rabczewska v. Poland, App. No.8257/13, ¶ 62.

[144] E.S. v. Austria, App. No. 38450/12, ¶¶ 39-58 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[145] *Id.*

Austria's statute did not incriminate all expression likely to hurt religious feelings because it required that the speech "[be] capable of arousing *justified indignation*" (emphasis added).[146] Interestingly, the *Rabczewska* Court seems to think that this justified indignation standard is a public order requirement because it directly references that standard as the type of requirement the Polish law is missing.[147] However, looking at the *E.S.* case, it is clear that it is not and never was a public order requirement; it is a classic, *Otto-Preminger*-centric focus on religious feelings, and in fact, it is the same language the statute had when Austria used it to protect religious feelings in *Otto-Preminger* itself.[148]

Just evaluating plain meaning, "threat to public order" already sets a very different standard than "arousing justified indignity" – the latter merely requires that the expression be capable of causing offense and that the offense taken is justifiable (i.e. reasonable) under the circumstances.[149] Beyond plain meaning, however, it is possible to refute the idea that "justified indignation" was ever about public order exclusively by looking at the Strasbourg Court's own opinion in *E.S. v. Austria*. The Austrian trial court concluded that E.S.'s statements were capable of causing this indignation simply because she had accused a religious figure of behavior that "was ostracised by society and outlawed."[150] The trial court made no evaluation that the statements may have caused violence, incited hatred, or otherwise threatened public order; it just noted that the statements were insulting because they alleged ostracized behavior.[151] In fact, the only time public order comes up in the *E.S.* opinion outside of third party sources is as a requirement in the text of Austria's hate speech statute, which E.S. was *acquitted* of at trial.[152] In other words, Austria expressly had a statute that restricted speech on the grounds of threatening public order, and the state and its courts chose not to punish E.S. under that statute. It instead relied – and convicted – E.S. on a standard that only questioned how offensive the statement was.[153]

These are the details that the Strasbourg Court affirmed about justified indignation in *E.S.* when it adopted the Austrian test into its own balancing of article 9 and 10.[154] This means the *Rabczewska* Court's observation that Austria's justified indignation requirement caused its blasphemy law to only punish expression threatening public order is, in essence, strictly wrong – it overtly contradicts what *E.S.* says about the meaning of justified

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[146] *Id.* ¶¶ 41, 52.

[147] Rabczewska v. Poland, App. No.8257/13, ¶ 62.

[148] *Compare* Otto-Preminger-Institut v. Austria, 19 Eur. H.R. Rep. 34, ¶¶ 25, 48 (1994) *with* E.S. v. Austria, App. No. 38450/12, ¶ 24.

[149] *Justified*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/justified_adj (last visited March 10, 2025) ("Supported by reason, evidence, or right; warranted."); *Indignation*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/indignation_n (last visited March 10, 2025) ("Anger at what is regarded as unworthy or wrongful[.]"); *Threat*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/threat (last visited March 10, 2025) ("an expression of intention to inflict evil, injury, or damage[.]"); *Order*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/order_n?tab=meaning_and_use#33288297. (last visited March 10, 2025)

[150] E.S. v. Austria, App. No. 38450/12, ¶ 14.

[151] *Id.* ¶¶ 14-15; *see also* Wrench, *supra* note 113, at 749.

[152] E.S. v. Austria, App. No. 38450/12, ¶ 25.

[153] Wrench, *supra* note 113, at 747.

[154] E.S. v. Austria, App. No. 38450/12, ¶¶ 14-15, 52, 57

indignation.[155] So what impact does this have on the *Rabczewska* Court's holding about requiring public order? Well, regardless of the court's erroneous assertion here, because the Strasbourg Court fairly directly refers to *E.S.*'s justified indignation requirement as a sufficient public order requirement, it appears the two are one and the same for now.[156] Ergo, if a blasphemy law requires at least justified indignation before it can punish speech, the court will be less concerned about the state's actions and more likely to apply its usual *Otto-Preminger* deference.

While at first glance, this conclusion may make it seem that *Rabczewska* has not changed anything about the *E.S.* court's holding on justified indignation, that is not the case. Most importantly, until *Rabczewska* affirmed and applied it, it was not clear that the *E.S.* court was announcing a legal rule when it determined that Austria's law did not criminalize all speech.[157] The *E.S.* court primarily discussed justified indignation in applying it as a test for determining whether the expression in the instant case was so insulting as to fall outside article 10 protection.[158] At the time, the court's statement that the Austrian law did not criminalize all insulting speech seemed a mere off-handed tautology: the Austrian law *was incapable of* criminalizing all expression because it now definitionally only punished speech unprotected by the freedom of expression. As a result, though the premise comes from *E.S.*, *Rabczewska* is the first instance in which it was applied to another set of facts and made into a rule. Now, if member states' blasphemy laws allow the punishment of expression that is not at least capable of arousing justified indignation or its equivalent, the court will scrutinize convictions under that statute much more closely as they may effectively criminalize all insulting speech.

Additionally, even if the court's reaffirming of *E.S.* in this sense means that speech can still be restricted based on nothing more than justified indignation, the fact that the *Rabczewska* Court framed the analysis as one of public order remains crucial. It both moves the jurisprudence away from being about the protection of religious feelings and towards prevention of actual harm, and it means that any future analyses of member states' blasphemy laws based on anything other than justified indignation will be done under the lens of whether they punish insults based on their threat to public order. For this reason, if the court evaluates this again in the future, it will be more likely to conclude the blasphemy law at hand is overinclusive regarding what expression it criminalizes because blasphemy laws by their definition primarily police insults to religion rather than threats to public order.[159] As a result, even if the court failed to address the contradiction it relied on in *Rabczewska*, it still moved itself towards a more amenable standard for future use.

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[155] *Compare* Rabczewska v. Poland, App. No.8257/13, ¶ 62 (calling justified indignation a public order requirement) *with* E.S. v. Austria, App. No. 38450/12, ¶ 52 (finding the domestic courts sufficiently established justified indignation merely because the statements weren't objective, did not contribute to a public debate, and had been aimed at demonstrating Muhammad was not worthy of worship without establishing any threat to public order).

[156] Rabczewska v. Poland, App. No.8257/13, ¶ 62.

[157] *See* Wrench, *supra* note 113 ("criminalizing all expression on religion" language not listed as a key takeaway from E.S.); Philippe Yves Kuhn, *Reforming the Approach to Racial and Religious Hate Speech under Article 10 of the European Convention on Human Rights*, 19 HUM. RTS. L. REV. 119 (2019) (not mentioning this test in a list of important conclusions from E.S.).

[158] E.S. v. Austria, App. No. 38450/12, ¶¶ 52-53, 57; Wrench, *supra* note 113, at 742.

[159] Szabo, *supra* note 12, at 148

C. The *Rabczewska* Court's Brief Foray into the Relevance of Hate Speech

Another important shift from the *E.S.* decision in *Rabczewska* is the court's terse admonition of Poland for seeking to interfere with Rabczewska's expression even though Poland never alleged before any court that her statements amounted to hate speech and the Polish courts never established her words were capable of "stirring up or justifying violence, hatred, or intolerance of believers."[160] This sentence is hard to reconcile with the justified indignation discussion above.[161] Since the *Rabczewska* Court reaffirmed justified indignation as a test for evaluating whether the speech may be restricted and because that test concerns the protection of religious feelings, not physical harm, it is odd that the court is once again discussing whether the expression could lead to violence.[162] However, unlike the court's statement that justified indignation was really about public order, there is more to the court's assertions here than meets the eye. In particular, they are rooted in two cases decided after *E.S. – Alekhina I* and *Tagiyev,* mentioned above.[163]

Alekhina I focuses on Russia's arrest, conviction and imprisonment of the members of the dissident band Pussy Riot for their impromptu midnight concert in one of Russia's most respected churches: the Cathedral of Christ the Savior in Moscow.[164] The decision discusses much of the Convention across its eighty-seven pages, but only part is of pertinence here: one of the charges the band members were convicted of was "hooliganism motivated by religious hatred and enmity."[165] Before the Strasbourg Court, they argued their convictions for hooliganism were a violation of their Article 10 freedom of expression.[166] In its analysis, the court recognized that Russia was pursuing the legitimate aim of protecting religious feelings, but it had very little trouble agreeing with the applicants that their freedom of expression had been violated.[167] The band's expression had been on a matter of public interest, namely the government's suppression of recent protests, and it was artistic in nature. The trial court had failed to reach any conclusions that the speech had the capacity to lead to harmful consequences. The trial judge concluded based on nothing more than the band's "brusque movements" and inappropriate attire for a church performance that the applicants' expression was driven by religious enmity, and finally, the three band members in the case were sentenced to nearly two full years of imprisonment.[168] While one applicant had their sentence suspended after seven months, the other two served a year and nine months of their sentence until they were amnestied.[169]

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[160] Rabczewska v. Poland, App. No.8257/13, ¶ 61 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102.

[161] *See* discussion *supra* section V.B.

[162] Rabczewska v. Poland, App. No.8257/13, ¶ 60, 62.

[163] *Id.*

[164] Mariya Alekhina v. Russia, App. No. 38004/12, ¶ 202-05 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666.

[165] *Id.* ¶ 216.

[166] *Id.* ¶ 174.

[167] *Id.* ¶ 210, 228.

[168] *Id.* ¶ 212-13, 215-16, 226.

[169] *Id.* ¶ 215.

Comparing these facts to *E.S.* and *Rabczewska*, it is easy to see why the Strasbourg Court was so horrified by Russia's actions, and that is without getting to the torture allegations.[170] For this reason, the court in *Alekhina I* was likely deeply concerned with announcing and refining rules that weakened or counteracted *Otto-Preminger*'s deference regarding the protection of religious feelings, and indeed, in its decision, the *Alekhina I* Court relied on a balancing test that gave little weight to such feelings from a case dealing with speech on race and ethnicity rather than religion – *Perinçek v. Switzerland*.[171] In that case, the court did a comprehensive review of its Article 10 case law to determine when a restriction of a statement "alleged to have stirred up or justified violence, hatred or intolerance" was necessary in a democratic society.[172] In its review, it identified the following as pointing in favor of the restriction being necessary: When (1) the statement was "made against a tense political or social background"; (2) the statement, when fairly construed, could be interpreted as a "call for violence or as a justification of violence, hatred or intolerance"; and (3) the statement has the "capacity – direct or indirect – to lead to harmful consequences."[173] In applying this test to the facts of both *Alekhina I* and *Rabczewska*, the Strasbourg Court found that the domestic courts had plainly failed to analyze anything like this whatsoever. Therefore, there was nothing to substantiate that the applicants' expression satisfied any of the factors, indicating that the restrictions on their speech were not necessary.[174]

The same is almost identically true for *Tagiyev* and its holding about the government's failure to allege hate speech allegations. The facts of the case concerned two journalists who were convicted of "incitement to … religious hatred and hostility" for their article that called into question the humanism of Islam and Muhammad.[175] The two were sentenced to three and four years of prison time respectively, and they served thirteen months of their sentences before they were pardoned.[176] Here, the court was similarly appalled by the state's use of prison time to restrict speech on what they considered a matter of public concern. The court cited to *Perinçek* for the assertion that if a member state does not allege or argue the expression in question is hate speech, the state is in essence admitting that the statements fall within Article 10's protection.[177]

So, what does any of this matter for *Rabczewska*? Regarding both the "stirring up" test from *Alekhina I* and *Tagiyev*'s conclusion about the relevance of hate speech, the *Rabczewska* Court finds that the Polish government and courts plainly failed to do their due diligence.[178] Therefore, what does *Rabczewska* really add to these tests? While it does not make any substantive changes to either, *Rabczewska*'s application of the tests provides

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[170] *Id.* ¶ 123.

[171] *Id.* ¶ 217-21; *see* Perinçek v. Switzerland, App. No. 27510/08, ¶ 204-08 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng?i=001-158235.

[172] Perinçek v. Switzerland, App. No. 27510/08, ¶ 204.

[173] *Id.* ¶ 205-08.

[174] Rabczewska v. Poland, App. No.8257/13, ¶ 61 (Sept. 15, 2022), https://hudoc.echr.coe.int/?i=001-219102; Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 226-27.

[175] Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 10-12 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[176] *Id.* ¶ 14, 19.

[177] Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 43; Perinçek v. Switzerland, App. No. 27510/08, ¶ 114.

[178] Rabczewska v. Poland, App. No.8257/13, ¶ 61.

important information about how they may be utilized in the future. For one, the mere use of these tests in *Rabczewska* solidifies their consistent application across cases; *Tagiyev* and *Alekhina I* both had substantially more heinous facts than *Rabczewska*, so it was not clear whether the court would continue to seriously apply them when there was no prison time at issue and the speech was not on a matter of public interest.[179] Beyond this, the *Rabczewska* Court's mention of the two tests in the same breath establishes that they are essentially two sides of the same coin. In other words, even if a state does allege hate speech, this only prevents the state from conceding the argument that the statements are not protected by Article 10. From there, the state must still have reasonably used its margin of appreciation in concluding that the statements were capable of "stirr[ing] up . . . violence, hatred, or intolerance."[180] While this test is undermined by the court's much less stringent justified indignation test, it does establish that, even in cases such as *Rabczewska* where there is no prison time and the speech is not on a matter of public interest, the court will seriously evaluate statements based on the threat of violence they pose, and is more likely to discredit the state when the risk of such a threat is low.

D. *Rabczewska* and Proportionality: A Firm Rejection of *Otto-Preminger* with Uncertain Results

Also striking is the *Rabczewska* Court's conclusion regarding its consideration of whether the state's punishment was proportional to the aim pursued. As a cursory note, it is odd that the *Rabczewska* Court dedicated any time to discussing proportionality in the first place because the court also reaches the conclusion that Poland failed to prove its interference with Rabczewska's freedom of expression was necessary at all, thereby more or less establishing that no interference of any kind would have been proportionate.[181] However, regardless of its necessity, *Rabczewska*'s conclusions on proportionality are fascinating when put side by side with *E.S.*'s. In *Rabczewska*, the Strasbourg court concluded that the applicant's penalty was a disproportionate interference with her freedom of expression because she was indicted by a prosecutor; convicted in a criminal proceeding; had been ordered to pay the equivalent of €1,160; and because prosecutors continued to pursue one of the charges even after Rabczewska had reached a friendly settlement with the Polish citizen who had complained.[182] In *E.S.*, the court concluded that Austria's punishment was acceptable because it only amounted to a small fine of €480, which in their view was a proportionate interference with her freedom of expression in order to protect others' rights to practice their religion in peace.[183]

The *E.S.* Court did not mention in its proportionality analysis, however, that the case also involved E.S.'s indictment, prosecution, and conviction in a criminal proceeding, identically to Rabczewska's.[184] There are some differences between the punishments, to be

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[179] *See* Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 229; Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 49.

[180] Mariya Alekhina and Others v. Russia, App. No. 38004/12, ¶ 217.

[181] Rabczewska v. Poland, App. No. 8257/13, ¶ 64.

[182] *Id.*

[183] E.S. v. Austria, App. No. 38450/12, ¶ 56 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[184] *Id.*

sure. It certainly is striking that Poland decided to continue with one of the charges after Rabczewska settled with the complainant, but the *Rabczewska* Court did not say this fact was particularly problematic or that only the settled charge resulted in the disproportionality.[185] However, the only other difference between the two is that the fine in *Rabczewska* was slightly more than twice as large.[186] Considering the court characterized the fine in *E.S.* as small, it is unlikely that the slightly larger sum is the real problem here either.[187] It is difficult to say for sure to what extent *Rabczewska* changes the court's analysis given that proportionality is always reliant on the court's underlying determinations of the facts, and it is not hard to see here that the court was livid with Poland's wanton behavior.[188] Nonetheless, by implicating the use of indictments, convictions, and criminal law generally as factors that will count against the state, *Rabczewska* connotes a significant shift against blasphemy laws in proportionality jurisprudence.

The case *Aydin Tatlav* was mentioned above as an example of the Strasbourg Court's tendency to announce grand rules limiting *Otto-Preminger* and the protection of religious feelings, and *E.S.*'s failure to apply the *Aydin Tatlav* rule demonstrated that the court only follows these rules when it is convenient for them.[189] *Aydin Tatlav* stood for the premise that government interferences with the right to expression that result in convictions that in turn could result in imprisonment are more likely to be disproportionate regardless of whether the applicant was actually imprisoned because the threat of imprisonment is so severe that it may have a chilling effect on others' speech.[190] The *Rabczewska* Court follows *E.S.* in making no mention of the *Aydin Tatlav* holding about the chilling effect of threatening imprisonment, but in some sense the court goes even further here.[191] Through *Rabczewska*, the court announces that it will consider the use of criminal law *generally*, from indictment to conviction, as a factor to be weighed against the state in its proportionality analysis for restrictions on speech about religion--regardless of whether the criminal law has a chilling or deterring effect on speech.[192]

This is a stark departure from the court's usual standard in *Otto-Preminger* and appears to be a complete endorsement of Rabczewska's submission to the court that it should consider the use of criminal law an entirely inappropriate avenue for protecting religious feelings. Looking at the case law, *Aydin Tatlav* is the only precedent that comes remotely close to offering as bold a statement on proportionality, especially considering its holding and the fact that it only involved a fifty-two euro fine.[193] Nearly every other case either found the state's interference was proportionate, found it disproportionate because it involved actual jail time or the speech was on a matter of public interest, or found a violation without

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[185] Rabczewska v. Poland, App. No.8257/13, ¶ 63.

[186] *Compare* Rabczewska v. Poland, App. No.8257/13, ¶ 63 *with* E.S. v. Austria, App. No. 38450/12, ¶ 56.

[187] E.S. v. Austria, App. No. 38450/12, ¶ 56.

[188] Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶ 41 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705; *See* Rabczewska v. Poland, App. No.8257/13, ¶ 63 (Sept. 15, 2022), https://hudoc.echr.coe.int/fre?i=001-219102.

[189] *See* discussion *supra* section I.

[190] Aydin Tatlav v. Turkey, App. No. 50692/99, ¶ 30 (May 2, 2006), https://hudoc.echr.coe.int/?i=001-75276.

[191] *See* Rabczewska v. Poland, App. No.8257/13, ¶ 63.

[192] *Id.*

[193] Aydin Tatlav v. Turkey, App. No. 50692/99, ¶¶ 30, 40.

having to conduct a proportionality analysis.[194] With that said, while *Rabczewska* boldly expands what the Strasbourg Court *may* consider in future cases, this does not mean the court *will* consider it. *Aydin Tatlav* and *E.S.* demonstrate that proportionality is one of the areas of Article 10 jurisprudence where the court is particularly inconsistent when the expression implicates religion, and considering *Rabczewska*'s holding is broader in this regard, it may be even more likely that the court will choose to apply its proportionality holding selectively in future cases.[195]

VI. Conclusion and Policy Suggestions

Taking all of these points together, where does *Rabczewska* leave the Strasbourg Court's expression on religion jurisprudence? First and foremost, the opinion makes it abundantly clear that the domestic courts must do their own analysis of the defendant's Article 10 rights and others' Article 9 rights under the Convention. If the domestic courts fail to sincerely analyze any one of those rights, the Strasbourg Court will intensely scrutinize the member state's claims that the restriction was necessary in spite of or because of that right.[196] In confirming this, *Rabczewska* adds a burden shifting step to the court's *Otto-Preminger* analysis. First, the state must prove they seriously analyzed the rights at stake under the Convention, and only then is it entitled to its usual wide margin of appreciation.[197] Similarly, *Rabczewska* also unambiguously reaffirms that *Otto-Preminger*'s emphasis on the protection of religious feelings is here to stay. While the case does speak much more about the relevance of public order and preventing violence and hatred, it always ultimately draws the line at refraining from causing offense to others.[198]

Furthermore, *Rabczewska* affirms the justified indignation test from *E.S.* as a two-part analysis for checking both the state's sincerity in restricting only problematic speech and whether the speech itself is overly offensive.[199] First, if the state's law restricts speech that is anything less than "capable of arousing justified indignation," the court will presume the statute incriminates all possibly insulting speech on religion and scrutinize the interference with the applicant's Article 10 rights more closely.[200] Second, the court will analyze whether the state proved the expression was actually capable of arousing justified indignation.[201] If the state meets this burden and the domestic courts properly considered the issue, the court

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[194] *E.g.* Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 652, ¶ 52; Giniewski v. France, 45 Eur. H.R. Rep 23, ¶¶ 54-55 (2006); Murphy v. Ireland, 38 Eur. H.R. Rep. 13, ¶ 82 (2004); İ.A. v. Turkey, 2005-VII Eur. Ct. H.R. 249, ¶ 32; Wingrove v. United Kingdom, 24 Eur. H.R. Rep. 1, ¶ 64 (1996); Tagiyev and Huseynov v. Azerbaijan, App. No. 13274/08, ¶¶ 49-50 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[195] *Compare* E.S. v. Austria, App. No. 38450/12, ¶¶ 56-57 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188 *with* Aydin Tatlav v. Turkey, App. No. 50692/99, ¶ 30.

[196] *See* Rabczewska v. Poland, App. No.8257/13, ¶¶ 60-64.

[197] *See id.* at ¶ 64 ("The Court thus considers that – despite the wide margin of appreciation - the domestic authorities failed to put forward sufficient reasons capable of justifying the interference with the applicant's freedom of speech.").

[198] *Id.* ¶¶ 47, 51.

[199] *Id.* ¶¶ 60, 62.

[200] *Id.*

[201] E.S. v. Austria, App. No. 38450/12, ¶ 52 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188; *See* Rabczewska v. Poland, App. No.8257/13, ¶ 61.

will evaluate whether the punishment was proportionate to the government's aim. If, however, the domestic courts do not meet their burden of proof, the court is very likely to find a violation.[202] As for how the court defines this standard of justified indignation, *Rabczewska* does not give any additional information.[203] For the time being, "justified indignation" can only be defined based on plain meaning and the court's approval in *E.S.* of the Austrian courts' conclusion that the expression there was capable of arousing justified indignation because the alleged behavior was "ostracised by society and outlawed," the statements had not been made objectively to contribute to a debate of public interest, and the expression had been aimed at demonstrating that the subject was not worthy of worship.[204] After this, the court will examine the extent to which the member state sought to and succeeded in punishing the expression as hate speech under *Tagiyev* and how likely it was to stir up violence, hatred, or intolerance based on the three factors from *Alekhina I*. It will then take this into account in considering how necessary and proportionate the restriction was in a democratic society.[205]

At this point, the Strasbourg Court must then determine whether the state's interference was proportionate to its aim of protecting religious feelings.[206] In considering this, the court will look at every detail regarding both how offensive the applicant's expression was and how severe the state's punishment was.[207] Looking at the court's case law, the golden rule regarding proportionality is that the punishment should not involve jail time; beyond this, the court may also find fines, convictions, and the use of criminal law generally to be excessive in cases where the applicant's speech was on a matter of public interest or like *Rabczewska* where the domestic courts completely failed to analyze her rights under the Convention.[208] If a state abides by these rules, the Strasbourg Court is likely to find the interference was proportionate to the aim of protecting others religious feelings and find no violation. If it does not, the court is likely to find the member state violated the applicant's Article 10 rights.

However, while this acknowledges what *Rabczewska* says the law is, it does not evaluate the policy behind the rule. In that regard, while *Rabczewska* represents an important step in the right direction, it mostly fails to address the issues scholars have pointed out with *Otto-Preminger* and its protection of religious feelings.[209] In refusing deference to states whose government and courts do not adequately consider the applicant's rights under the Convention, the Strasbourg Court has managed to weed out, scrutinize, and find violations

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[202] *See* Rabczewska v. Poland, App. No.8257/13, ¶ 64.

[203] *Id.*

[204] E.S. v. Austria, App. No. 38450/12, ¶¶ 14, 52.

[205] Tagiyev v. Azerbaijan, App. No. 13274/08, ¶ 43 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705; Alekhina v. Russia, App. No. 38004/12, ¶ 227 (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666.

[206] *See* Rabczewska v. Poland, App. No.8257/13, ¶ 63.

[207] *Id.*

[208] *See* Alekhina v. Russia, App. No. 38004/12, ¶¶228-29; Tatlav v. Turkey, App. No. 50692/99, ¶ 30 (May 2, 2006), https://hudoc.echr.coe.int/?i=001-75276; Giniewski v. France, 45 Eur. H.R. Rep. 23, ¶¶1 54-55 (2006); Rabczewska v. Poland, App. No.8257/13, ¶ 63.

[209] Wrench, *supra* note 113, at 749; Hanna Wiczanowska, *Searching for Common European Standards Regarding Blasphemy? Analysis of Italian, Irish, Austrian Regulations In the Light of the ECHR*, 1 TORUN INT'L STUD. 31, 45; Kuhn, *supra* note 154, at 132-34; Szabo, *supra* note 12, at 147.

in quite a few cases where the local authorities did not take seriously the individual's freedom of expression.[210] However, in practice, this solution is a band-aid more than a permanent fix. If the local courts start doing the analyses the court is looking for, the member state will once again be entitled to its wide margin of appreciation, and the court will thereby respect any interferences with expression capable of merely causing indignity.[211] Once this occurs, it is back to square one of *Otto-Preminger*, where states may practically restrict any possibly offensive speech on religion as they please.

So, what can the court do to improve the rule from here? As many scholars and judges of the Strasbourg Court have argued before, the most impactful and straightforward thing the court can do is abandon *Otto-Preminger* and rebuke the concept of the protection of religious feelings.[212] However, while others, including the concurring judges from *Rabczewska*, have suggested replacing the protection of religious feelings with another principle such as public order, that no longer seems necessary.[213] *Rabczewska* already enunciates and affirms many other standards that focus more on violence than religious feelings and offensiveness.[214] In particular, the decision points out that hate speech falls outside Article 10's protection, and its use of the "stirring up" test from *Alekhina I* represents a standard that more directly tests the statement's actual capacity to lead or contribute to physical harm.[215] Along these lines, the court has already adopted many other rules that better address the possible harms this type of speech can cause and fall more in line with what other scholars and judges have suggested.[216]

In fact, rooting the jurisprudence in the protection of religious feelings only hinders the application of these other tests because it searches first and foremost for harm or offense to another religious group. In practice, the emotional harm should not, and, as *Rabczewska* demonstrates, no longer seems to be the court's ultimate concern in these cases—it is the likelihood that the expression will result in actual, physical harm to members of either religious group.[217] For example, in *E.S.*, the court was not just concerned with the idea that Muslims would feel indignation at the applicant's comments, they were worried it would compromise religious peace in Austria generally and lead to deterioration of relations, or worse, violence, between Christians and Muslims.[218] However, if that's the case, why is the current test of justified indignation rooted in proving that the offended group was sufficiently insulted? E.S.'s words were arguably more capable of causing non-Muslims to hate and

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[210] *See* Alekhina v. Russia, App. No. 38004/12, ¶¶ 225-29; Tagiyev v. Azerbaijan, App. No. 13274/08, ¶¶ 47-50; Rabczewska v. Poland, App. No.8257/13, ¶¶ 60-64.

[211] Rabczewska v. Poland, App. No. 8257/13, Eu. Ct. H.R. at ¶ 2 (Felici, J., concurring); *See* Wrench, *supra* note 114, at 748.

[212] Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 2 (Felici, J., concurring); Wrench, *supra* note 114, at 749; Szabo, *supra* note 12, at 147.

[213] Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 3-4 (Felici, J., concurring); Kuhn, *supra* note 154, at 119-20.

[214] Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 61-63.

[215] *Id.* at 61.

[216] *See* Wrench, *supra* note 114, at 749; Kuhn, *supra* note 154, at 131; Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 2 (Felici, J., concurring).

[217] *See* Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 61-62; Wrench, *supra* note 114, at 749.

[218] E.S. v. Austria, App. No. 38450/12, Eu. Ct. H.R. at ¶ 57 (Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

attack Muslims based on the idea Muhammad was a pedophile than the inverse, so what if someone were to make a statement that a religious group found entirely inoffensive based on its traditions but that could incite some other group to hatred? What if we tone down E.S.'s statement to the court's liking? What if she had said "the Sahih Al-Bukhari says Muhammad married Aisha when she was six and consummated the marriage when she was nine." This matter-of-fact statement is far less likely to cause offense and doesn't amount to hate speech either but, depending on the context, it could still be weaponized in a manner that encourages non-Muslims to hate or attack Muslims. If the court were to get rid of *Otto-Preminger* and interpret its case law forbidding the restriction of expression merely because it is offensive to exclude the protection of religious feelings as a legitimate government aim, it could address this issue of non-offensive speech that still encourages hatred or violence. For this reason, even if the court continued giving states a wide margin of appreciation for determining which expression on religion is likely to "stir up" violence or threaten public order, overturning *Otto-Preminger*'s protection of religious feelings alone would already be a substantial improvement.

Another revision scholars have vehemently requested is that the court formulate one clear rule for member states to follow.[219] The court's inconsistent jurisprudence is what allows the government abuses in cases like *Rabczewska*, *Alekhina I*, and *Tagiyev* to happen; a clear rule would prevent governments from justifying these actions in the first place.[220] Instead, as it stands and as all of these cases reflect, member states can violate people's human rights first, claim they were simply following the court's more deferential *Otto-Preminger* jurisprudence, and then maybe pay a small fine years later should they lose before the Strasbourg Court.[221] *Rabczewska* does take an important step in the direction of a cohesive rule by much more clearly requiring that the domestic courts evaluate the defendant's rights under the Convention and requiring that blasphemy laws only criminalize language that arouses justified indignation.[222] However, these requirements do not create a permanent fix. If a state were to simply add the justified indignation language to its statute and its courts adequately considered whether the language was capable of arousing that justified indignation under the Convention, case outcomes would still be uncertain because justified indignation remains an extremely broad and largely undefined standard under *E.S.* and *Rabczewska*.[223] Regardless of where the court draws the line, whether it is through refining or changing the definition of justified indignation, consistently applying the "stirring up" test from *Alekhina I* in its stead, or adopting some new test altogether, it is paramount that it does draw a line somewhere because the current system not only allows bad faith actors to continue committing blatant human rights violations, but also hinders good actors' efforts to adopt rules that respect human rights.[224]

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[219] *See, e.g.*, Wiczanowska, *supra* note 206, at 45.

[220] Szabo, *supra* note 13, at 149.

[221] Wiczanowska, *supra* note 206, at 45-46; *see e.g.* Rabczewska, App. No. 8257/13; Mariya Alekhina v. Russia, App. No. 38004/12, Eu. Ct. H.R. at (July 17, 2018), https://hudoc.echr.coe.int/eng?i=001-184666.

[222] *Compare* Rabczewska, App. No. 8257/13, Eu. Ct. H.R. at ¶ 60-62, 64, *with* Tagiyev v. Azerbaijan, App. No. 13274/08, Eu. Ct. H.R. at ¶ 47-49 (Dec. 5, 2019), https://hudoc.echr.coe.int/eng?i=001-198705.

[223] E.S. v. Austria, App. No. 38450/12, ¶ 52; Rabczewska v. Poland, App. No.8257/13, ¶ 60-62.

[224] Wiczanowska, *supra* note 207, at 48.

Finally, perhaps most pressingly of all, the court's current case law fails to take into consideration the applicant's own Article 9 rights. Across all post-*Otto-Preminger* cases, the court has almost always remained completely silent about the applicant's religion while opining about the importance of protecting some – usually theoretical – third party's right to religious feelings. Furthermore, its refusal to add the applicant's freedom of religion to the equation frequently transforms the court into a quasi-authority on what kind of religious conduct and expression is "proper."[225] *Rabczewska* illustrates the two parts of this perfectly. First, despite the Strasbourg Court's efforts to limit its discussion to Rabczewska's more incredulous statements about dinosaurs and drunken Bible authors, a more complete view of her responses reveals a genuine effort to answer questions about her beliefs.[226] To whatever extent her actions were protected under Article 10, they should have been doubly protected because she was "manifest[ing] h[er] . . . belief[s]" as protected by Article 9.[227] Second, according to her interview, Rabczewska was raised religious, seemingly Catholic based on her reverence of the Pope and Jerzy Popieluszko, and she claims to still be religious in some sense.[228] Ergo, why is the court evaluating the risk her statement poses to religious peace at all? If she does consider herself Catholic and other Catholics are outraged by her views, no religious tensions should result because there is no other religious identity in the picture. When approaching the case from this angle, it becomes clear that, in even entertaining the question, the Strasbourg Court has taken on the role of an arbiter of Catholic dogma – it is literally adjudicating whether Rabczewska's speech deviated far enough from Catholic norms to become offensive to other Catholics. This applies even if Rabczewska does not consider herself Catholic. Should that be the case, what is the unnamed religious or irreligious group that Rabczewska theoretically belongs to here? Pro-dinosaur non-denominational Christian spiritualists? Is the court worried about a deterioration of relations between the Catholic Church and Doda fans?

The goal of these questions is not to ridicule the European Court of Human Rights but to earnestly raise the question of why it is taking at face value the states' assertions that they are protecting religious peace to begin with. Keeping relations friendly between different faiths and their followers is undoubtedly an important goal of the international community.[229] However, in not evaluating and thereby failing to protect the applicants' freedom of religion in these cases, the court continues to allow and sometimes even approve of circumstances like *Rabczewska* that feature nothing more than conformists trying to enforce their morals against a non-conformist.[230] When that is the case, the court should evaluate both sides' Article 9 rights equally so it can give due respect to each of their religious morals and right to manifest their beliefs as they please, including sharing them with others as protected since

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[225] *See* Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 652, ¶ 42-52; İ.A. v. Turkey, 2005-VII Eur. Ct. H.R. 249, ¶ 29-30; Rabczewska v. Poland, App. No. 8257/13, ¶ 58-59.

[226] DZIENNIK, *supra* note 37, at 5.

[227] *Id.* at 5; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9, 10, Nov. 4, 1950, C.E.T.S. No. 005.

[228] DZIENNIK, *supra* note 37, at 5.

[229] *See* G.A. Res. 75/187 ¶ 4, Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence against Persons, Based on Religion or Belief (Dec. 16, 2020).

[230] *See e.g.,* İ.A. v. Turkey, 2005-VII Eur. Ct. H.R. 249, ¶ 29-32; S.A.S. v. France, App. No. 43835/11; Murphy v. Ireland, 38 Eur. H.R. Rep. 13 (2004).

Kokkinakis.[231] Without this, the court is allowing states to stymie individuals' discussions of their beliefs, hindering the very pluralism the court has repeatedly claimed Article 9 was enshrined to protect.[232] Analyzing the applicant's Article 9 rights would also help draw a clearer distinction for member states regarding what interferences are necessary in a democratic society; if the statement at issue includes a manifestation of the person's beliefs, the state would have to overcome both Article 9 and Article 10 to establish that the interference was required; if the statement did not, the state would only have to surmount Article 10. In this way, the court could create a higher burden for cases such as *Rabczewska*, and a lower one for cases where the speech in question plainly targets a disparaged religion, as in *E.S.*[233]

Whether or not the European Court of Human Rights does address these issues in future cases, *Rabczewska* still represents a crucial step forward in solidifying the court's use of heightened scrutiny in cases where states and their courts fail to seriously consider the applicants' freedom of expression. Though this rule does not address many of the issues underlying *Otto-Preminger* and its progeny, it has already proven its effectiveness in identifying violations in *Tagiyev*, *Alekhina I*, and *Rabczewska*. It is even more promising now that *Rabczewska* has demonstrated the court's willingness to use heightened scrutiny even when the speech is not a matter of public concern, the punishment is less than comically disproportionate, and the domestic courts did analyze the relevant rights provided by their constitutions.[234] In tandem with the court's new rule that blasphemy laws should only punish speech capable of causing justified indignation; its continued application of the "stirring up" test rooted in hatred and violence rather than religious feelings; and its comments about the importance of public order and hate speech in its analysis, there is more reason than ever to be optimistic about the court's expression on religion jurisprudence.[235] However, it is impossible to know how effectively the court will apply these new rules until it puts them to the test in future cases.

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[231] Kokkinakis v. Greece, 17 Eur. H.R. Rep. 397, ¶ 31.

[232] *Id.*; İ.A. v. Turkey, 2005-VII Eur. Ct. H.R. 249, ¶ 28-30; Murphy v. Ireland, 38 Eur. H.R. Rep. 13, ¶ 73. (2004).

[233] Rabczewska v. Poland, App. No.8257/13, ¶ 64; Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 652, ¶ 51-52; E.S. v. Austria, App. No. 38450/12, ¶¶ 7, 12-13.

[234] Rabczewska v. Poland, App. No.8257/13, ¶ 60-64.

[235] *Id.* at ¶ 61-63.


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