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APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

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K-Court:

The Feminist Pursuit of an Interdisciplinary Approach to Domestic Violence

Frances Salvaggio**

For many Canadian women, family does not represent sanctuary. Domestic violence* has reached alarming proportions in our society and represents the leading cause of injury to women aged 15 to 44. Sources indicate that in Canada, one woman in every 10 is beaten by her male partner, two-thirds of all Canadian marriages experience at least one occurrence of domestic violence.¹ Thus, domestic violence is among the most troubling and complex problems facing the legal community today.² As a social phenomenon, spousal abuse challenges the scope, breadth and role of criminal law enforcement, practice and theory.

A significant problem in attempts to address this issue has been a lack of coordination across sectors. The focus of this paper is the situation in Ontario. Ontario's 1998 Provincial Coroner's Inquest into domestic

violence made more than 200 recommendations that spoke to the need for a continuous system held together by the partnership of all sectors.³ Fragmented services are particularly problematic in the area of domestic violence where complex and inter-related concerns are triggered.⁴ Few social issues necessitate such an integrated effort at the interstices of criminal justice, health care, education and social service systems. While criminal law is certainly not a panacea for responding to and preventing domestic abuse, many spousal abuse victims initially seek criminal justice intervention. Thus, in order to ensure comprehensive and viable solutions to domestic violence, the law must not operate in a social vacuum. It has become increasingly clear that traditional methods of service delivery are ineffective at addressing the varied and complex patterns of domestic violence.⁵

** Frances Salvaggio is a third year law student at Osgood-Hall Law School, York University. She wishes to thank Sharon Steele and Raji Mangar for their assistance.

* The term "domestic violence" and variations of it (i.e., domestic assault, domestic abuse, spousal abuse, spousal assault, spousal violence, etc.) is used to refer to violence directed at women and perpetrated by men in intimate relationships. Other forms of violence, such as elder abuse, child abuse, female on male, and same sex abuse, and stranger assaults will not be considered in this paper. Further, the word "victim" should not be read to infer helplessness on the part of the abused.

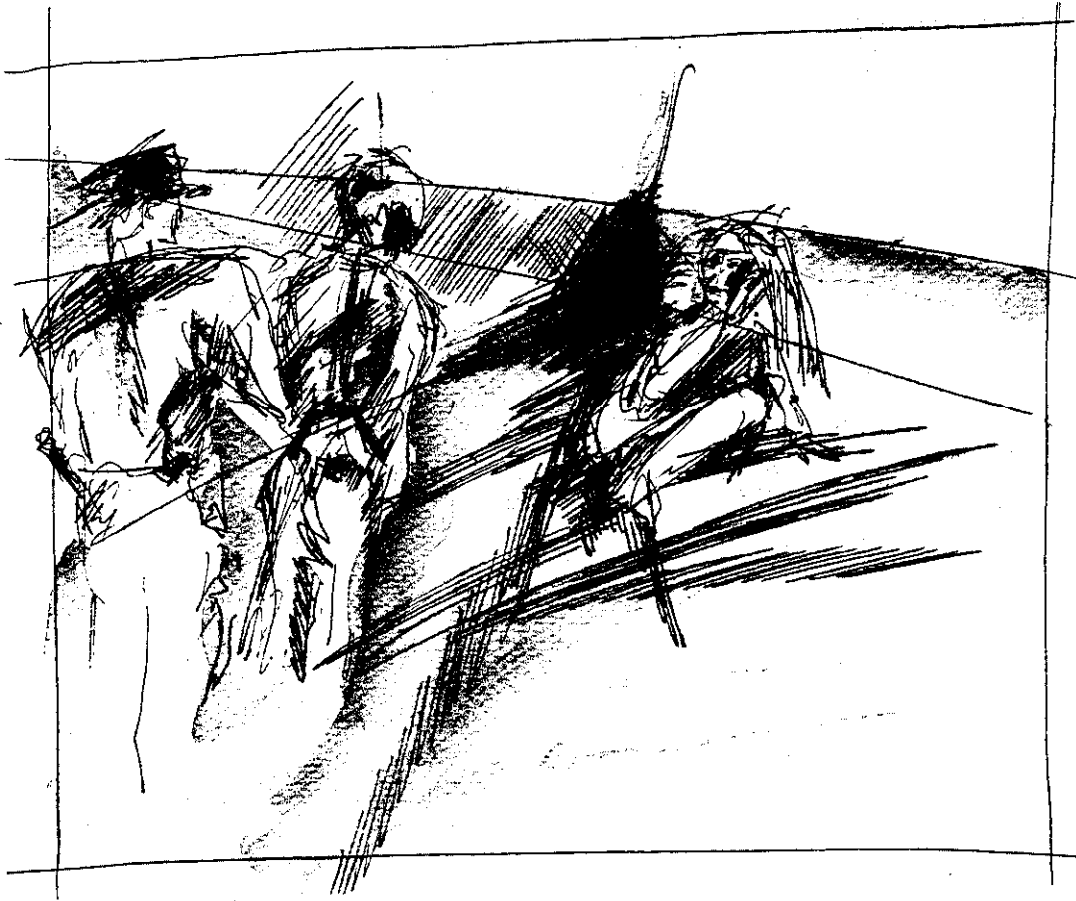
1 B. Wilson, "Family Violence" (1992) 5 Can. J.W.&L. 137 at 138; E. M. Hyman, "The Courts and Domestic Violence" (1999) 19 Lawyer's Wkly 4; C. Christopher, "New Family Violence Protection" (1999) 23 L. Now 58 at 62. Statistics on domestic abuse may be accessed at Toronto City Council, "Woman Abuse Council of Toronto" <http://www.city.toronto.on.ca/council/wac_index.htm> (date accessed: 9 April 2001); Statistics Canada, "The Violence Against Women Survey: Highlights" (November 1993) *The Daily*, online: Education Wife Assault <<http://www.womanabuseprevention.com/html/statistics.html>> (date accessed: 15 March 2001).

2 A. Duffy and J. Momirov, "Family Violence: A Canadian Introduction" (1999) 24 Can. J. of Sociology 554 at 555; D. B. Mitchell, "Contemporary Police Practices in Domestic Violence Cases: Arresting the Abuser: Is it Enough?" (1992) 83 J. Crim. L. & Criminology 241-249.

3 *Supra* at note 1.

4 D. Kinnon, *The Other Side of the Mountain: Working Together on Domestic Violence issues, Phase 1* (Ottawa: Interdisciplinary Project on Domestic Violence, 1988) 794 at 794.

5 *Supra* note 5 at 798; K. Yllo, Book Review of *Woman Abuse: Sociological Perspectives* by Walter DeKeseredy and Ronald Hinch (1992) 19 Social Justice 146-9.



Interdisciplinary cooperation is critical to promote a thorough understanding of the issues, increase the efficient use of resources and diminish system-induced re-victimization, with special attention to racialized and otherwise marginalized women.⁶

In recent years, a number of initiatives have been developed specifically targeting broader social, political and economic forces that impact upon individual perpetrators' propensity to abuse. The legal system itself has undergone transformation, beginning in 1997 when specialized domestic violence courts were launched in North York and Toronto through the Courts Pilot Projects in Ontario.⁷ These pilot programs have become permanent fixtures in the criminal court system and now serve as models for

other projects across Ontario. They are believed to be more effective than the traditional approach to addressing the complexities of prosecuting domestic assault. These courts facilitate early intervention in the cycle of violence, provide counselling for victims and offenders, courtroom and support services for victims and investigation and prosecution of complaints.

Toronto's K-Court model, named after police K (domestic violence) files, operates through a coordinated and mandatory response involving the Crown attorney, the Victim/Witness Assistance Program (V/WAP), the police, the judiciary, court administration, probation services and community groups offering intervention programs for offenders.⁸ This innovative model, with its multi pronged

⁶ *Supra* note 5 at 795.

⁷ A. Bissett-Johnson, "Domestic Violence: A Plethora of Problems and Precious Few Solutions" (1986) 5 Can. J. Fam. L. 253 at 276; "Canadian Introduction", *supra* note 2 at 555.

⁸ *Domestic Violence Justice Strategy—The DVC Projects at Old City Hall and North York Courts*, looseleaf (Toronto, 1999).

approach to domestic abuse, encompasses some of the systemic remedies that feminist legal theory supports. The remainder of this article explores the K-Court model's most controversial features, namely aggressive criminal justice intervention in domestic violence through mandatory charging and no-drop prosecution. Although the impetus for these features can be attributed in part to historical demands by feminists that the criminal justice system take seriously the injuries to women flowing from domestic violence, a closer look at feminist analysis reveals significant concerns about the combination of criminal law responses with mandatory frameworks.

The economic, political and social inequalities of women simultaneously fuel and justify violence against women.

CRIMINALIZING DOMESTIC VIOLENCE: THE INTERFACE WITH FEMINISM

Aggressive criminal justice intervention in domestic abuse cases is characterized most often by mandatory charging and no-drop prosecutorial policies. This approach is held out as offering protection for individual women facing domestic violence, and transforming the norms currently sustaining male violence against females.⁹ This approach has enjoyed and continues to enjoy widespread support among some women's advocates and various governmental actors. In part, such aggressive interventions grew out of contemporary demands for reform of the criminal justice response (or rather, lack of response)

to domestic violence.

Although political and legal theory have long recognized the danger of unlimited state authority, traditional theory has not acknowledged the incongruous authority of men over women. A systemic critique of the criminal law yields insights into the myriad ways criminal justice regimes have legitimized sexual dominance, remained oblivious to its harm and refused to characterize violent expression of that dominance as an abuse of power.¹⁰ The economic, political and social inequalities of women simultaneously fuel and justify violence against women. In short, the alienating and oppressive practices of the legal system have failed women where justice, validation and support should be found.¹¹

Feminist critiques of the social conditions that sustain women abuse, and more specifically, of legal responses to domestic violence which characterized it as merely a private matter within the domain of family life were the impetus for reform strategies which increasingly centred on demands for a more aggressive and regularized criminal justice response. The historical entrenchment of men's proprietary rights over women in the legal system is well documented.¹² Feminist struggles woman abuse thus logically came to focus on legal solutions. The criminal law further came to be seen as having symbolic importance in the struggle to prevent violence against women due, in part, to both its historical role in subverting women's voices and its potential for public exposure of violence as a social and political (and not merely personal) issue.¹³

9 D.L. Martin and J.E. Mosher, "Unkept promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8 Can. J. W. & L. 3 at 3.

10 L. M.G. Clark, "Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service and Criminal Justice Concerns" (1989) 3 Can. J. W. & L. 420 at 425.

11 Wilson, *supra* note 1 at 140.

12 See generally R. Dobash & R. Dobash, *Violence Against Wives: A Case against the Patriarchy* (New York: Free Press, 1979); W.S. DeKeseredy & L. MacLeod, *Woman Abuse: A sociological Story* (Toronto: Harcourt Brace, 1997).

13 D.H. Currie, "The Criminalization of Violence Against Women: Feminist Demands and Patriarchal Accommodation" in K. Bonnycastle & G.S. Rigakos, eds., *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 41 at 41.

As such, in the late 1970s and early 1980s, women's groups lobbied government to emphasize the criminality of domestic abuse by encouraging the police to treat it "like any other crime", and take positive steps to charge the perpetrators of assault rather than relying on dispute resolution through other means.¹⁴ Beginning in 1981 with a series of federal initiatives, within less than one decade, most Canadian jurisdictions adopted a "zero-tolerance" policy, encouraging mandatory charging and prosecution.¹⁵ In domestic violence cases, the criminal law is engaged procedurally at three discrete, but related points of discretionary power: the decision of the police to arrest and/or charge, the decision of the Crown to prosecute, and the decision of the court to impose a sentence if the case is made. For advocates of aggressive criminal justice intervention in domestic violence cases, taking wife abuse seriously has come to be measured by criminal justice yardsticks at each of these discretionary points: charges must be laid and prosecuted, convictions obtained, and jail sentences imposed.¹⁶ Proponents of such an approach assumed (and continue to assume) that these interventions operate directly and indirectly to better women's lives.

According to some academics, feminist activists never intended to focus societal responses to violence against women on criminal justice intervention.¹⁷ Feminist critics of such an approach argued that: criminal justice interventions merely contain the problem within legal boundaries, criminal justice, as an adversarial process rooted in punishment, hierarchy and dependence,

perpetuates the very factors contributing to abuse in the first instance, criminal justice is based on interventions into discrete events and narrowly-defined acts and abused women's problems, which are not strictly legal, have no place in criminal proceedings.¹⁸ While initially struck as a challenge to patriarchal notions of domestic violence, the movement to end violence against women came to support, in part, expanding the reach of a legal apparatus, which incorporated many patriarchal norms, through demands for more aggressive criminal interventions on behalf of victims of such violence.

It must be a theory that, while acknowledging the pervasiveness and harm of violence against women, does not accept this violence as an immutable feature of social relations.

Nevertheless many feminists remain committed to criminal law responses while at the same time pursuing a critical inquiry into the role that criminal law plays in resolving domestic violence. This involves a review of structural and systemic problems, organizational barriers and other issues perpetuating the status quo.¹⁹ Criminal law takes notice of women but often denies women benefits and protections. The basic tenet of one strand of feminist critique of criminal justice is that a preoccupation with men and male perspective has dominated the system.²⁰ The challenge, therefore, is to adapt male-oriented laws and practices to the concerns of female victims of domestic assault. This is difficult, however, because of the many conflicting concerns and

14 *Supra* note 10 at 15.

15 *Supra* note 14 at 41.

16 *Supra* note 10 at 16.

17 See W.S. DeKeseredy & L. MacLeod, *Woman Abuse: A sociological Story* (Toronto: Harcourt Brace, 1997).

18 *Supra* note 14 at 45.

19 *Supra* note 5 at 796.

20 S. J. Schulhofer, "The Feminist Challenge in Criminal Law" (1995) 143 U. Pa. L. Rev. 2151 at 2153.

commitments held by key stakeholders in the system. Further, although some feminist theory equates women's oppression with patriarchal domination, there is little agreement as to how patriarchy is upheld and how it can be challenged. Beliefs about how patriarchy continues to subordinate women and sustain that subordination become expressed in various moments and individual actions. Despite these difficulties, feminist legal reform has consistently striven to address the root causes of the problem by demanding the implementation of systemic remedies.²¹ This process involves the development of theory and practice steeped in social reality. It must be a theory that, while acknowledging the pervasiveness and harm of violence against women, does not accept this violence as an immutable feature of social relations. The aim, then, is not merely to describe social relations, but to transform them. Feminist theory, however, has the luxury of being able to abstract women from their social context, whereas, feminist struggles are shaped by and framed within existing social orders and, as such, the translation of knowledge into action is not a straightforward endeavour. As in the case of criminal justice interventions, frequently something is lost in the translation.

MANDATORY PROSECUTION AND LEGAL REFORM

Criminal law has been slow to respond to the unique circumstances and challenges presented by domestic assault. As recently as 1983, a man in Canada could not be charged with the rape of his wife, even if the couple were separated. The situation,

however, is gradually improving. Though the criminal justice system has been primarily concerned with physical and sexual abuse, non-physical forms of abusive behaviour that often characterize domestic situations are now being recognized as punishable crimes. In 1993, the federal government passed a law that created the offence of criminal harassment to deal with stalking (s.264 of the *Criminal Code*).²²

Along with this trend, there has been an increasing recognition that domestic violence cannot be effectively dealt with in a fragmented system. In Ontario, this has spurred the creation of two specialized courts through the Courts Pilot Project initiative: one at the Old City Hall courthouse in Toronto and the other at the North York courthouse. The Pilot Project addresses the findings of a series of articles in the *Toronto Star*, which identified that the vast majority of domestic violence cases were dropped or withdrawn during the court process due to difficulty in prosecuting such cases.²³

Old City Hall's K-Court operates according to a coordinated prosecution model. This model brings together the police, Crown attorneys, probation and parole services, shelters and other services for abused women. The target of this integrated approach is to collect additional evidence beyond victim statements to aid the prosecution.²⁴ By combining state-level policing legislation, backed by aggressive prosecution efforts and supplemented by treatment programs, K-Court's interdisciplinary approach has, in effect, streamlined and apparently increased the effectiveness and sensitivity of the criminal justice system.²⁵

21 *Ibid.* at 141.

22 N. Bala and S. Edwards, "Legal Responses to Domestic Violence in Canada and the Role of Health Care Professionals" (1999) at 2-3, online: QL (SFLA).

23 V. Green, "Domestic Violence Courts Project," online: Education Wife Assault <http://www.womanabuseprevention.com/html/domestic_violence_courts_projec.html> (date accessed: 15 March 2001)

24 *Ibid.*; E. Raymer, "Domestic Assault Projects Mark Successful First Year" (1998) 17 *Lawyer's Wkly* 1.

25 N. Z. Hilton, Book Review of *Domestic Violence: The Changing Criminal Justice Response* by E.S. Buzawa and C.G. Buzawa, eds. (1994) 36 *Crim. J. Crim.* 211 at 212; Toronto City Council, "Woman Abuse Council of Toronto", online: City of Toronto, City Council <http://www.city.toronto.on.ca/council/wac_index.htm> (date accessed: 9 April 2001).

K-Court handles all domestic violence cases from police divisions 11, 14 and 52. It is staffed by a team of Crown attorneys who prosecute only domestic violence cases and receive mandatory training in social, psychological and legal issues associated with domestic assault and sexual abuse prosecutions.²⁶ In accordance with the 1982 directive of Ontario's Attorney General, Crown attorneys are required to assume an active role in promoting police-laid assault charges.²⁷ Under this zero-tolerance policy, the police also play a critical role in responding to spousal abuse and have taken significant steps to improve training in this regard.²⁸ Police officers are no longer expected to ask a victim if she wants her abuser charged. Instead, they must lay charges regardless of the victim's wishes.²⁹ After police lay a charge, a special reporting form is used and an attempt is made to have the victim participate in a videotaped interview.³⁰ The investigation of a case thus involves close cooperation between Crown attorneys and the police.

Another development facilitating prosecution of such cases relates to evidentiary rules regarding bad character and previous criminal conduct.

It is now accepted practice to begin domestic abuse investigations with the aim of being able to prove that an assault occurred without having to rely on the victim's in-court testimony. Gathering evidence such as photographs of the victim's injuries, 911 emergency

telephone tapes and audio or videotaped statements from the victim and other witnesses permit a victimless prosecution. This type of evidence collection is presumed to lessen the emotional burden on the victim although she will normally be called to testify if the case goes to trial.³¹

Recent case law developments have further facilitated the prosecution of domestic assault cases. Canadian courts now accept that an audiotaped statement by a woman to the police may be the basis for proving domestic abuse if she takes the witness stand to deny that her partner abused her and claims that her injuries were accidental. Such admission depends on the judge being satisfied that the earlier statement was true and that the victim has been pressured into recanting her original story in court. Before the Supreme Court of Canada's decision in *R. v. B.(K.G.)*³², prior inconsistent statements were excluded as hearsay unless the witness adopted the statements as true while testifying. The court in *B.(K.G.)*, however, held that prior inconsistent statements are admissible when they meet the dual requirements of necessity and reliability.

Another development facilitating prosecution of such cases relates to evidentiary rules regarding bad character and previous criminal conduct. In spousal abuse cases, the courts are increasingly acknowledging the unique nature of the offence with respect to the admission of evidence. In *R. v. F.(D.S.)*,³³ evidence that helped to characterize the nature of the relationship between the parties and the context in which the abuse occurred was admitted. As such, a

26 Victim Witness Programs and Services, "The Designated Domestic Assault and Sexual Assault Coordinators", online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/html/VW/dsexass.htm>> (date accessed: 10 April 2001).

27 *Supra* note 8 at 267.

28 Christopher, *supra* note 1 at 62.

29 *Supra* note 23 at 7.

30 *Ibid.*

31 *Ibid.* at 10.

32 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257.

33 *R. v. F.(D.S.)*, [1999] O.J. No. 688 (C.A.), online: QL (OJ).

victim or other witness may testify as to the entire history of abuse in a relationship in order to put the charges in context.

The impact of aggressive criminal justice intervention is felt differently depending upon individual women's social location and needs.

Prior to the commencement of a trial in K-Court, the domestic assault victim is contacted by the V/WAP and encouraged to participate in an interview. The program familiarizes the victim with the court process and provides her with support throughout the trial. Referrals to community agencies and services are also provided.³⁴ Shelters play a critical role in providing crisis accommodation and security for women and their children who are leaving an abusive relationship and have nowhere to turn. Shelters usually provide crisis or transitional accommodation for a period as long as six weeks. Although it is recognized that only a relatively small percentage of abused women stay at these shelters, there is an urgent need for more long-term accommodations and support. It is reported that if more spaces were available, there would be greater use of such facilities.³⁵

The coordinated prosecution model provides counselling services to abusers as well. When a judge imposes counselling as a condition of the sentence, the abuser is referred to an intervention program by his probation officer.³⁶ Many of these programs operate on a group model with one or two leaders directing each abuser to discuss and confront his problems and history of abuse. An intensive curriculum helps to

identify the philosophies and biases that abusers use to legitimize their use of violence. Treatment goals often aim at getting the abuser to: understand the harm done to his partner, family and community; take responsibility for his abusive and controlling behaviour without minimizing or denying it, and; recognize his abusive behaviour within the context of power and control and not within the context of anger.

Ultimately, the highest priority is the safety of potential victims. While participation in counselling and other forms of individual and group therapy can reduce the incidence of violence, some men do not respond to these programs and continue to abuse their partners. Programs can teach abusers that there will be serious consequences for their behaviour, but it takes a lifetime to change values and learned patterns of behaviour.³⁷ Recovery begins when abusers can express emotion without intimidation.³⁸

AGGRESSIVE CRIMINAL JUSTICE REFORMS: A FEMINIST CRITIQUE

Faced with the difficulties of translating theory into praxis and transforming social reality, feminists must continually ask themselves whether existing policies are benefiting assault victims. When the answer to this question uncovers dislocation between the interests of domestic assault victims and the goals pursued by the state, there is cause for concern.³⁹ Such a dislocation has been alleged with respect to K-Court and other specialized domestic assault courts. Some critics believe that public interests tend to supersede the interests of victims and that the position adopted in Ontario does not adequately reflect the needs of women or the contemporary feminist debate.⁴⁰ Central to

³⁴ *Supra* note 23.

³⁵ *Ibid.*, at 6.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at 6-7.

³⁹ A. Cretney and G. Davis, "Prosecuting 'Domestic' Assault" (1996) *Crim. L.R.* 162 at 163.

⁴⁰ *Supra* note 22 at 4.

this critical stance is a concern about the negative impacts of arrest, and charging and prosecution policies phrased in mandatory terms. While there are a greater number of successful prosecutions through the use of specialized domestic violence courts, there exist a range of practical and conceptual difficulties related to aggressive criminal justice intervention in the area of domestic violence.

The impact of aggressive criminal justice intervention is felt differently depending upon individual women's social location and needs. Under-lying the use of policies such as mandatory arrest and no-drop prosecution is the problematic notion of uniform victim experience. Many abused women have resisted and continue to resist aggressive criminal justice intervention. The use of such mandatory policies is premised on two unsavoury assumptions: that all women will react to domestic violence in much the same way, and unquestioningly welcome prosecution to the fullest extent of the law, or more ominously, that individual women's experiences and desires ought not factor in state responses to domestic violence. The opposition of an abused woman to aggressive criminal justice intervention in her circumstances may all too easily be dismissed as "wrong" or the product of "false consciousness" or a "symptom of pathology".⁴¹ Further, apart from addressing women's objections to aggressive criminal justice intervention more broadly, the literature is devoid of attention to the differential impact of such interventions on dually marginalized women, those socially



dislocated along lines of class, race and citizenship, for instance.⁴² We thus tend to generalize abused women from two inadequate reference points—that of the white, middle class woman and the "ideal victim", one who does not resist or provoke her assailant, does not introduce complexity and ambivalence into the legal process and views her relationship with her abuser solely in zero-sum terms.⁴³

Aggressive criminal justice interventions such as mandatory charging and no-drop prosecutions may deter immigrant women, who often are poor and racialized as well, from seeking assistance in response to domestic abuse. When questioned about the factors that weigh in a decision about whether to contact the police or not, immigrant women expressed a fear of deportation (along with other negative immigration consequences), feelings of cultural shame and betrayal if the police were involved, ruination of the family, fear of financial consequences, concern for the husband, language barriers, and fears of retribution from the spouse and involvement by child protective services.⁴⁴

The presumption that a man who assaults his partner should be arrested, charged and prosecuted like any other assailant may, as far as the state is concerned, demonstrate that they are taking domestic violence seriously. However, where there is no congruence of purpose between victims and prosecuting authorities, women's victimization is exacerbated rather than resolved.⁴⁵ Discussions with immigrant

41 *Supra* note 10 at 6.

42 *Ibid.*

43 R. Langer, "Male Domestic Abuse: The Continuing Contrast Between Women's Experiences and Judicial Responses" (1995) 10 *Crim. J. L. & Soc.* 65 at 85.

44 *Supra* note 10 at 21.

45 *Ibid.*

women reveal that they do not necessarily equate useful and necessary state intervention with charging and prosecution.⁴⁶ This response may seem counter-intuitive in the context of the aggressive criminalization strategy in Ontario, however that strategy fails to account for the importance that immigrant women may attach to husband, family, and community. Without underestimating or dismissing the patriarchy evident in many immigrant communities in Canada, we must recognize that there are unique pressures at play for racialized minority women who may be (and feel) responsible for maintaining and protecting their cultural communities, in the face of an often hostile and racist world existing without. Further, many women express love for their partners and seek rehabilitative and not punitive responses from the state. These men are in some tangible way part of their communities, and of themselves.⁴⁷

Under pressure to follow through with a charge, reluctance becomes one of the few ways battered women can retain some control over the process.

A criminalization strategy of mandatory charging and prosecution is underpinned by two broad assumptions: that domestic violence is the same as other assaults, and that criminal justice intervention is efficacious in reducing or eliminating violence against women. However, domestic violence differs fundamentally from violence between strangers, most compellingly in that it is situated well within a complex and nuanced interpersonal relationship. Unlike other acts of violence, the abuser here has breached a long-standing and particular type of trust, thus the victim is especially

vulnerable. Depending on the nature of the relationship between the victim and the abuser, both may want the relationship to continue. The victim may choose to reside with her abuser rather than see him punished, especially if she and her children are economically dependent on him. Pressure from family or friends can also affect her decision to remain in the relationship. Alternatively, she may simply decide that the stigma of a criminal conviction is too high a price for her partner to pay. The combination of any these factors compel women to return to relationships they originally attempted to sever. Some women believe that the involvement of the police and the threat of prosecution is enough to prevent further violence. Many women remain in, or return to, abusive relationships. The desire to preserve the relationship, however, does not mean that the victim wants the violence to continue.

In turning to the police for protection, domestic assault victims will often get caught up in the criminal justice process without necessarily intending to do so. Under pressure to follow through with a charge, reluctance becomes one of the few ways battered women can retain some control over the process. In the short term, domestic assault victims see this strategy as the safest available choice. There is a misguided tendency to accuse reluctant victims of somehow "failing" those who have put themselves out on their behalf. However, from a victim's perspective, a discontinued case need not be a failed one. The experience of arrest and the threat of conviction may be enough to deter some men from further violence. It is therefore incorrect to assume that conviction and sentencing is the only successful outcome.⁴⁸ In asserting that aggressive criminal justice intervention is in

⁴⁶ *Supra* note 10 at 24.

⁴⁷ *Ibid.* at 29.

⁴⁸ *Ibid.*

the best interests of all abused women, an abused woman who resists this intervention is denied rational actor status as “arrest over the objection of the woman implies that she does not know what’s good for her”.⁴⁹ This sort of attitude only further violates women’s autonomy and increases victimization. Further, the threat of contempt charges to control a reluctant victim is a legalized form of re-victimization that serves to emphasize public interest over individual interest and regularizes male domestic abuse with other violations of criminal law.⁵⁰

Apart from the normative treatment of spousal assault as the “same” as other assaults, an aggressive criminal justice response is alleged to offer individual women protection against future violence and contribute significantly towards the eradication of violence in the long-term by communicating forcefully a message of “zero tolerance” through mandatory charging and prosecutions. However, if women do not turn to the criminal justice system because of risks it entails, or because of its punitive irrelevance in their lives, claims of protection and eradication may be grossly overstated.⁵¹ As stated above, some women may consciously be forced to decide in favour of no intervention where the decision reveals such zero-sum odds as mandatory charging and prosecution. This would impact marginalized women with the greatest force—economically disadvantaged, racialized and immigrant women (often all three) who lack access to other supports and resources. Indeed, attention to a criminalization response to domestic violence may leave other supports under-serviced, even where the over-arching program is alleged to be interdisciplinary or community-based.

Some feminist scholars approach this problem from another angle, arguing that women should have an absolute right to bodily integrity and protection from aggression.⁵² For those committed to this view, society has an obligation to use arrest powers vigorously when a man violates a woman’s right to physical safety. While this is an appealing perspective, it takes no account of the psychological, social and institutional dynamics that determine whether and under what conditions an aggressive prosecutorial approach is in the best interest of the complainant.⁵³

Denunciation through criminal law does signal strong general social disapproval that violence against women is unacceptable, even in the realm of the private.

Aggressive criminal justice intervention does offer two tangible benefits. Firstly, victims are given temporary respite from their abusive relationship in instances where the abuser is incarcerated. This is often the principle reason why women summon police officers during the course of an assault. Secondly, criminalization has ideological significance. Denunciation through criminal law does signal strong general social disapproval that violence against women is unacceptable, even in the realm of the private. However, the needs of domestic assault victims, those the model presumes to assist, are not being entirely met because of the continued tendency to misrepresent and misunderstand women’s experiences of abuse, along with the legal system’s propensity to pathologize behaviours and isolate each case inside its “individual” facts.⁵⁴

49 *Supra* note 10 at 34.

50 *Supra* note 44 at 85.

51 *Supra* note 10 at 35.

52 *Supra* note 21 at 2161.

53 *Ibid.* at 2162.

54 *Supra* note 10 at 9.

A more thorough examination of aggressive criminal justice intervention in domestic violence, of the assumptions underpinning it and of women's experiences with it, reveal that it has done little to promote the dual purposes of protection and prevention that it was believed to serve. The criminalization strategy, precisely because of its location within the arena of adversarial, individualized and value-laden processes, is inadequately attentive to the role of power, its inequitable distribution, and the role of the state in perpetuating such imbalances.⁵⁵ Feminists have long questioned the efficacy of legal redress through a system in which male perspectives and interests dominate at all levels of the proceedings.

ASSESSING THE SUCCESS OF K-COURT

Despite the concerns about the vulnerability of policies framed in mandatory language, the interdisciplinary approach exemplified by the K-Court model is believed to hold great promise. In general, interdisciplinary approaches to domestic violence have been widely accepted as the ideal response to domestic assault. K-Court is lauded as a progressive example of an interdisciplinary and collaborative project responding to persistent problems in community response to woman abuse. Studies have confirmed that these courts can make a real difference in holding abusers accountable and providing safety for victims. On July 9, 1999, the Woman Abuse Council of Toronto released the results of its Women's Court Watch Project. In assessing the effectiveness of domestic violence court sites, the survey monitored judges' decisions and outcomes in domestic violence cases and compared the effectiveness of Old City Hall's specialized court to non-specialized courts. The results

indicated that the innovative court program was better able to successfully prosecute domestic violence cases, had lower rates of withdrawals, dismissals and peace bonds, as well as higher and faster rates of guilty verdicts and higher rates of victims attending courts. Overall, the number of spousal abuse cases reaching the courts had increased while the average time from first court appearance to the conclusion of the case had decreased.⁵⁶

Interdisciplinary cooperation was also found to facilitate community-wide information sharing and effective needs-assessment. Planning and service coordination, along with improved design and monitoring of joint protocols and programs have also been positive results of such an approach. Further, thorough case consultation and review, strong client advocacy, informed public and professional education, and consistent government consultation have been achieved.⁵⁷ The "success" of K-Court is attributed to the coordination between the police, V/WAR, Crown attorneys, batterers' programs, probation and community agencies.⁵⁸

In part, the "success" of K-Court and similar violence prevention courts flows from framing issues in individualistic, rather than institutional, terms. It is far easier to speak about individual perpetrators and victims than social responsibility, for instance. For many women, however, the documented benefits of aggressive criminal justice responses to domestic violence remain contentious.⁵⁹ Assessments depend on whose criteria are used to measure success. With mandatory charging and prosecution, arrest and detention rates for abusers have increased, while attrition rates of cases proceeding through the courts have decreased, and the percentage of offenders receiving

⁵⁵ *Ibid.*

⁵⁶ "Violence at the doorstep" *The Globe and Mail* (22 June 2000).

⁵⁷ *Supra* note 5 at 797.

⁵⁸ *Supra* note 23 at 10.

⁵⁹ *Supra* note 14 at 47.

court-imposed sanctions has increased.⁶⁰

However, it is not clear that these effects of aggressive criminalization are measures of success in addressing violence against women more generally. There is no literature verifying that punitive sanctions have either a deterrent or transformative effect, particularly where applied to marginalized offenders for expressive offences.⁶¹ There are several contradictions that arise where violence against women is addressed through aggressive criminal justice interventions. Such policies imply acceptance of liberal guarantees and formal safeguards inherent in our system of justice, which do not go far enough in addressing problems such as domestic violence, mired as they are with socially constructed and maintained norms. Further, aggressive criminal intervention strategies may result in the demise of notions of rehabilitation and re-education, and result in an unconscious abandonment of the notion of prevention.⁶²

In light of these successes attributed to K-Court, however, numerous similar initiatives have sprung up endorsing better support for victims and greater accountability for abusers. The Ontario government is willing to fund eight new domestic violence courts. This would effectively double their number across the province and enhance services at existing sites. Apart from the two specialized courts in Toronto, domestic violence programs currently exist in Brampton, Hamilton, London, North Bay, Oshawa and Ottawa. It is anticipated that the eight new domestic violence courts will be located in Barrie, Kitchener, Newmarket, Sudbury, Windsor, Etobicoke, Scarborough and metro Toronto. In total, all 16 domestic violence court programs will offer a broad range of coordinated services, including referral of first-time offenders, intensive counseling through partner assault

response programs, specialized investigations to obtain evidence, aggressive prosecution of repeat offenders and incidents involving serious injuries and support services for victims through the V/WAP.⁶³

This effort is part of Ontario's strategy to improve the justice system's response to domestic violence in partnership with local communities. Other improvements to justice services initiated by the introduction of the domestic assault program include new guidelines for police response to domestic violence and an additional \$8 million annually so that Crown attorneys can better support victims and witnesses during the preparation of cases.⁶⁴

CONCLUSION

In recent years, there have been significant changes in the ways Canada's social and legal systems have responded to spousal abuse. Thanks to a general feminist critique of social, legal and economic structures, attempts have been made toward a more collaborative approach to domestic violence, which includes improved support networks for victims. While programs such as K-Court provide a useful model, caution must be exercised in practice and we must remain vigilant to ensure that the very hierarchies and power imbalances that we seek to eradicate are not resituated in renewed efforts. This article has explored many of the problematic elements of aggressive criminal justice intervention in domestic violence. The K-Court model goes some way toward responding to the concerns raised by feminist critiques. However, its two core elements—a primary reliance on punishment and a mandatory “zero tolerance” framework—may aggravate rather than relieve the situations of women who are the most vulnerable to domestic violence. ■

60 *Ibid.* at 48.

61 *Ibid.*

62 *Ibid.*

63 *Supra* at note 9.

64 *Ibid.*

Criminal Law Reform in the People's Republic of China:

Any Hope for those facing the death penalty?

Meaghan Sunderland**

INTRODUCTION

In March 1996, the eighth National People's Congress (NPC) of the People's Republic of China (PRC) substantially amended the Criminal Procedure Law (CPL), which had been in force since 1979. A year later, revisions to the 1979 Criminal Law were also passed. These changes have been described by Chinese officials as a "major step forward" in the improvement of the Chinese legal system.¹ Said by some to "contribute to narrowing the gap"² between Chinese law and international standards, these amendments have also been heavily criticized for their failure to reach the acceptable level of international norms.³ As a country notorious for having the highest death penalty rate in the world,⁴ the purpose of this

article is to ask whether these recent substantive amendments reveal an evolution in the use of capital punishment within the PRC. This will be done by juxtaposing four aspects of criminal law from imperial China with their modern-day counterparts.

PUNISHMENT IN IMPERIAL CHINA

The persistent recurrence of death sentences and executions throughout various regimes in late imperial and modern China cannot be explained away as merely historical coincidence. The state's meting out of severe punishment to control society and serve its needs has been a constant theme throughout Chinese history.⁵

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* 2001 Centre for Asia-Pacific Initiatives (CAPI), University of Victoria, student essay prize winner. For more information see generally, online: CAPI <<http://www.capi.uvic.ca>>; see specifically, online: CAPI Occasional Papers <<http://www.capi.uvic.ca/publications.html#occas>>.

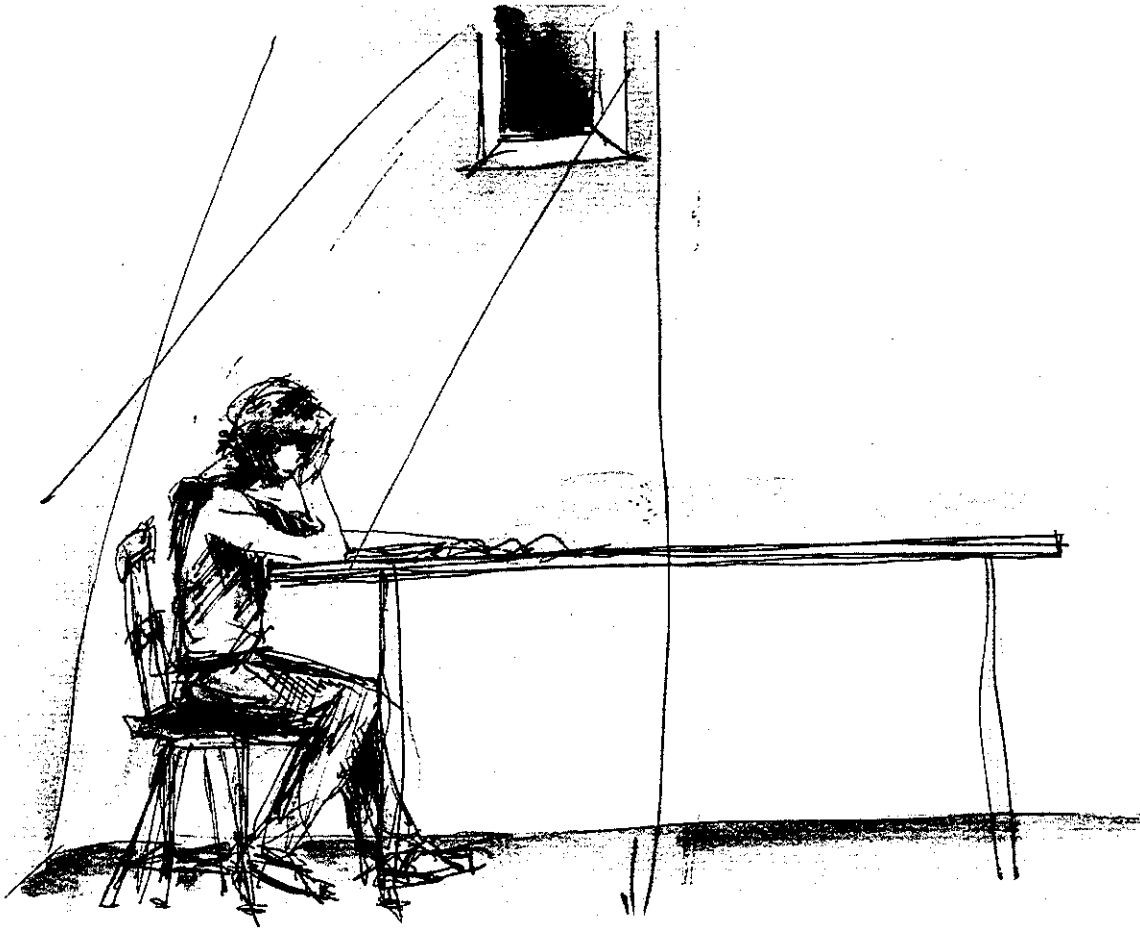
1 *Xinhua English Newswire* (17 March 1996).

2 "People's Republic of China: Law Reform and Human Rights" (1997) Amnesty International, online: Amnesty International <<http://www.web.amnesty.org/ai.nsf/index/ASA170141997>> (date accessed: 23 Sept. 2000) [hereinafter "Law Reform"].

3 See for example *ibid.*; Jeremy T. Monthly, "Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC" (1998) 33 *Texas International Law Journal* 189 [hereinafter "Internal Perspectives"]; John T. Boxer, "China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest" (1999) 22 *Suffolk Transnational Law Review* 593 [hereinafter "Undermining Legal Reform"]; Daniel C. Turack, "The Chinese Criminal Justice System" (1999) *Spring Cardozo Journal of International and Comparative Law* 49 [hereinafter "Justice System"]; and "Opening to Reform?: An Analysis of China's Revised Criminal Procedure Law" (Oct. 1996) *Lawyers' Committee for Human Rights*, online: *Lawyers' Committee for Human Rights* <<http://www.lchr.org/pubs/china.htm#OPENING>> (date accessed: 25 Sept. 2000) [hereinafter "Opening"]. While some of these reports speak generally of "international standards", others specifically refer to the requirements set out in international treaties such as the U.N.'s Universal Declaration of Human Rights (adopted Dec. 1948) or the U.N.'s International Covenant on Civil and Political Rights (adopted Dec. 1966).

4 China is reported to have executed 1,067 prisoners in 1998; the next highest rate of execution was in the Democratic Republic of Congo where 100 death sentences were carried out. See "Facts and Figures on the Death Penalty" (April 1999) *Amnesty International*, online: *Amnesty International* <<http://www.amnestyusa.org/abolish/act500299.html>> (date accessed: 17 Nov. 2000).

5 See Alan W. Lepp, "Note, The Death Penalty in Late Imperial, Modern, and Post-Tiananmen China" (1990) 11 *Michigan Journal of International Law* 987 at 988 [hereinafter "Post-Tiananmen"].



Essential to any understanding of the present-day use of the death penalty in China is a look at its historical use. According to one scholar, Chinese imperial codes “were less concerned with the defendant’s individual rights than with imperial interests.... Therefore, a significant goal of sentencing in early criminal codes was punishment.”⁶ The punishment meted out was to correspond to the seriousness of the offence, “as determined by its repercussions on universal harmony.”⁷ As early as the Tang Code of 653 AD, the harshest of punishments, the death penalty,

was codified. Each imperial code thereafter included more than 100 capital offences for “heinous” crimes, ranging from treason and murder to the striking of one’s paternal grandparents or one’s master (if a slave).⁸ The most severe form of execution—death by slicing—was reserved for the most ruthless crimes, which was followed, in descending order of severity, by decapitation and strangulation.⁹

THE IMPERIAL APPEAL PROCESS

During the Qing Dynasty (1644–1911), an accused who felt he had not received a

6 See Stephen B. Davis, “The Death Penalty and Legal Reform in the PRC” (1987) Fall Journal of Chinese Law 303 at 307 [hereinafter “Legal Reform in the PRC”].

7 *Ibid.* at 306.

8 See Internal Perspectives, *supra* note 3 at 213–221 for a helpful chart that lists the Qing Code’s death-eligible crimes.

9 Death by slicing involved the executioner making dozens of slices on the defendant’s body, presumably letting him or her bleed to death. While strangulation likely made for a more prolonged death than decapitation, the latter was considered the more severe punishment; traditional tenets of Chinese filial piety viewed the body as a bequest from the parents and was therefore not to be mutilated.

fair hearing could send a special petition requesting reexamination of his case to the Censorate, the Board of Punishments, or the Commandant of Gendarmerie in Peking. The appeal could proceed provided that the case at the lower level was complete, that the appeal was made to the superior in charge of the official whose decision was being disputed and that a serious matter was at issue. Those officials in Peking receiving the appellate petition could either refer the case to the Emperor or send it back to the governor of the province in which it had originated. However, this second option meant that appeals were often returned to officials who had heard the case previously. Officials, facing the possibility of sanctions for their errors, were unlikely to find fault with their earlier rulings. Even in those instances when special imperial commissions were established to review cases, they often had to "rely on the very local officials whose work they would be scrutinizing."¹⁰ In addition to these structural problems, there were other practical impediments to the appeal process: "the complainant was himself subject to punishment either if he failed to exhaust all legal procedures at the lower level before appealing higher, or if his accusation were found to be untrue."¹¹

IMPERIAL USE OF THE DEATH PENALTY FOR CRIMES THAT THREATENED "STATE SECURITY"

In imperial China, it was believed that strong leadership was necessary for the maintenance of a stable environment. From such conditions would arise the Confucian ideal of social harmony. The substantive law of the dynastic codes was one of several tools used to uphold the leadership of the impe-

rial government. Of greatest concern to lawmakers were those matters that threatened the security of the state and, consequently, the preservation of the social order. As Jones points out in his discussion of the Ch'ing (Qing) Code:

[T]hat part of the Chinese Code that looks like criminal law to us was, in China, very much a part of the governing apparatus of the state.... Rules which punish murder or theft... have a very different meaning when the [sic] operate in a system which punishes violations of individual rights as opposed to one which punishes interference with the administration of the Confucian empire.¹²

Many of the provisions in the Board of Punishments section (the part of the Code said to deal with "criminal" law) involved crimes against the state. For example, the section on robbery and theft included provisions on treason and stealing public property. The homicide section had a provision for the killing of a government official. The entire bribery and corruption section was a collection of offences against the state, while the part of the Code dealing with deception and fraud consisted mostly of offences of forgery of government documents. Given this preponderance of provisions dealing with crimes against the state, it is not surprising that some of the harshest punishments in the Qing Code "were reserved for those crimes that were regarded as threatening the continued existence of the state."¹³ Compare, for example, Article 290 of the Qing Code, which prescribed death by strangulation for those who committed manslaughter, to Article 254, which

10 William P. Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China" (1984) 72 *California Law Review* 1180 at 1232.

11 See Derk Bodde & Clarence Morris, *Law in Imperial China* (Cambridge: Harvard University Press, 1967) at 118 [hereinafter "Bodde & Morris"].

12 William C. Jones, "Studying the Ch'ing Code—The Ta Ch'ing Lu Li" (1974) 22 *American Journal of Comparative Law* 330 at 354-355.

13 See *Internal Perspectives*, *supra* note 3 at 201.

prescribed not only death by slicing for those who plotted rebellion, but also the beheading of all male relatives living in the same household as the accused.¹⁴

MITIGATED SENTENCING IN IMPERIAL TIMES

Despite the possibility of harsh sentences, procedural limitations placed on the employment of the death penalty reduced the general severity of the Codes and provided some protection for defendants. Because the death penalty held such strong repercussions for social harmony, it was necessary that the time, place and method of punishment be given due consideration. Some of the reasons for the methods of execution (strangulation, beheading and slicing) have already been discussed. As for the time, it was believed that executions should only take place in the fall or winter because these were the seasons of death and decay. Even then, executions were prohibited on various holidays such as the solstices and equinoxes. This left less than two months of the year (at least according to the Tang Code of 653) when death sentences could be carried out. While not outright amnesties, these postponements may have provided some prisoners with further opportunities to have their cases reconsidered. In other discussions of mitigated sentencing, it has been noted that “[r]eflecting prevailing social mores, the imperial codes generally prohibited the death penalty for the mentally or physically disabled, minors and the elderly, ‘sole representatives’ (only sons), and criminals in other special categories.”¹⁵

Besides these procedural limitations that applied to all equally, elites charged with

capital offences benefited from the application of entirely different standards. Article 3 of the Qing Code, entitled “The Eight [Categories of Persons Whose Cases are to be Especially] Considered,” distinguished nobility and officials (both civilian and military) from the rest of the populace. These people (and their immediate family members) could not be investigated, arrested or tortured without the approval of the Emperor himself. Those found guilty would have their sentences considered by the Emperor for possible mitigation. The sentences normally given to commoners (including death) were often commutable to monetary fines, demotion or dismissal from the civil service for these privileged classes.¹⁶

PUNISHMENT OF OFFICIALS IN IMPERIAL TIMES

Despite the leniency accorded to officials by the aforementioned “Eight Categories,” there was a cost involved. According to Confucian tenets, government was to lead by moral example; officials, because they were viewed as embodiments of the imperial authority, were no different. Those officials who did not live up to their moral obligations were at times subject to harsher punishments for the same offence than were non-officials. An official who consorted with a prostitute, for example, was said to have “shown himself lacking in moral restraint and [had] disgraced his position as an official.”¹⁷

Besides the requirement that they act as morally upright examples for the rest of the population, officials also had to obey those provisions in the Codes that related specifically to their official duties. Officials who suggested overly lenient punishments,¹⁸ rendered wrong

14 *The Great Qing Code*, trans. William C. Jones (New York: Oxford University Press Inc., 1994) at 276 & 237 [hereinafter “Great Qing Code”].

15 See Legal Reform in the PRC, *supra* note 6 at 307.

16 See Bodde & Morris, *supra* note 11 at 34–35.

17 *Ibid.* at 435.

18 *Ibid.* at 330.

judgments,¹⁹ or cited laws and orders incorrectly²⁰ were subject to punishment—usually a certain number of strokes of the light bamboo. In particular circumstances, however, the punishment could involve death.²¹

Those officials who did not live up to their moral obligations were at times subject to harsher punishments for the same offence than were non-officials.

COMMUNIST CHINA

The last imperial dynasty, that of the Qing, came to an end in 1911. For the next four decades or so, uncertainty ruled China as competing forces controlled different regions of the country at different times. First the Nationalists, under the leadership of Chiang Kai-shek, came to power in 1927. Their reign, however, was short-lived, hindered by feuding warlords, the invasion of the Japanese, economic strife and civil war with the Communists. Eventually, the Chinese Communist Party came to power, founding the People's Republic of China in 1949.

Initially, the Communists, having abolished all Nationalist laws and judicial organs, borrowed heavily from Soviet legal institutions. But despite their attempts to establish a systematic socialist legal system (particularly in the mid-1950s), the Communists, like the Nationalists before them, faced severe economic hardships and security challenges (both internal and external) that would eventually limit their ability to experiment with judicial processes. Eventually, the party began to supercede the courts in the task of meting out punish-

ment. The use of party rhetoric and ideological policies ruptured during the chaos of the Great Proletarian Cultural Revolution (1966–76), when a massive purge was launched of all those who opposed Chairman Mao Zedong. Tens of thousands were persecuted, the formal legal organs having lost control over social order and the administration of justice. As with earlier mass campaigns, summary trials were often immediately followed by mass executions. Normalcy would only be restored in 1977 following the death of Mao and the purge of the “Gang of Four.”²²

Faced with increasing crime rates, economic pressures, external demands to liberalize and internal dissension after the anarchy of the Cultural Revolution, legal modernization was deemed to be of great importance by the Deng Xiaoping administration. The courts, procuracy and legal education all needed to be restructured, having been severely damaged during the Cultural Revolution. Consequently, some of the first pieces of legislation promulgated under Deng's leadership were the Criminal Law and Criminal Procedure Law of 1979. These laws enhanced the predictability and fairness of the PRC's criminal justice system, providing for such things as appellate review and suspended death sentences, while denouncing public executions.

Not long after their promulgation, though, the Chinese leadership initiated numerous campaigns to combat crime, and many of the newly legislated procedural safeguards were stripped away. The right to approve death sentences was given to the higher people's courts of the provinces, suspending the Supreme People's Court's mandated review of capital cases. The time

19 *Ibid.*

20 See Great Qing Code, *supra* note 14 at 396.

21 *Ibid.* at 381. Officials who wrongly increased a penalty to death and the sentence was carried out (or, conversely, wrongly decreased a death penalty and the offender was released) were to be executed.

22 See Post-Tiananmen, *supra* note 5 at 998.

limit for appeals was reduced from 10 to three days. The number of offences punishable by death more than doubled from his initial 21 (seven ordinary and 14 “counterrevolutionary” crimes). Mass sentencing rallies and swift executions were once again commonplace; these were often evidenced by the posters that hung in public squares publicizing the names and photos of the condemned, red check-marks indicating those sentences already carried out. This suspension of procedural safeguards continued right up until the amendments of 1996 and 1997, gaining particular attention after the Tiananmen massacre of June 4, 1989.



promulgation of the amended Criminal Law and Criminal Procedure Law.²⁵ In a similar vein, Boxer focuses on China’s inevitable accession to the World Trade Organization as the main reason for the legal reforms. As he notes: “The global development of the Chinese economy compels China to develop a corresponding legal system capable of handling the complex issues that such a business environment presents.”²⁶

In 1983, the Chinese government launched a massive “anti-crime campaign.” Central to the campaign’s success were the streamlined procedures that accompanied it.

WHY THE NEED FOR AMENDMENTS?

After Tiananmen, the PRC found itself the target of much condemnation by an outraged international community. While the enormity of the Chinese market was a great attraction for foreign investors, it was accompanied by the knowledge that the PRC was a country with a penchant for abandoning procedural safeguards.²³ Investors needed predictability for their interests and foreign governments demanded accountability for human rights atrocities.²⁴ Monthly suggests that it was those sorts of foreign pressures that led to the

Others still have discussed political reasons for the amendments. China Rights Forum notes that, for example, the continued existence of “counterrevolutionary” crimes in the 1979 Criminal Law was “an international liability, as it was an easy target for outside condemnation and a hindrance to cooperation on legal issues more generally” (e.g. cooperative cross-border judicial relations needed for extraditions).²⁷ Added to these reasons is the more mundane, yet equally valid, notion that 17 years had passed, circumstances had changed

23 See *ibid.* at 1002, where Lepp discusses the pattern of abandoned procedural safeguards: “In times of greatest threat, during which external pressures undermine the authority of the leaders, criminal punishment has been susceptible to greater arbitrariness, capriciousness, and brutality. Conversely, a relatively peaceful and complacent environment has enabled a more regularized legal system to dispense more predictable and often more lenient punishments.”

24 Human rights issues continue to be the topic of discussion between many foreign governments and the PRC. See, for example, “Talks on China Human Rights” *Australian Financial Review* (11 August 2000) discussing the fourth annual Australia-China human rights dialogue; “Beijing Continues To Go Its Own Way” *Bangkok Post* (2 October 2000) discussing the biannual European Union-China talks on human rights; and “Germany Stresses No to Death Penalty in Talks with China” *Deutsche Presse-Agentur* (18 October 2000).

25 See *Internal Perspectives*, *supra* note 3 at 211.

26 See “Undermining Legal Reform”, *supra* note 3 at 607–608 (footnote 77).

27 “Whose Security?: “State Security” in China’s New Criminal Code” (Summer 1997) China Rights Forum, online: China Rights Forum <<http://www.hrichina.org/crf/english/97summer/e8.html>> (date accessed: 7 Nov. 2000) [hereinafter “Whose Security?”].

considerably and new economic and legal trends had developed, all requiring a revamping of the criminal laws.²⁸

In the past, the provisional sentences handed out by local magistrates in imperial China required the approval of those above them; so, too, the death sentences imposed by present-day local courts need to be reviewed by a higher authority.

THE APPEAL PROCESS

In 1983, the Chinese government launched a massive “anti-crime campaign.” Central to the campaign’s success were the streamlined procedures that accompanied it. In 1981, the Supreme People’s Court’s approval for death sentences was suspended in cases of murder, rape, robbery, arson and other crimes. Instead, the higher people’s courts of the provinces and municipalities could approve these sentences.²⁹ This was followed in 1983 by a decision to reduce the time limit for death

penalty appeals from ten to three days.³⁰ Articles 183 and 200 of the revised Criminal Procedure Law essentially repeal these measures. Article 183 renews the ten-day limit for appeals that was first legislated under the 1979 CPL. And like its 1979 counterpart, Article 200 stipulates that a capital case first tried by an intermediate people’s court must be reviewed by a higher people’s court before being submitted to the Supreme People’s Court for approval. In those instances when the court of first instance is a higher people’s court, the case must still be submitted to the Supreme People’s Court for approval.³¹ As Boxer notes, “This separation of power is a critical move toward the elimination of the summary trial.”³² However, according to Amnesty International, these provisions are easily emasculated as “the Supreme People’s Court can delegate its power to approve death sentences to the provincial high courts in some cases.”³³ Consequently, the approval process is often rendered valueless as it can become amalgamated with the higher court’s review process.³⁴ Even more blatantly ineffective are those cases where a higher court is the court of first instance; the initial sentencing and approval of the sentence may be done concurrently.³⁵

28 See Cai Ding Jian, “Commentary: China’s Major Reform In Criminal Law” (1997) Spring Columbia Journal of Asian Law 213 at 213. Cai, Division Chief for the Research Department of the Standing Committee of the National People’s Congress notes that the Criminal Law of 1979 “focused largely on principles and was comprised of definitions that were unduly formalistic as well as containing many loopholes.” In the intervening years:

the National People’s Congress adopted 22 ordinances and decisions that amended or supplemented the criminal statute. In addition, it adopted 130 articles regarding criminal liabilities in context of civil, economic, and administrative law. The Reform Bill on Criminal Law was formulated out of the accumulated experiences from the enactment of criminal laws over the past 17 years, the research conducted on criminal laws of various foreign countries, and the studies made on modern criminal legislation and developmental trends.

29 Decision of the Standing Committee of the National People’s Congress Regarding the Question of Approval of Cases Involving Death Sentences (adopted 10 June 1981).

30 Decision of the Standing Committee of the National People’s Congress Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security (adopted 2 Sept. 1983).

31 Article 48 of the Criminal Law also states: “Except for judgments made by the Supreme People’s Court according to law, all sentences of death shall be submitted to the Supreme People’s Court for approval.”

32 See “Undermining Legal Reform”, *supra* note 3 at 610.

33 See “Law Reform”, *supra* note 2.

34 See for example “Murderer of 3 Pupils Executed in Central China City” *Xinhua English Newswire* (17 April 2000) [hereinafter “Murderer of 3”] where it was reported: “The Higher People’s Court of Henan Province then checked and approved the death penalty for Xin Xiangwu...” (emphasis added).

35 For a confusing example see “Woman Gets Death Penalty for Children-Trafficking” *Xinhua English Newswire* (28 May 1998) where the defendant was executed the same day that she was sentenced by the municipality’s First Intermediate People’s Court, yet somehow the sentence had been “approved by the Higher Court of the city earlier.”

While a defendant's appeal cannot result in a harsher punishment, both the procuratorate and the victim's family can appeal a sentence they think is too lenient. Although successful appeals by defendants are said to be rare, it is common for appeals by these others to result in increased penalties.³⁶ Perhaps most startling, though, is the swiftness of the appeal process. For example, the April murder of a German family of four resulted in July death sentences for the defendants; they were executed September 27, the same day the higher court rejected their appeal.³⁷ Another case involved the murder of three children on February 27, 2000; by April 17, the defendants had been tried, their appeals heard and reviewed, and the one defendant sentenced to death was executed.³⁸

In the past, the provisional sentences handed out by local magistrates in imperial China required the approval of those above them; so, too, the death sentences imposed by present-day local courts need to be reviewed by a higher authority. Unfortunately, the substantive law and its practical effects seldom parallel one another. While today's higher courts are not subject to punishment for the incorrect decisions of those below them, they continue to rubber-stamp lower courts' decisions, just as imperial courts once cursorily reviewed cases.

**"COUNTERREVOLUTIONARY" vs.
"STATE SECURITY" CRIMES**

Once, during a campaign to suppress counterrevolutionaries within the party, government, schools and army, Mao Zedong aptly noted the danger of false arrests: "Once a head is chopped off, history

shows it can't be restored, nor can it grow again as chives do, after being cut."³⁹ This acknowledgement of the fragility of human life, however, was belied by Mao's frequent use of the death penalty against those who dared to oppose him or the Communist Party. Most victims of such political purges were labeled counterrevolutionaries. This term was codified in the Criminal Law of 1979 when 12 counterrevolutionary offences, both violent and non-violent, were listed (Articles 90 to 104). The removal of these offences from the 1997 amended law, then, has not gone unnoticed.

At first blush, the removal of counterrevolutionary crimes may be thought to signal greater respect for the rule of law. At the same time, critics like the China Rights Forum argue that "in fact, China has merely replaced the term 'counterrevolution' with the equally elastic notion of 'endangering state security' and has, in the process, actually broadened the capacity of the state to suppress dissent."⁴⁰ Thus, in addition to those serving time for counterrevolutionary crimes, there are now state security offenders (Articles 102 to 113). Perhaps the government hoped that, without actually having to release any political prisoners, the simple replacement of the politically charged term with something more innocuous would help to alleviate some of the pressure coming from foreign sources. However, both the China Rights Forum and a Chinese government official, admittedly for different reasons, instead point to the difficulty that existed with the earlier legislation's requirement that the prosecution prove the defendant's "subjective counterrevolutionary purpose." The former is of the opinion that the removal of this requirement

36 See "Peoples Republic of China: the Death Penalty in 1998" (1999) Amnesty International, online: Amnesty International <http://web.amnesty.org/_802568f7005c4453.nsf/747054d43f9328025693e00500113/8203acb0a0173bc8025690000692fa0!OpenDocument> (date accessed: 23 Sept. 2000) [hereinafter "Death Penalty '98"].

37 See "China Executes Four for Family's Murder" *The Washington Post* (27 Sept. 2000).

38 See "Murderer of 3", *supra* note 34.

39 See Mao Tsetung, *On the Ten Major Relationships* (Peking: Foreign Language Press, 1977) at 23.

40 See "Whose Security", *supra* note 27.

was “in part intended to facilitate convictions,” as it meant one less thing for the prosecution to prove.⁴¹ Wang Shangzin, however, speaks of the inclusion of “counter-revolutionary” as having hindered the prosecution of state security crimes that “faced no clear charge or punishment in the law books in the past.”⁴²

Whatever the reasons for the change from counterrevolutionary to state security, eight of the 12 articles are of particular relevance as they are punishable by death. Of greatest concern to critics is the possibility that the lack of a definition for “endangering state security” will result in these provisions being used to condemn a wide variety of activities. “Both entirely non-political actions—such as [prominent dissident] Wang Dan’s providing humanitarian assistance to families of imprisoned dissidents—as well as political actions, can potentially be dealt with under the judicial rubric of ‘endangering state security.’”⁴³ Meanwhile, those in ethnic minority regions are concerned with Article 103, which appears to have created the distinct crime of separatism. Amnesty International has already noted a steady increase in the number of ethnic Uighurs sentenced to death in Xinjiang province for this crime.⁴⁴

Although the notion of strong leadership continues to be of importance in modern China, as it was in imperial China, its explicit goal is no longer the Confucian ideal of social harmony. Rather, legitimization of the state’s authority is required in order to create the necessary stable environment that will attract

foreign investors and quell criticism. The state has chosen to establish its primacy both through the creation of state security offences and their subsequent harsh punishment. The new law’s use of the term “endangering state security” in place of the older, more politically charged “counterrevolutionary,” is nothing more than a substitution in vocabulary. Contrary to any so-called reformative purpose, these provisions are similar to their correlative 1979 articles, if not broader in scope.

MITIGATED SENTENCING

Those who have been tried and convicted must inevitably be sentenced. While a variety of punishments exist, the PRC is perhaps most famous (or rather, infamous) for its use of the death penalty. Despite the introduction of the use of lethal injection in the 1996 Criminal Procedure Law, the most common method of execution involves a single bullet to the back of the head.⁴⁵ More than 60 separate offences in the amended Criminal Law of 1997 include execution as a possible sentence. Amnesty International estimates that in 1998, 2,701 death sentences (an average of 51 per week)⁴⁶ were handed down and 1,769 executions carried out. While there is some room for mitigation of this sentence, particular trends have, in fact, resulted in the frequent application of the death penalty.

One form of alleviation came from the 1997 Criminal Law’s repeal of any form of the death penalty for pregnant women and those who were under the age of 18 when the

41 *Ibid.*

42 Wang Shangxin, deputy director with the Criminal Law Department of the Legislative Affairs Committee under the Standing Committee of the National People’s Congress, quoted in “China: Revised Criminal Law Clarifies Court Procedure” *China Daily* (20 Oct. 1997).

43 See “Whose Security”, *supra* note 27.

44 “Peoples Republic of China: the Death Penalty in 1997” (1998) See Amnesty International, online: Amnesty International <http://web.amnesty.org/_802568f7005c4453.nsf/747054d43f9328025693e00500113/8e0da9c9e68f09d68025690000692d58!OpenDocument> (date accessed: 23 Sept. 2000) [hereinafter “Death Penalty ‘97”]; and “Death Penalty ‘98”, *supra* note 36.

45 See “Post-Tiananmen”, *supra* note 5 at 1015 for a description of a modern execution.

46 See “Death Penalty ‘98”, *supra* note 36.

offence was committed. Previously, these two categories of offenders could have faced suspended death sentences (*sihuan zhidu*).⁴⁷ Also known as a two-year reprieve, this sentence postponed the death penalty for two years, during which time the prisoner would be observed. Those prisoners who demonstrated evidence of “reform” over the period could have their sentence commuted to life or fixed-term imprisonment. No standards for evaluating the prisoner were ever codified. After the 1997 amendment, execution or commutation of the death sentence now depends on whether or not the prisoner has “intentionally committed crimes” during the period of suspension (Article 210). The revised law does not, however, specify what types of new crimes might warrant carrying out of the death sentence.⁴⁸

Despite the fact that most suspended death sentences are eventually commuted to life imprisonment, this form of punishment is not without reproach. The indefinite renewal of the two-year suspension or the eventual execution of the criminal who waited those years with hope of reprieve may be considered inhumane.⁴⁹ Another criticism is that the largely white-collar crimes of corruption, embezzlement and fraud, when compared with other capital crimes, are more frequently punished by the two-year reprieve; this is significant knowing that regular death sentences tend to be disproportionately imposed on those with little education and social standing.⁵⁰ Whatever

the potential benevolence behind its use and the possible benefits that might accompany it, any sense of mitigation is diminished by virtue of the fact that the two-year reprieve is used considerably less often than the death sentence; compare 200 two-year reprieves with 2,701 death sentences in 1998.⁵¹

One reason cited for the recent number of death sentences and executions is the nationwide strike-hard (*yanda*) anti-crime campaign. First launched in 1996, the campaign continued throughout 1997 and 1998,⁵² targeting specific crimes like drug trafficking, separatism in Tibet and Xinjiang, tax fraud and corruption. Later, many local or regional campaigns also took hold. Crimes committed during the strike-hard campaign were supposedly dealt with more seriously than their pre-campaign counterparts.⁵³ This harsher treatment was justified as a means to punish criminals for having flouted the policy in the first place. Another reason had to do with the pressure faced by local officials to achieve speedy results; penalties resulted for those who did not promote the campaign zealously. Some provinces, eager to prove their enthusiasm, were said to have retried and sentenced to death offenders previously sentenced to fixed-terms of imprisonment, while others imposed the death penalty for the first time for specific crimes. Particularly harsh punishments were imposed on those with a previous criminal conviction or record of administrative penalty.⁵⁴

47 Amnesty International is aware of some cases where the defendant's age was in question or where the defendant was in fact under 18 at the time the offence was committed, yet still received the death penalty. See “Death Penalty '98”, *supra* note 36.

48 See “Law Reform”, *supra* note 2.

49 See “Legal Reform in the PRC”, *supra* note 6 at 314.

50 See “Death Penalty '98”, *supra* note 36.

51 *Ibid.*

52 No specific information is available about whether or not the strike-hard campaign continued into 1999 and 2000; however some targeted campaigns are known to exist, suggesting a continuation in one form or another of the strike-hards. See “Fair, Efficient Justice Promised” *China Daily* (11 March 2000) [hereinafter “Fair Justice”], discussing the crackdown on corruption.

53 See “Death Penalty '98”, *supra* note 36.

54 See “People's Republic of China: At Least 1,000 People Executed in 'Strike Hard' Campaign Against Crime” (1998) Amnesty International, online: Amnesty International <<http://www.amnesty.org/ailib/intcam/dp/country/hard.htm>> (date accessed: 23 Sept. 2000).

In addition to the harsher treatment of crimes during the strike-hard campaign, Amnesty International has identified another phenomenon responsible for the high rates of capital punishment: sentencing peaks. Often before major events, public holidays and anniversaries, the authorities will sentence and execute more prisoners than usual.⁵⁵ Anti-Drugs Day on June 26, National Day on October 1 and Chinese New Year tend to be popular sentencing periods. This pattern is an interesting contrast with imperial times when holidays prohibited any executions.

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PUNISHMENT OF CORRUPT OFFICIALS

Hundreds of years ago, the Qing Code legislated particular methods for dealing with officials who committed crimes. These people, known as “The Eight [Categories of Persons Whose Cases are to be Especially] Considered,” were often accorded more lenient punishments simply because of their status. Although this special category ceased to exist with the fall of the Qing Dynasty in 1911, the mitigating influence of power and privilege was not rendered obsolete. While those who criticized Mao were often labeled as counterrevolutionaries and subject

to harsh punishments, those properly connected to the authorities could do no wrong.⁵⁶ This lenient punishment of corrupt officials that first took root in imperial China and continued through to the days of the PRC only ceased to exist in the early 1980s when anticrime campaigns began to crack down on those with power and privilege. Symbolic of Deng’s desire to implement legal reform, the anticrime campaigns spared no one, not even Communist Party cadres and their family members.⁵⁷ No longer could officials buy their way out of punishment; all who committed crimes were subject to the same penalties, including the possibility of capital punishment for those offences considered heinous.

The campaigns to end corruption do not appear to have subsided in the past few years. In fact, Chinese government statistics released in March 1998 revealed that corruption proceedings had increased by ten percent to more than 40,000 investigations and 26,000 indictments. (Perhaps most ironic was the dismissal of the head of the Anticorruption Bureau of the Supreme People’s Procuratorate in January 1998 for corruption.)⁵⁸ Most recently, the president of the Supreme People’s Court identified bribery and embezzlement of public funds as two particular targets for corruption crackdowns.⁵⁹ In implementing these crackdowns, officials at all levels have not been spared from the harshest of punishments. Huang Faxiang, a local official in charge of building new towns for people relocated by the Three Gorges Dam project, was sentenced to death for misappropriating

55 See “Death Penalty ’98”, *supra* note 36 and “Death Penalty ’97”, *supra* note 44.

56 Privilege, however, was a tenuous characteristic; those within the inner circle could easily fall out of favour with Mao. Deng Xiaoping for instance, once Chairman of the Secretariat and General Secretary of the Party, was purged at the beginning of the Cultural Revolution.

57 See “Post-Tiananmen”, *supra* note 5 at 1030.

58 “1999 Country Reports on Human Rights Practices” (Feb. 25, 2000) U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, online: U.S. Department of State, Bureau of Democracy, Human Rights, and Labor <[ftp://ftp.state.gov/DOSFTP/pub/hrct/_1999/04_East_Asia_and_Pacific/China](http://ftp.state.gov/DOSFTP/pub/hrct/_1999/04_East_Asia_and_Pacific/China)> (date accessed: 27 Oct. 2000).

59 See “Fair Justice”, *supra* note 52.

more than a million dollars of the project's funds.⁶⁰ Hu Changqing, former deputy governor of Jiangxi Province, was sentenced to death for accepting thousands of dollars' worth of bribes.⁶¹ Even former vice-chairman of the NPC Cheng Kejie was executed in September 2000 for accepting millions of dollars worth of bribes.⁶² Cheng's execution was said to have spurred an appeal by one party cadre to eliminate death sentences for party officials, but as evidence of the state's commitment to go after both "flies and tigers," President Jiang Zemin and Premier Zhu Rongji quickly rejected the idea.⁶³

Until now, this examination of substantive laws and their practical implications has revealed few parallels. While the substantive provisions often appear to be modern or reformative, their practical implications usually lag far behind, seldom differing from their imperial ancestors. Only with regard to corrupt officials do the two finally concur; like the anticorruption crackdowns carried out by the state, the 1997 Criminal Law is equally intolerant of corrupt individuals. The Criminal Law's Chapter Nine ("Crimes of Dereliction of Duty") is entirely devoted to the problem of corrupt officials, each article particularly detailed in its application. Compare, for example, Article 416 "State organ personnel charged with the responsibility of rescuing abducted or kidnapped women and children..." with Article 414 "State organ work personnel charged with the responsibility of establishing liabilities of criminal acts relating to the sale of fake and shoddy merchandise...." A separate offence

seems to have been created for every type of state official known to exist (e.g. customs personnel [Article 411]; quarantine personnel [Article 413]; public health administrative department personnel [Article 409], etc.). Intentional acts of "favouritism and malpractice" have been distinguished from negligent acts of "serious responsibility"; the former, not surprisingly, demand a stricter punishment.⁶⁴ The chapter's harshest punishment, however, consists of no more than ten years' imprisonment.

The expansion of time for appeals from three to ten days and the notion of a death penalty with reprieve are positive steps towards China's acceptance of international standards.

Besides Chapter Nine, there are other provisions scattered throughout the Criminal Law that pertain only to officials. Many are found in Chapter Eight, "Graft and Bribery." Article 383 defines the crime of "graft", while Article 384 sets out the related penalty that varies with "the seriousness of the case," i.e., the amount of money involved. "Especially serious" instances of graft over 100,000 yuan can result in capital punishment. The same punishment scheme exists for those who commit bribery (Article 386). Not all provisions dealing with officials who abuse their power entail "state interests." Chapter Four, "Crimes against Human and Civil Rights", includes particular provisions concerning official abuse of power and its effect on

60 See "Official Pays Dearly for Crime" *China Daily* (15 March 2000).

61 See "Official Sentenced to Death" *China Daily* (16 February 2000).

62 See "The Fight Against Corruption" *China Daily* (21 Sept. 2000).

63 See "Clemency for Top Officials Rejected; Leaders put Weight Behind Death Penalty to Scare Off Big-Time Graft Offenders, Despite Purge Fears" *South China Morning Post* (22 Sept. 2000).

64 Compare, for example, Article 412 paragraph 1: "Work personnel with state commercial inspection departments or organizations, who practice favouritism and malpractice and forge inspection results, shall be punished with imprisonment or criminal detention of less than five years..." and paragraph 2: "Work personnel mentioned in the preceding paragraph, who, because of serious irresponsibility, fail to inspect goods requiring inspection, or delay inspection and issuance of certificates, or wrongly issue certificates resulting in serious losses to state interests, shall be punished with imprisonment or criminal detention of less than three years."

others. In illustration, Article 238 provides that an employee of a state organ who abuses his or her authority and unlawfully detains a person (whether or not serious injury or death results) "is to receive a heavier punishment" as compared with any other offender. Similarly, Articles 247 and 248 deal respectively with judicial personnel who torture suspects to extract confessions and prison officials who beat prisoners; those causing serious deformity or death may receive death sentences.

Whereas the death penalty's repercussions on social harmony were once strong enough to limit executions to less than two months of the year, a desensitization has taken hold.

While laws against corrupt officials are not novel, the PRC's enforcement of such measures is new. Fewer than 20 years ago, the favouritism once explicitly set out in the Qing Code manifested itself among those privileged to have ties to the Communist Party. Anticorruption crackdowns, however, in tandem with substantive law reforms, have done away with these distinctions. Finally, the parallelism of the Criminal Law and its practical implications might be said to live up to the label of "reform."

CONCLUSION

The juxtaposition of modern Chinese criminal laws and their historical counterparts reveal some instances of modernization. Today, there are fewer death-eligible crimes than the 100 or so found in each dynastic code, and the methods of execution are perhaps no longer as drawn out as they once used to be. The unequal application of laws for particular groups of people also appears to have been abolished in all practicality. Other changes to the CPL and Criminal Law, incomparable with imperial laws

because these issues were never documented in imperial treatises (e.g. role of the court president), point to significant improvements from their preceding incarnations. The expansion of time for appeals from three to ten days and the notion of a death penalty with reprieve are positive steps towards China's acceptance of international standards.

Yet, on examination, the same contemporary laws, particularly when compared with their practical effects, are demonstrative of a stagnancy that plagues the Chinese criminal justice system. While not in the hundreds, the categories of death-eligible crimes are more numerous than those first listed in the Criminal Law of 1979. Any notion of an obligatory review system has been lost in the amalgamation of reviews and approvals. In fact, sometimes the most recent laws appear to have regressed beyond anything imaginable in imperial times. Whereas the death penalty's repercussions on social harmony were once strong enough to limit executions to less than two months of the year, a desensitization has taken hold. The speed of the process can now take an offender through his trial, sentencing, appeal and execution in a matter of days or weeks. Seasons and holidays which once expressly forbid judicially sponsored death sentences, are now reasons to impose such sentences and to carry out executions. The possible number of offenders facing the death penalty is larger than in imperial times now that the number of groups exempt from execution has dwindled to two.

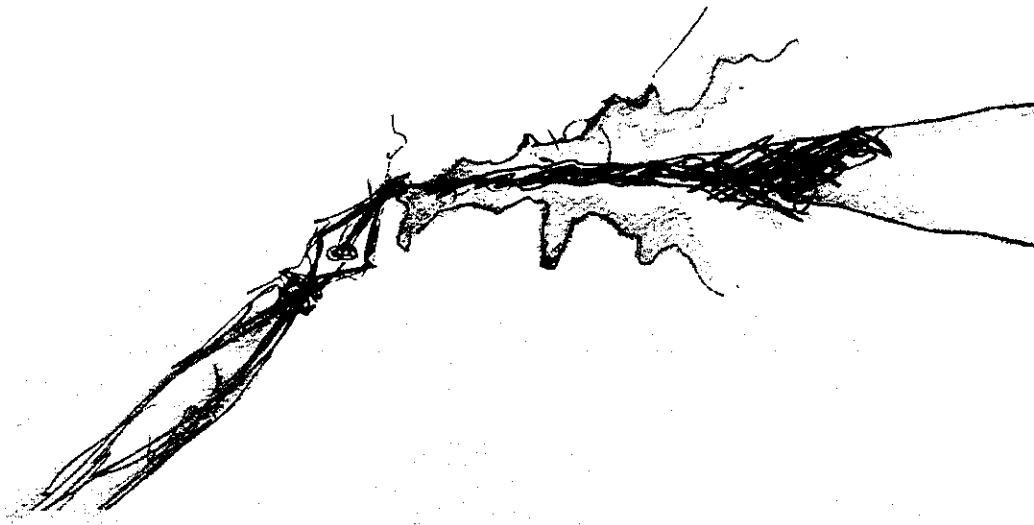
Admittedly, the four areas of law taken into consideration in this article provide only the briefest of introductions into the Chinese criminal justice system. Chosen quite randomly, these four aspects are not necessarily representative of the system as a whole. Chinese and Western scholars alike, in examining different criteria, have described the 1996 Criminal Procedure Law and the 1997 Criminal Law as "point[ing]

in a positive direction,"⁶⁵ "hav[ing] important implications for China's observance of international standards,"⁶⁶ and "increas[ing] the protections for people detained under the criminal justice system."⁶⁷ Issues such as increased access to counsel, limitations on non-judicial determinations of guilt, and the abolishment of punishment by analogy are deservedly hailed as signals of China's evolution towards internationally acceptable norms. But only in comparing these measures with their historical counterparts can one decide whether they are truly worthy of the label reform.

The imbalance between the substantive laws and their practical effects, as identified in this article, are only indicative of the lack of reform intended by the amended Criminal Law and Criminal Procedure Law. Past cycles of openness in China have been followed by violent crackdowns. Arguably, it is just a matter of time before another anticrime campaign strips away any last vestiges of procedural safeguards. The government's silence about individual rights,

particularly when compared with the new laws' concern for state and economic interests, is not encouraging either. A simple historical analysis quickly reveals the transparency of any evolution.

Rather than temporarily appeasing the international community with so-called amendments, the PRC should be making some kind of real attempt to move beyond its past. Monthly's description of the 1997 Criminal Law, equally appropriate for the Criminal Procedure Law, perhaps said it best: "[W]e can view the significant measure as a Janus-faced stab at pleasing both chive-cutters and legal reformers."⁶⁸ If it was the watchful eye of foreign economic and political pressures that motivated these most recent changes in the first place, China cannot seriously expect that the same international community will be satisfied with only the most cosmetic of changes. On the contrary, as China continues to open its doors, it is likely to come under more detailed scrutiny. In the next few years, we will wait anxiously to see if the garden is left to grow. ■



65 See "The Revised Criminal Procedure Law: Will it Mean What it Says?" (1996) China Rights Forum, online: China Rights Forum <<http://www.hrichina.org/crf/english/96fall/e4.html>> (date accessed: 23 Sept. 2000).

66 See "Opening", *supra* note 3.

67 See "Law Reform", *supra* note 2.

68 See "Internal Perspectives", *supra* note 3 at 194.

Cambodia's Response to the Khmer Rouge

War Crimes Tribunal vs. Truth Commission

Matthew J. Soloway*

INTRODUCTION

Numerous human rights atrocities have plagued the twentieth century. The mass genocide of the Holocaust, the killing fields of Cambodia, the ethnic cleansing of the former Yugoslavia and South Africa's apartheid will be remembered for the horror these events embedded in humanity. Yet, such massacres are not a new phenomenon. Human genocide and persecution motivated by race and religion date back thousands of years. What makes modern day human rights tragedies unique is the recent legal and political responses to these systematic violations. Specifically, two types of legal reactions have emerged: international or national war crimes tribunals and truth and reconciliation commissions. These responses signify an effort both to punish those individuals directly responsible for injustices and to serve notice to the international community that violations of human rights will not be ignored. Further, the establishment of tribunals and truth commissions functions to raise social awareness in order to prevent future atrocities by attempting to dissociate a present political climate from those of the past. Two factors have contributed to these developments. First, the post-Nuremberg growth of humanitarian laws of war crimes has expanded the number of offenses defined by international law. Second, the developing convergence of international humanitarian law and international human rights law in

relation to crisis situations has created a stronger relationship between two formerly distinct bodies of law.

... a truth commission would be a more effective alternative to the establishment of a war crimes tribunal in Cambodia.

In order to understand the nature and effects of these two types of legal responses it is necessary to examine their organization and function in a political and legal setting. This paper will examine the role of international war crimes tribunals in the context of past atrocities, for example in the former Yugoslavia and in Rwanda, as well as the use of truth commissions in South Africa and Central America. Applying the strengths and weaknesses of both approaches to the present day political situation in Cambodia, the paper will then determine whether the Cambodian government's decision to try former Khmer Rouge officials before a national tribunal is likely to be their most effective option. The approach to be taken is twofold: first, from a national interest perspective, is the tribunal likely to lead to domestic reconciliation? Second, from an international law point of view, is the establishment of a domestic war crimes tribunal an adequate response to the Khmer Rouge regime in comparison to a national truth commission?

This paper will argue that a truth

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commission would be a more effective alternative to the establishment of a war crimes tribunal in Cambodia.

HUMAN RIGHTS IN THE UNITED NATIONS ERA

The Nuremberg trials in 1945 forever changed the focus of international human rights movements. Upon liberating concentration camps in Europe at the end of World War two, the Allied governments established the International Military Tribunal (IMT) to prosecute Nazi officials. The prosecution represented an unprecedented effort to punish people accused of war crimes and crimes against humanity.¹ Prior to Nuremberg, nation states were the only recognized subjects of international law and jurisdiction over the types of offenses prosecuted at

Nuremberg had been limited to domestic courts. By focusing on the offenses of surviving members of the Nazi regime, the IMT sought to publicly condemn aggressive war using principles of international law. Thus, Nuremberg was revolutionary in that it held individuals personally responsible for actions considered international in nature. In doing so, the trial at Nuremberg helped spur an international movement for human rights that focused on individual responsibility for crimes with universal scope.

Despite the revolutionary development of human rights in the United Nations era,² international efforts to establish war crimes tribunals were virtually non-existent for the next forty years. Perhaps no attempts were made because many of the atrocities that took place, for example in Cambodia, did

1 (War Crimes Tribunals), online: Issues and Controversies on File < www.facts.com/icof/nazi.htm > at para. 3.

2 The definition of war crimes expanded in 1948 when the United Nations General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide, which specified that religious or racial genocide is an international crime. The following year, the four Geneva conventions were adopted for the protection of prisoners of war.

not occur in the context of international wars. Theodor Meron asserts that “internal strife and even civil wars are still largely outside the parameters of war crimes and the grave breaches conventions of the Geneva Conventions.”³ A more probable explanation for the lack of international efforts to respond to human rights violations is the opposing ideological perspectives dividing the international community as a consequence of the Cold War. In effect, these conflicting ideologies brought international co-operation to a standstill. However, since the end of the Cold War, there have been numerous international efforts to establish international war crimes tribunals to investigate human rights atrocities. Two of the most significant examples are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Before examining the effect of these tribunals, it will be beneficial to outline the objectives of international war crime tribunals.

WAR CRIMES TRIBUNALS

A war crimes tribunal is a “judicial body created to investigate and prosecute individuals accused of violations of human rights or humanitarian law in the wake of violent conflict.”⁴ Martha Minow, in her book, *Between Vengeance and Forgiveness*, argues that a trial in the aftermath of mass atrocity “announces a demand not only for accountability and acknowledgement of harms done, but also for unflinching punishment.”⁵ Specific objectives of war crimes tribunals are to exorcize a possible

culture of impunity by holding those who commit violations accountable and to publicly demonstrate that the national government and the international community will take action against those who commit gross human rights violations.

In 1993, the UN Security Council created the ICTY; the first international war crimes court since Nuremberg. The ICTY’s mandate was to prosecute individuals alleged of violations of humanitarian international law during armed conflict in the territory of the former Yugoslavia since 1991.⁶ Supporters of the ICTY argue that the tribunal was necessary in order to assign guilt for war crimes to individuals rather than assigning the blame on an entire nation or ethnic group. Critics, on the other hand, felt that the prosecution of individual leaders would hinder peace negotiations, as many of the leaders whose co-operation was needed to maintain political stability were themselves prosecuted.

In 1994, the Security Council established the ICTR to prosecute individuals responsible for violations of humanitarian law. The ICTR’S mandate calls on the commission to bring to justice those persons responsible for acts of genocide or other violations of humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states.⁷ The Preamble to the resolution states that the Council was convinced that prosecution of those responsible for serious violations would “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁸ Yet, one of the

3 Theodore Meron, *The Case for War Crimes Trials in Yugoslavia* 72 *Foreign Affairs* 122 (No. 3, 1993), at 123.

4 (Democracy and Deep Rooted Conflict), online: Institute for Democracy and Electorate Assistance <http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html> at chapter 4.10.

5 Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at p. 26.

6 “Security Council Resolutions on Establishment of an International Tribunal for the Former Yugoslavia” reprinted in 14 *Hum. Rts. L.J.* 197 (1993).

7 Statute of the International Tribunal for Rwanda, reprinted in 33 *I.L.M.* 1590 (1994).

8 Statute of the International Tribunal for Rwanda, reprinted in 33 *I.L.M.* 1590 (1994).

strongest criticisms of the ICTR is that it failed to end the genocide in Rwanda in 1994, leading to hundreds of thousands of deaths. Consequently, this perceived failure⁹ raises questions about a tribunal's ability to end on-going violations while utilizing its resources to indict those responsible for past crimes. Jose Alvarez argues that "for all their attention to the attribution of individual blame for these crimes," the international community "has not been attentive to wider circles of guilt."¹⁰ Alvarez's point is simply that international efforts to prosecute individuals, like the ICTY, fail to identify the factors leading up to the incidence of war crimes. In this sense, the underlying objectives of international efforts to establish tribunals compromise their own ability to understand the political and historical context of a situation and thus make it more difficult to accomplish their own goals of national reconciliation and the restoration and maintenance of peace. If the inability to examine a political situation in context is a weakness facing tribunals, it is a problem that can be addressed by adopting an alternative legal response to war crimes, namely, truth commissions.

TRUTH AND RECONCILIATION COMMISSIONS

Truth and reconciliation commissions have played a critical role in a number of countries, for example El Salvador,¹¹ when a

former regime has committed internal systematic human rights violations. The main purpose of a truth commission is to provide an accurate record of past human rights atrocities so that the truth can be integrated into a country's common history. There are at least four factors that suggest that truth commissions are valuable for the reconciliation process. First, while the documentation of human rights violations will generally serve to educate future generations, Angelika Schlunk, a trial attorney at the Federal Department of Justice in Germany, asserts that "this is especially true in situations where those who have survived the atrocities refuse to deal with the conflict"; as was the case for many survivors of the Holocaust.¹² Second, truth commissions provide a forum for victims to convey their stories while at the same time demonstrating a government's commitment to democratic ideals, thus facilitating change in the public's perception of the government. Third, according to Tina Rosenberg, truth commissions can "assist in the examination of individual responsibility," by helping people to "re-examine the choices they have made and the ones they could have made."¹³ She views this process as vital for building a democratic political culture. By acknowledging the violations of the past, both the new government and the private citizens accept their involvement and recognize the consequences of their action or inaction. Finally, the commission will report

9 A report by an international panel of experts claims that the UN made weak and equivocal decisions in the face of mounting disasters, while the United States persistently played down the problem. The report raises doubt on the effectiveness of the ICTR to deal with the actual crises it was created to respond to, specifically, genocide.

10 Jose Alvarez, "Crimes of States/ Crimes of Hate: Lessons from Rwanda" 24 *Yale J. Int'l L.* 365 (1999), at 441.

11 The "Commission on the Truth for El Salvador" was established pursuant to the Salvadoran Peace Accords negotiated with the support of the United Nations. Thomas Buergethalm, one of the appointed commissioners, reported that "one could not listen to them [the people who came before the commission] without recognizing that the mere act of telling what happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution."

Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at 68.

12 Angelika Schlunk, (Truth and Reconciliation Commissions), online: <www.nslaw.nova.edu/student/organisations/ILSAJournal/4-2/Schlur>

13 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 41.

its findings to the government. Such reports can publicly identify individuals responsible for human rights violations and recommend action to be taken.

Truth commissions have been widely used in Central and South America as a transitive tool from oppression to democracy.

While there is no standard model, Priscilla Hayner, in her book, *Unspeakable Truths—Confronting State Terror and Atrocity*, has identified several primary constitutive elements of a truth commission. Focusing on the past, a truth commission does not concentrate on a specific event but attempts to paint an overall picture of human rights violations over a period of time. Truth commissions aim to discover, clarify and formally acknowledge past abuses while responding to victims' particular needs.¹⁴ These objectives are common features of a truth commission; other elements vary to shape each particular commission. The investigative capacity given to commissions has ranged from extensive staffs armed with legal powers, to reliance on voluntary testimony that may or may not be verified.¹⁵ For example, the South African Commission was several times larger in terms of staff and budget than any previous commission.¹⁶ Therefore, to best illustrate the design features of various truth commissions it will be beneficial to examine their organization in a particular political and legal setting.

Truth commissions have been widely used in Central and South America as a transitive tool from oppression to democracy. In 1990, Chile established a "National Commission for Truth and Reconciliation" to investigate violations committed over the previous seventeen years of military rule. When the commission's report was distributed in 1991, Congress passed a unanimous resolution commending it, and all political parties acknowledged the truth of the facts investigated.¹⁷ Most of the relatives of victims interviewed stressed that what really mattered was to know the truth, "that the memory of their loved ones would not be denigrated or forgotten" in order to prevent future violations of human rights.¹⁸ The decision in Chile not to indict and prosecute individuals, but rather to promote reconciliation, reflects the view that tribunals are not designed to address victims and community needs, whereas those who worked on the report of the Chilean National Commission on Truth and Reconciliation became aware of "the cleansing power of the truth."¹⁹

Among the commissions established to date, Henry Steiner asserts that "potentially the most significant for a country's future operate[d] in South Africa."²⁰ The African National Congress (ANC), led by Nelson Mandela, sought a truth commission to investigate the atrocities of the Apartheid regime. In 1992, Mandela created the "Commission of Enquiry" to investigate treatment of prisoners at ANC training camps in Angola. While the findings were

14 Priscilla Hayner, "Fifteen Truth Commissions—1974–1994: A Comparative Study", in 1 *General Considerations* 225–61, 600–11, 613–33, 635–55 (Neil J. Kritz ed. 1994).

15 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 7.

16 "Report of Truth and Reconciliation Commission of South Africa", 1998 5 Vols, online: <www.truth.org.za>

17 *Ibid.*

18 "Report on the Chilean National Commission on Truth and Reconciliation" (1993), Vol.1, p.13.

19 *Ibid.*

20 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 7.

criticized for being biased, this process revealed truths about human rights violations committed within ANC prisons. Minow argues that the commission functioned to “[elevate] human rights standards and set a tone concerning values that departed from those that prevailed under apartheid.”²¹ However, many black leaders, unsatisfied with the work of the commission, advocated setting up a tribunal similar to Nuremberg in order to punish the white leaders responsible for oppressing blacks during apartheid. Instead, the Mandela-led ANC believed a more extensive truth commission investigating the human rights violations committed by apartheid officials would reveal the truths about the apartheid period, a documentation they felt was necessary to reconstruct the country’s future.

The last 25 years have witnessed the emergence of truth commissions as a new field of transitional justice to deal with past human rights atrocities. These commissions function as an alternative to the judicial approach and thus have different mandates, authority and objectives. For Cambodia, a government looking into a pattern of abuses from its past, the main challenge is to determine whether a truth commission or a tribunal is best suited to meet its objectives. To address this issue as it affects Cambodia specifically, it is first necessary to examine the advantages and disadvantages of both truth commissions and international and national tribunals.

WAR CRIME TRIBUNALS VS. TRUTH COMMISSIONS

Significant advantages of a truth commission are that they can be established instantly at a relatively low cost and can be designed according to the specific needs of a society. The proceedings do not have to follow the

rigid rules of the criminal procedure, and thus, a commission is more flexible in hearing and accommodating witnesses and in evaluating evidence.²² Another benefit of truth commissions is that they, unlike criminal prosecutions, have a broad mandate and thus are able to look at the context of gross human rights violations. While a court is not intended to give an account of the political, historic and economic causes of an offense, such accounts are the purpose of a truth commission. Many survivors argue that they need to know the truth as both part of a therapeutic process of dealing with the past, as well as to feel emotionally validated through a public acknowledgement of past events.

Despite the potential benefits of truth commissions, they are often the result of a negotiated compromise between parties in conflict, as was the case in South Africa, and thus may be at a disadvantage from the onset depending on the political climate. Since truth commissions are often seen as a means of maintaining peace during a transition period, they may take on unrealistically high expectations. A reality facing many truth commissions is that full access to government records is often not possible. Further, the mandate of truth commissions often prevents them from playing an active role in the implementation of their recommendations. Unless a government is committed to reforms and allows for significant changes, a commission’s recommendations may not be followed. Another problem is that truth commissions do not investigate the current situation in a country, as their objective is to reduce conflict about the past. Abuses by the new regime can be overlooked. For example, in El Salvador, death squads continued to operate after the establishment of the Commission on the Truth for El Salvador.²³ Moreover,

21 Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at 53.

22 An illustrative report on the hearings before the Truth and Reconciliation Commission in South Africa, see Michael Ignatieff, *Digging up the Dead*, *The New Yorker*, Nov. 10, 1997, at 84–93.

23 Democracy and Deep Rooted Conflict, online: Institute for Democracy and Electorate Assistance <http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html> at chapter 4.10.

there are often conflicting versions of events reported and the commission has no way of determining what happened objectively.

The most significant difference between a truth commission and a war crimes tribunal is that a tribunal has the ability to prosecute individuals accused of human rights violations. Thus, the advantage of a tribunal is that it has the potential to rebuild a shattered society based on the rule of law through a process that is determined to be fair by the international community. The judgment of the Nuremberg Tribunal states that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”²⁴ Thus, the importance of a tribunal is that it can assign blame on individuals instead of on an entire society or ethnic group.

The effectiveness of war crimes tribunals has several limitations. First, there is not an internationally accepted norm on the punishments to be imposed for war crimes. For example, in the Rwanda case, the punishments endorsed by the tribunal differed greatly from Rwandan national law.²⁵ A response to this criticism is that the International Court of Justice, should it be involved in future tribunals, would impose penalties determined to be fair by the international community. However, this solution would not solve potential problems regarding penal sanctions in a domestic war crimes tribunal. Second, tribunals lack enforcement mechanisms to apprehend individuals who have been indicted and thus rely on the co-operation of local governments and other international bodies. The reliance on other bodies may hinder a tribunal’s effectiveness as local governments may themselves

have an interest in protecting certain individuals. This would have likely been a concern if the Cambodian government had gone ahead with an international tribunal to prosecute members of the Khmer Rouge who are still presently involved in Cambodian politics. Finally, many would argue that tribunals lack the ability to promote national reconciliation because they are not designed to address victims or communities but rather focus on a few high ranking officials from previous political regimes. In light of the advantages and disadvantages of truth commissions and tribunals, this paper will now assess the Cambodian government’s decision to prosecute members of the Khmer Rouge before a national tribunal.

Despite the scale and brutality of the atrocities committed in Cambodia, no credible efforts to punish those responsible were initiated until recently.

CAMBODIA’S REACTION TO THE KHMER ROUGE REGIME

Between 1975 and 1979, the Khmer Rouge regime led by Pol Pot was responsible for the deaths of up to two million people.²⁶ Despite the scale and brutality of the atrocities committed in Cambodia, no credible efforts to punish those responsible were initiated until recently. The only trial established prior to recent developments, occurred in 1979, when Vietnam arranged for the People’s Republic of Kampuchea, the government it had installed in Cambodia that year, to try and convict Pol Pot and Ieng Sary of genocide.²⁷ This trial, held in

24 Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946) 41 Am.J.Int.L. 172 (1947) at 221.

25 Democracy and Deep Rooted Conflict), online: Institute for Democracy and Electorate Assistance <http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html>

26 Sharmila Devi, (Cambodia: Bringing the Khmer Rouge to Justice), online: <www.globalpolicy.org/intljustice/tribunals/2001/1005kmer.htm>

27 (Recent Initiatives to Prosecute CPK Crimes), online: Coalition for International Justice, <http://www.cij.org/index.cfm?fuseaction=homepage> (June 2001).

absentia, is generally regarded as a show trial.²⁸ Finally, in 1996, the United Nations began to revisit the issue of accountability for the Khmer Rouge.

Annan created a group of experts to assess the feasibility of bringing Khmer Rouge leaders to justice.

In April 1997, the UN Commission on Human Rights adopted resolution 1997/49 requesting the Secretary General to “examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of addressing the issue of individual accountability.”²⁹ Two months later, Prime Minister Norodom Ranariddh and second Prime Minister Hun Sen requested the assistance of the UN and the international community “in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge.”³⁰ The letter to UN Secretary General Kofi Annan stated that the Prime Ministers were “aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia” and requested “that similar assistance be given to Cambodia.”³¹

Annan assembled a group of experts to assess the feasibility of bringing Khmer Rouge leaders to justice. This group, consisting of Sir Ninian Stephen from Australia, Judge Rajsoommer Lallah from Mauritius and professor Steven Ratner of the United States

visited Cambodia in 1998 and presented its report to the UN the following year. The report recommended the creation of an international tribunal to judge the crimes of the Khmer Rouge period. The Cambodian government, now under the exclusive control of Hun Sen, responded by cautioning the UN that any decision to prosecute Khmer Rouge officials must take into account Cambodia’s need for peace and national reconciliation. If former Khmer Rouge members perceived misconduct it could have lead to renewed guerilla warfare.³² By August 1999, the Cambodian government stated that they wanted to maintain overall control of a UN backed international tribunal, and that the tribunal should take place in a Cambodian court. However, the participation of foreign judges and legal experts would be accepted. Over the following few months, talks between UN and Cambodian officials failed to reach an agreement on how to set up a tribunal for Khmer Rouge leaders, thereby putting a tribunal on hold.

Mounting pressure on Hun Sen’s government amplified in September of 1999 when former Khmer Rouge leaders, now allies of the Hun Sen government, issued a statement warning of the possibility of a return to civil war if a tribunal was held. Sen responded to these concerns by proposing a domestic trial with international participation. The proposal endorsed a US design for a tribunal with three Cambodian judges and two UN-appointed judges. Wary of involving itself in what could be perceived as another “sham trial,”³³ the UN insisted that

28 *Ibid.*

29 Commission on Human Rights Resolution 1997/49, U.N. ESCOR, “Situation of Human Rights in Cambodia,” U.N. Doc.E/CN.4/RES/1997/49 (1997).

30 Letter dated June 21, 1997 from the first and second Prime Ministers of Cambodia addressed to the Secretary-General, annexed to U.N. Doc. A/1997/488 (24 June 1997).

31 *Ibid.*

32 United Nations Office of Legal Affairs, “Draft Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights.” For an account of Hun Sen’s public response, see Hun Sen Won’t Let U.N. Control Genocide Trials, Washington Times, August 20, 1999, at A14.

33 Cambodia Approves Khmer Rouge Trial, Associated Press, Phnom Penh, Jan 6, 2000.

organs and staff of the tribunal be politically and financially independent from any government authority and that the process not be selective with regard to suspects. In responding to the draft tribunal law approved by the Cambodian government, Kofi Annan identified four design characteristics of the tribunal upon which the UN was insistent: guarantees that those indicted would be arrested, no amnesties or pardons, the appointment of independent international prosecutors and the appointment of a majority of foreign judges. Several negotiations in 2000 failed to resolve these issues. In fact, the situation was further complicated when Hun Sen indicated that former Khmer Rouge Foreign Minister Ieng Sary should not be re-prosecuted since he was granted amnesty by King Sihanouk after he defected from the government in 1996.

Despite these uncertainties, in January 2001, the Cambodian National Assembly approved the draft law to establish a tribunal.³⁴ However, the UN did not approve of the draft law, proposing changes to 18 of the 49 articles. On June 22, the Cambodian government amended the draft law and expressed optimism that the Khmer Rouge tribunal could take place by the end of the year. The legislation states that the court's subject matter jurisdiction will include genocide as defined under the Genocide Convention of 1948, crimes against humanity and grave breaches of the 1949 Geneva Conventions, as well as homicide, torture and religious persecution as characterized by the Penal Code of Cambodia. As negotiations between the Cambodian government and the UN continue, there is uncertainty as to when, if ever, the tribunal will begin. There is even more skepticism from the

international legal community as to whether the Cambodian government's decision to respond to the Khmer Rouge period by prosecuting individual officials could meet international standards of justice.

A substantial difficulty facing the establishment of a tribunal is the granting of amnesty to former Khmer Rouge officials. Many criticisms of this tribunal emphasize the fact that most of the notorious Khmer Rouge leaders have already been granted amnesties under a deal in the 1990's to end the country's long running civil war.³⁵ At present, there are only two Khmer Rouge officials in prison awaiting trial. Pol Pot died in 1998 and many other former leaders live freely in Pailin, a former Khmer Rouge stronghold, after having surrendered in return for amnesty deals with the government. Hun Sen maintains that only four or five leaders at most would face trial, prompting Sam Rainsy, leader of the opposition, to label the proceedings a "mockery of justice."³⁶

The international community perceives the current design of the tribunal as problematic for ensuring a just process.

From an international law perspective, the proposed domestic tribunal appears to lack legitimacy, both inside and outside Cambodia, due to the reputed lack of independence and professionalism of the Cambodian judiciary.³⁷ The international community has, and will continue to view concessions made by the UN to the Cambodian government in their negotiations with skepticism. According to Human Rights Watch, the plan as currently formulated does

³⁴ Seth Mydans, *Cambodian Deputies Back War Crimes Court*, N.Y. Times, Jan. 3, 2001.

³⁵ (Cambodia set for Khmer Rouge Trials), online: Global Policy Forum <www.globalpolicy.org/intljustice/tribunals/2001/0807camb.htm> (August 7, 2001).

³⁶ *Ibid.*

³⁷ Balakrishnan Rajagopal, *At Last There is a Chance to Bring the Khmer Rouge to Justice*, Boston Globe, June 20, 1999.

not meet minimum benchmarks to ensure a legitimate and credible process in line with international standards.³⁸ "The UN must avoid giving legitimacy to a process that does not meet international standards," remarks Sidney Jones, executive director of the Asia Division of Human Rights Watch, "the Cambodian people deserve justice, not a show trial."³⁹

The establishment of a tribunal reflects careful compromises struck between the Cambodian government and the UN, neither group wanting to cede too much authority to the other.

The international community perceives the current design of the tribunal as problematic for ensuring a just process. More specifically, it has been argued that the UN plan fails to insist that Cambodia co-operate in attempting to apprehend suspects who have fled its territory, thereby leaving open the possibility of government collusion to shield cooperative former Khmer Rouge leaders by allowing them to quietly disappear over the border.⁴⁰ Further, Jones argues that "witnesses and defendants have often been tortured in Cambodia, and this tribunal would fail to give them protection," which demonstrates a very serious omission in the tribunal's design.⁴¹ Further legal deficiencies include the absence of any appeal rights and the failure to allow defendants' recourse to lawyers of their choice.

The establishment of a tribunal reflects careful compromises struck between the Cambodian government and the UN, neither group wanting to cede too much

authority to the other. These negotiations have raised concerns around the world as to whether the prosecution of Khmer Rouge officials, utilizing the design now in place, would be an adequate response to the atrocities of the Khmer Rouge regime from an international law perspective. Moreover, if the international legal community views the proposed process as inadequate, should Cambodia follow through with the tribunal anyways or are there alternatives which better suit the needs of Cambodians?

The criticisms raised suggest that the international community will not be satisfied by the present design of the domestic tribunal. If a tribunal took place that failed to meet international standards of justice, it appears the Cambodian government would fail to meet its objectives on two levels. First, pending World Bank loans totaling five hundred million dollars of desperately needed funds for Cambodian development would likely be withheld if the international community viewed the tribunal as a sham. Hun Sen's decision to establish a court was motivated, at least in part, by these loans and international donors have made no secret of the connection between the granting of loans and efforts undertaken to punish former Khmer Rouge leaders.⁴² Yet if these loans are no longer a factor, Sen may want to reconsider the establishment of a tribunal that risks re-igniting civil war. Further, Senator Kerry has announced that he will introduce legislation once the court is in operation that will lift restrictions on U.S. foreign aid to Phnom Penh. Again, if the trials in Cambodia proceed and fail to meet international standards, it is likely that these restrictions would not be lifted.

38 (UN Should Insist on International Standards for Khmer Rouge Trial), online: Human Rights Watch <www.hrw.org/press/1999/aug/camb0824.htm> (August 24, 1999).

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Nicolas Berry (The Tangled Politics of the Cambodian Genocide Court), online: <www.cdi.org/asia/fa070500.html>

Therefore, the Cambodian government's objective of securing World Bank loans and having American restrictions on foreign aid lifted would not be met by pursuing a tribunal that is viewed as an inadequate response to the Khmer Rouge period. Second, the Cambodian government would fail to meet its own people's needs of national reconciliation with a domestic tribunal viewed from the outside world as a sham. While trials can be therapeutic, a process globally seen as illegitimate would severely limit the healing power of the prosecutions as victims may be skeptical of the accuracy of the tribunals' findings and thus find it difficult to move on. The Cambodian government may better serve its people by responding to the Khmer Rouge atrocities with a national truth and reconciliation commission.

CAMBODIA'S TRUTH COMMISSION?

The debate over whether a tribunal or truth commission is likely to be the most effective response to the Khmer Rouge regime must focus on the Cambodian people. An international tribunal, like the ICTY or ICTR, in addition to being very expensive, would take place far from Cambodia, thus lacking the ability to impact popular consciousness in Cambodia. Further, an international tribunal risks the outbreak of civil war in a unique time when the Cambodian people are living in relative peace. "For the first time in a long time we are seeing hope and stability," said Kassie Neou, director of the Cambodian Institute of Human Rights, "the general public wants to keep enjoying the peace."⁴³

Similarly, a domestic trial appears to lack legitimacy for the aforementioned reasons, most notably the lack of independence and professionalism of the Cambodian judiciary. It has been argued that a truth commission, as in South Africa, seems impractical in

a country where massive crimes took place more than twenty years ago since truth commissions generally work best where there is an urgent moral desire for addressing immediate past crimes. Truth commissions cannot be standardized; each model must reflect the specific needs of a people who have survived a period of gross human rights violations, even if the commission is reacting to events 20 years in the past.

Similar to the establishment of the Commission on the Truth for El Salvador, the Cambodian government would have to co-operate with the UN, allowing for the appointment of respected international figures to the commission.

In Cambodia's case, a truth commission could provide the most accurate record of the atrocities that took place between 1975 and 1979, allowing victims to tell their stories as part of a therapeutic process of dealing with past events. Based on experiences in other countries, achieving unity and morally acceptable reconciliation requires that the truth about gross violations of human rights be established by an official investigation unit using fair procedures fully and unreservedly acknowledged by the perpetrators, and made known to the public. In order to legitimize the process and keep it out of the hands of Cambodian politicians, a Cambodian truth commission would have to be internationalized. However, to be effective, the truth commission would have to take place in Cambodia. Thus, the best option would be to establish a national truth commission with international representatives. Similar to the establishment of the Commission on the Truth for El Salvador, the Cambodian

⁴³ *Ibid.*

government would have to co-operate with the UN, allowing for the appointment of respected international figures to the commission. By doing so, the Cambodian government could solve the main problems it now faces with the establishment of a tribunal. On one hand, the international community would likely view the process as an adequate response to the Khmer Rouge period, thus guaranteeing badly needed World Bank loans and American foreign aid. On the other hand, the people of Cambodia could finally begin to feel emotionally validated through a public acknowledgement of the horrors they experienced. By basing the process in Cambodia, the commission is more likely to contribute to consciousness raising among the Cambodian public.

A significant advantage of a truth commission in Cambodia would be the ability of the commission to grant amnesty to those who confess their roles in full. While many Cambodians would argue that such a commission is too sympathetic, this design would encourage the full disclosure of crimes that took place during the Khmer Rouge period. By uncovering and documenting the atrocities of the past, this important process could heal the Cambodian people and support national reconciliation. This process of uncovering truths could also lead to the development of a public record based on individual experience and thus provide an opportunity for Cambodians to come to terms with traumatic events of the past. Furthermore, by granting amnesty, the threat of re-ignited civil war in Cambodia would be alleviated. "The threat of trial and imprisonment can drive the guilty into hiding or into re-igniting civil war," argues Nicholas Berry, "especially if a sanctuary exists for the fighters,"

as is presently the case in Cambodia.⁴⁴ This happened in Rwanda, where militant Hutus not apprehended by Tutsis renewed their attacks on the Tutsi government from their sanctuary in the Congo.⁴⁵ Therefore, by granting amnesty and taking away the threat of trial, a truth commission in Cambodia could satisfy both Khmer Rouge officials as well as the citizens of Cambodia. "War can be made any time here," argues Kassie Neou, "guns are everywhere and we know from experience that no outside government can prevent violence here."⁴⁶

An alternative would be the establishment of a truth and reconciliation commission that would take place in Cambodia...

Virtually all Cambodians lost relatives to the genocide, and many still suffer post-traumatic stress disorder.⁴⁷ There are a wide range of both immediate and delayed emotional responses affecting survivors, including self-blame, depression and anxiety. A truth commission could therefore provide an opportunity for Cambodians to begin healing by re-telling their personal stories in a safe environment. Tina Rosenberg finds parallels between truth commissions and the therapeutic process that helps individuals deal with post-traumatic stress disorder.⁴⁸ She argues that in both contexts individuals need to tell their stories to someone who listens seriously and who validates them with official acknowledgement; in both settings, individuals must be able to reintegrate the narrative of atrocity into their whole life story.⁴⁹

44 Nicolas Berry (The Tangled Politics of the Cambodian Genocide Court), online: <www.cdi.org/asia/fa070500.html>

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism*. (New York: Vintage, 1995), at 26.

49 See note 50 at 62.

A truth commission would break the conspiracy of silence, providing an account of the historical and political factors that contributed to the genocide and offer symbolic acknowledgment of the suffering of victims. As a result, such a commission could function to prevent future violations of human rights in Cambodia through individual therapy that recognizes atrocities committed against the Cambodian people during the Khmer Rouge regime.

Cambodian survivors of the Khmer Rouge would be the main focus of a truth commission—finally the citizens of Cambodia would have an opportunity to reveal to themselves, and to the world, the facts about one of the most horrific events in recorded history.

CONCLUSIONS

In summary, the Cambodian government's decision to prosecute former Khmer Rouge leaders in a domestic court is problematic for several reasons. First, the design of the proposed tribunal does not meet international standards of justice and the tribunal will not be viewed as an adequate legal response to the Khmer Rouge regime. The consequences of this perception are that the tribunal may be seen as a sham by the international community, which in turn may affect World Bank Loans and American foreign aid to Cambodia. Second, from a national interest point of view, if the anticipated tribunal lacked support from within Cambodia for its inability to prosecute free from corruption, the healing power of the trials would be severely limited. Without the full support and confidence of the Cambodian people, which at present is in

doubt, it seems unlikely that the proposed national tribunal will lead to national reconciliation. An alternative would be the establishment of a truth and reconciliation commission that would take place in Cambodia with the aid of the international community. Cambodian survivors of the Khmer Rouge would be the main focus of a truth commission—finally the citizens of Cambodia would have an opportunity to reveal to themselves, and to the world, the facts about one of the most horrific events in recorded history.

Without a truth commission in Cambodia the full story may never be known. A primary account of the genocide would continue to be Roland Joffe's *The Killing Fields*. Based on a personal experience, this possibility is a frightening reality. One afternoon I had the opportunity to watch *The Killing Fields* at a guesthouse on Boeng Kak Lake on the outskirts of Phnom Penh with a Cambodian family and other travelers after returning from the Killing Fields at Cheoung Ek. Surprisingly, the most difficult part of this experience was not watching the recreation of the horrors experienced by Cambodians, but rather the response of the Cambodian family with whom I was staying. The older Cambodians expressed contempt for the American made film, arguing that the movie fails to paint an accurate picture of the experiences of Cambodians during the Khmer Rouge regime. In contrast, the children were yelling out certain lines of the film with actor Sam Waterston, especially when expressing any semblance of Cambodian pride, for example, in a speech honoring the Cambodian journalist with whom he worked. These children were proud Cambodians, fortunate to have been born after the Khmer Rouge era, who have relied on the personal accounts of their family as their main source of information. Based on the conversations we had, I had a sense these children were confused, torn between the

beliefs their family had instilled in them from a young age and the events presented in the film.

On the other side of the room sat several travelers from around the world that admitted the only thing they knew about Cambodia's history was what they had learned from the film. From an outsider's perspective, I immediately recognized the dangers of a lack of information of Cambodia's recent past. There is an inherent problem when many Westerners rely on an American film as their only source of information about Cambodia's history, especially considering America's role in the Khmer Rouge era. Reflecting on this experience, I cannot help thinking that a truth commission could provide a voice for all three groups of people I encountered on this day. The Cambodian public who survived the Khmer Rouge era would have the

opportunity to tell their side of the story, and document their history as they experienced it. Cambodian children would be presented with numerous recorded accounts of the past versus a single reflection from their family. Finally, the rest of the world would have a publicly documented account of the experiences of surviving Cambodians as a valuable source of information related to the Khmer Rouge. Personally, all it took was one viewing of *The Killing Fields* with a Cambodian family to realize the dangers of accepting this work of fiction as a complete picture. This realization leads me to recognize who is really hurt by an inaccurate record of history and persuades me that a truth commission in Cambodia would be the most effective response to the Khmer Rouge regime. ■



What's Yours is Mine:

Issues in Private Legal Disputes Regarding Title of Stolen Art and Artifacts

Leo Caffaro*

INTRODUCTION

More than two millennia ago, an artisan was commissioned to create a gold *philae*, a decorative gold plate with inlaid motifs. His workshop was in a Greek colony on the Sicilian coast, where the natural wealth of the region and the creative skills of Greek colonists nurtured a significant amount of artistic work. His patron would have been extremely satisfied with the final result, which would have been given an honoured place in the family home. However, the times were turbulent, and an upstart town in the north—Rome—was flexing its muscles, having deposed its Etruscan rulers and declaring a republic. The *philae* was soon hidden, perhaps for its protection, and then lost in ensuing wars. Centuries passed by and witnessed the Roman republic and empire rise and fall into the ashes of the Middle Ages before the consolidation of Renaissance kingdoms. When a new republican power, also ruled from Rome, asserted ownership over the island, including its heritage of ancient artifacts, the *philae* resurfaced. It was traded between modern art dealers in Italy and Switzerland, finally

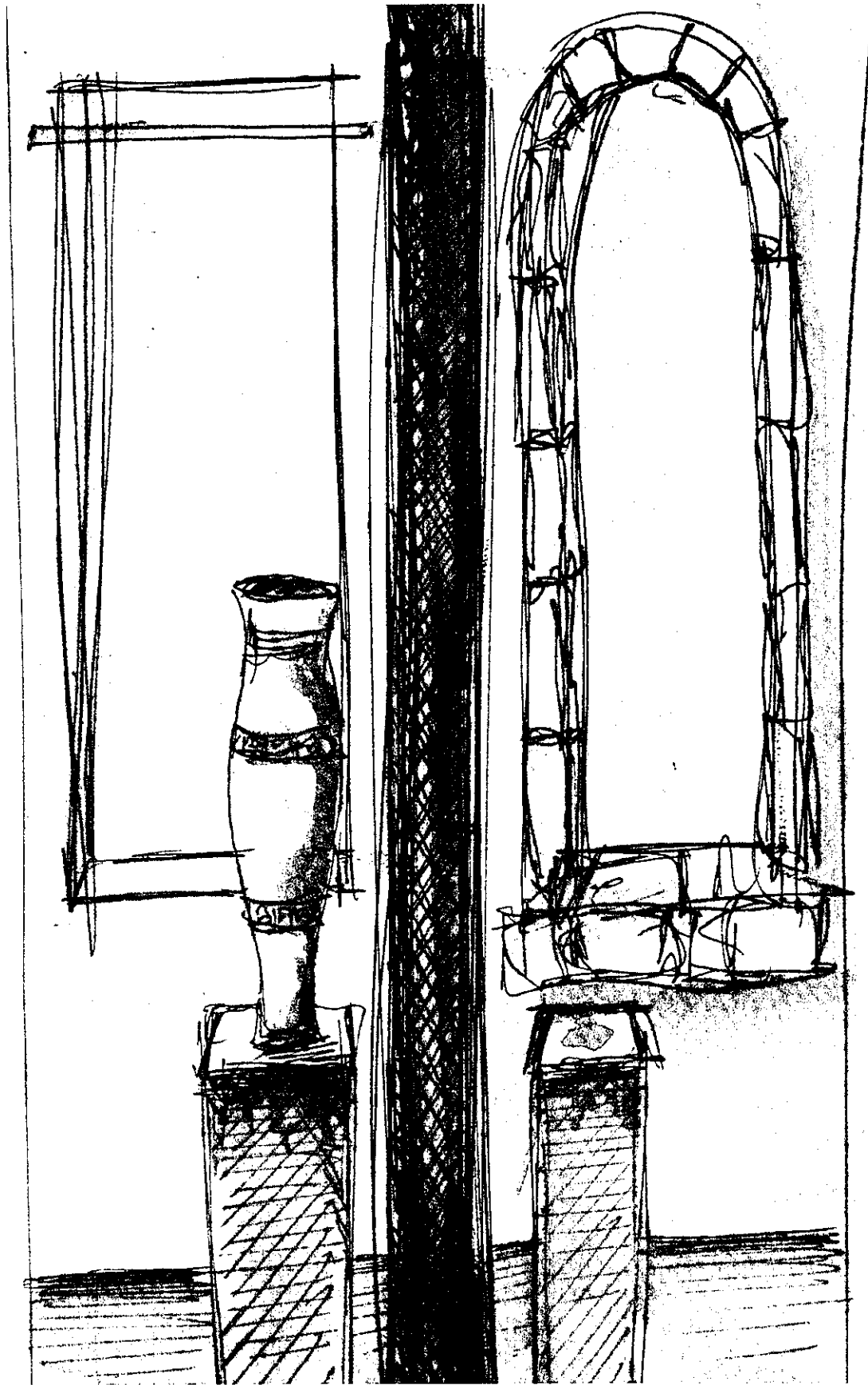
ending up in the private collection of one Mr. Steinhardt of New York, where its market value had increased fifty-fold to US\$1.15 million. But the covert removal of the artifact from Italy had violated state laws, and Italy wanted it back.

THE INTERNATIONAL PROBLEM OF POSSESSION

The international marketplace for art, artifacts and antiquities is immense, totalling US\$6 billion annually.¹ The high-stakes black market in such items reportedly ranks only behind that of narcotics and the arms trade.² The licit and illicit international market involves art and artifacts from all over the world and is characterized by large regional differences in the legal treatment of these objects. Generally, southern regions of the world that have nurtured cultural growth for millennia possess a rich patrimony of art and artifacts and are looked upon as a source of such items by the art markets of wealthier northern countries.³ Of particular interest are the circumstances in the European Union (E.U.), where an uneven distribution of wealth in both

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- 1 Robin Hardy Villanueva, "Free Trade And The Protection Of Cultural Property: The Need For An Economic Incentive to Report Newly Discovered Antiquities" (1995) 29 *George Washington Journal of International Law & Economics* 547 at 580.
- 2 Nina R. Lenzer, "The Illicit International Trade in Cultural Property: Does the UNIDRIOT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?" (1994) 15 *University of Pennsylvania Journal of International Business Law* at 528.
- 3 There are exceptions to this trend, even within a single state's subcultures, an obvious example is the appropriation of Native cultural property by non-Natives within Canada.



market power and cultural property exist. The art-rich or source countries, of southern Europe are the homelands of ancient Mediterranean empires, the birthplaces of the later Renaissance. The ensuing legacy of artistic effort was fuelled by the institutional patronage of the Catholic church. It nurtured tradition that produced classical, baroque, neo-classical, romantic and impressionist art. Sharing this experience are countries such as France, Italy, Greece, Spain and Portugal. Northern countries participated in such artistic traditions, but they did not have the same overlap of artistic ambitions of religious and monarchical powers, rooted in the milieu of classical traditions. Southern European source nations are under pressure to make their rich cultural heritage of art and artifacts accessible to northern market nations, such as Germany, the Netherlands, Belgium, Switzerland, Britain and the U.S. This latter group has the financial resources, institutional mechanisms and market demand to encourage both legal and illegal trade in such items.

Within the E.U., the importance of trade has been heightened by the community's abolishment of internal border controls, with the result that art and artifacts can circulate quickly beyond the border controls of national governments. Some of the southern E.U. source nations have difficulty regulating even domestic trade and are not be able to monitor effectively the cultural property's cross-border transfer. Decreasing regulation of the transfer of property encourages clandestine acquisition of it for sale in foreign markets. Italy alone reported 14,737 missing artifacts in 1997.⁴ Art thieves steal 60,000 works of art in Europe each year, which are laundered and

then resold.⁵ Beyond Europe, the market demand of the United States also attracts stolen or illegally exported property.

The evocative nature and unique value of cultural property makes disputes over its possession difficult to resolve.

Both nations and individuals find themselves in the position of Italy and struggle to deal with the loss of their cultural property to modern art markets. The term cultural property describes a broad range of items that symbolically represent an identity or an awareness of a culture's history. This expression may manifest itself in art, archaeological remains, architectural styles, historical memorabilia, literature, traditional rituals and other tangible and intangible products that are central in defining a people, culture or country.⁶ The communal significance of cultural property distinguishes it from other real or personal property in that, even in private hands, it remains part of a larger cultural heritage. As such, the physical expression of a culture through art and artifacts is particularly important because it continues to define a community even beyond its extinguishment.

The evocative nature and unique value of cultural property makes disputes over its possession difficult to resolve. This class of property deserves special legal consideration but cannot be separated from non-legal interests. The starting point for protecting cultural property, both in terms of individual items and the class as a whole, should be the defence of original title. There are circumstances in which title might be passed or extinguished, but only as a result of the wilful conduct of each party with an interest in an object.

4 Ian M. Goldrich, "Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale" (1999) 23 *Fordham International Law Journal* 118 at 119.

5 Victoria J. Vitano, "Protecting Cultural Objects in an Internal Border-Free EC: the EC Directive and Regulation for the Protection and Return of Cultural Objects" (1994) 17 *Fordham International Law Journal* 1164 at 1165.

6 Daniel Shapiro, "Reparation: A Modest Proposal" (1998) 31 *N.Y.U. Journal of International Law and Politics* 95 at 96.

Determining when this happens must involve synthesis of law and policy and must incorporate certain mechanisms for verification of market information. In order to identify what considerations should be accounted for when resolving disputes over title to cultural property, this paper will examine the general nature of possession, legal dimensions of the issue, policy considerations, regulatory problems and the conflicts involved in synthesizing these factors. Finally, after illustrating the major shortfalls of the current legal predicament, this essay will suggest a model regime to resolve future title disputes, which is based on the objective of preserving cultural property.

Tangible, portable items of cultural significance are the subject of more regulation than are common chattels.

This paper will also focus on the private law context of western European states and the U.S. because these regions contain the elements central to cross-border cultural property disputes: large art markets, varying legal traditions and, in the case of the European Union, increasing ease of transporting goods across borders. Together, they constitute a forum in which dynamic issues arise regarding the regulation and circulation of cultural property. This paper will concentrate on is the transfer of cultural property where such movement appears to violate individual ownership rights and requires a determination of legal title.

WHAT IS PROVENANCE?

In art markets, provenance is the entire

history of an object, including details of its origin and all subsequent transactions.⁷ Licit provenance refers to an object that has been legally and willingly transferred by each of its successive owners. Illicit provenance has often been acquired when third parties have intervened opportunistically in areas of political flux to acquire the cultural property of the disempowered, as occurred when Lord Elgin of Britain was permitted by the occupying Ottoman Turks to remove many friezes from the walls of the Parthenon atop the acropolis of Athens.⁸ But even in such circumstances, the international law doctrine of prescription⁹ stands for the principle that ownership rights in possessed property strengthen with the passage of time.¹⁰

Tangible, portable items of cultural significance are the subject of more regulation than are common chattels. They represent more than the sum of their constituent parts; they are finite and non-reproducible, and they can be extremely valuable—increasing dramatically with age—which attracts illegal behaviour. The conflict lies in how to balance the protection of a culture's physical heritage of artifacts and the rights of a private property owner to exercise exclusive power over their conversion or transfer. This balance varies within different jurisdictions, and the issue of reconciling different national private laws is the subject of this paper.

LEGAL DIMENSIONS

The relationship between ownership and possession varies between states. National legal structures serve to entrench each nation's perception of cultural property. These positions are manifested in two

7 Patrick O'Keefe, "Provenance and Trade in Cultural Heritage" (1995) UBC Law Review at 260.

8 Micheal J. Repas, "The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the 'Elgin Marbles' Must be Returned to Greece" (1999) 9 Fordham Intellectual Property, Media and Entertainment Law Journal.

9 Shawn S. Stephens, "The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany" (1995) 18 Houston Journal of International Law 59 at 97.

10 Sylvia L. Depta, "Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany" (1996) 10 Temple International and Comparative Law Journal 371 at 379.

significant ways: export controls and the application of property law. The first instance will not be discussed at length in this paper, but it is an axiom that countries with many resources of art and artifacts, such as Italy, are prone to adopting laws to protect the loss of such resources to foreign collectors. Conversely, other countries, such as Britain, have a tradition of profitably dealing in antiquity markets with cultural items from foreign (i.e., non-British) sources and prefer unfettered trade. The retention of cultural property is often regarded by protective nation-states as necessary both to maintain the integrity of an item (especially if it is part of a larger architectural or historical collection) and to support the sentiment that the object and the culture are bound together in the same national identity.

However, national laws are ill-equipped to protect and consistently regulate the burgeoning international trade (legal and otherwise) in cultural property. This is especially true in western Europe where internal border controls are being reduced. Management of cultural property ownership has become a type of legal tragedy of the commons,¹¹ with each country trying to maximize the application of its own policy to the detriment of the legal protection of the international resource. Disagreement hinders even the formation of a uniform definition of national treasure within the E.U.¹² The real crisis is that the lack of international co-operation encourages the illegal acquisition and sale of cultural property. While some efforts have been made to curtail such activity, they have not met with great success and point to the need for a more comprehensive analysis of

contested ownership.

In order to resolve international disputes over cultural property three essential elements of the issue must be addressed¹³: (1) a conflict of laws analysis to determine title; (2) the balance between competing sale of goods rights of the dispossessed owner and a *bona fide*, good faith, purchaser; and (3) what limitation period must pass before title consolidates with the new purchaser. Current disputes demonstrate that each of these components is contentious. But before reviewing the consequent litigation of such disputes, it is important to identify two contrasting features on the legal landscape that are central to conflict surrounding title to cultural property.

Replevin is an action for re-delivery of wrongfully seized chattels to their owner.

SUBSTANTIVE DIFFERENCES BETWEEN COMMON AND CIVIL LAW PERSPECTIVE OF TITLE

Under the Common law, private actions exist for replevin or for damages associated with conversion of stolen cultural property.¹⁴ Replevin is an action for re-delivery of wrongfully seized chattels to their owner. The existing difficulties in pursuing these actions exhibit a crucial difference between Civil and Common law property rights principles. Under the Common law, a thief breaks the chain of good title upon acquiring property from its rightful owner and cannot gain or pass good title to the appropriated object. The determining factor is whether or not an item has been stolen, as the grant of title does not depend on the purchaser's good faith.

11 G. Hardin, "The Tragedy of the Commons" (1968) *Science* 162 1243 at 1244.

12 Christopher G. Jernigan, "Protecting National Treasures in a Single-Market EC" (1994) 17 *Boston College International and Comparative Law Review* 153 at 160.

13 Thomas W. Pecoraro, "Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law" (1990) 31 *Virginia Journal of International Law* 1 at 4.

14 L. Rutherford & S. Bone, eds., *Osborn's Concise Law Dictionary*, 8th ed., (London: Sweet & Maxwell, 1993) at 287.

Therefore, all subsequent buyers are liable to the original owner. This discourages potential buyers from purchasing stolen property (or at least devalues potential profits) since buyers risk having to surrender the property to the owner. This helps deter illicit trade.

Conversely, in the Civil law, good title to stolen property can be acquired if both a codified limitation period has expired, and the purchaser can show that he or she was a *bona fide* purchaser in good faith (belief that the vendor had legal title). This regime provides certainty to buyers, thus encouraging trade and lowering risk-assessment costs. The legislated limitation period is a policy instrument that provides a period for victims of theft to make a claim against the purchaser. It varies among jurisdictions, from ten years in Germany, to five in Switzerland and three in France.¹⁵ In Italy, where so much cultural property smuggling takes place, a *bona fide* purchaser receives good title to stolen goods immediately, thus making it extremely difficult for dispossessed owners to reclaim lost property.¹⁶ Germany's longer limitation period—complemented by Civil Code s. 935—provides that that title does not immediately pass where the chattels are stolen, and there is no exception for purchases made at *market ouvert* (a public auction).¹⁷ Germany permits the purchaser of a stolen or lost chattel to gain title only if the purchase is made in good faith and the purchaser possessed the item for ten years without notification of the spoiled title. However, ten years is not a particularly long cooling period for stolen and appreciating goods.

After ten years Germany's laws are no better at protecting the original owners than other Civil law jurisdictions with shorter limitation periods.¹⁸

Swiss laws are at the other extreme. The Swiss limitation period runs from the date of loss, regardless of owner's knowledge, and thus can expire before an owner is aware of the loss, let alone before he or she has successfully completed a search for it. Additionally, under Swiss *market ouvert*, the original owner would be required to indemnify the possessor in order to reclaim the property. Unlike in Common law jurisdictions, an original Civil law owner has the burden of proving that the subsequent owner had not acquired the property in good faith.¹⁹ As a result, Civil law countries (Switzerland in particular) are a haven for property laundering²⁰ since the legal system facilitates trade in stolen cultural property. Middlemen and dealers can effectively purge the taint of an object's defective title and transfer that object for further value without exposing the subsequent purchaser to a risk of loss. Dealers are further insulated from explicitly illicit dealings in Switzerland, since the law permits them to sell artifacts anonymously in Swiss auction house catalogues.²¹ An item can be acquired illicitly and sold in a particular sequence in order to ensure good title eventually in both Civil and Common law jurisdictions. Once laundered in a Civil law country, property may be transferred for resale in a Common law country, where original clean title rights can be perfected.

15 Vitrano, *supra* note 5 at 1173.

16 Stephen F. Grover, "The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study" (1992) 70 Texas Law Review 1431 at 1449.

17 Bürgerliches Gesetzbuch (Civil Code) [BGB] § 932 (Ger.).

18 *Ibid.* at 1451.

19 *Ibid.* at 1171.

20 Chauncey D. Steel, "The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts" (2000) 23 Suffolk Transnational Law Review 667. See also Andrew L. Slayman, "Italy Fights Back" (1998) Archaeology at 49; Jennifer H. Lehman, "The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention" (1997) 14 Arizona Journal of International and Comparative Law at 527.

21 Lisa J. Borodkin, "The Economics of Antiquities Looting and a Proposed Legal Alternative" (1995) 95 Columbia Law Review 378 at 387.

INTERNATIONAL POLICY INSTRUMENTS FOR THE MANAGEMENT OF CULTURAL PROPERTY

To comprehend the problems that result from an incomplete international regulatory framework, it is crucial to understand the competing interests at stake, which in this paper's view were not properly addressed by the UNIDROIT Convention. Market actors exhibit various interests and motivations that, when manifested through cumulative trading activity, may be at odds with the long-term preservation of cultural property. For example, George Ortiz, a world renowned collector who resides in Switzerland, refuses to recognize laws that give a state title to all unknown and unfound artifacts—so unless items are already part of collection or in the process of known, well-delimited excavation sites, they are free for the taking.²² It is not that his lack of concession to such laws is important, but that Swiss law protects the consequential trade stemming from his kind of disregard for other states' laws. Such an attitude endangers the safety of less economically valuable, but archaeologically important, collateral finds and is concomitantly bolstered by Swiss laws' endorsement of the laundering of such items. Conventions neither adequately address the competing interests of source and market nations, nor do they resolve the interpretation problems and how they might be treated differently by courts in Common versus Civil law jurisdictions. If the conventions could be more predictable in such matters, then perhaps more states would endorse their principles.

Additionally, there remain procedural difficulties in resolving disputes over

cultural property, and a comprehensive multinational process remains elusive. The disparity between protective policy and enforceable regulation fuels the black market in cultural property.

The court used Indiana choice-of-law rules to affirm the application of Indiana law and held that the defendant could not acquire valid title or right to possession of the stolen property.

LITIGATION OVER CULTURAL PROPERTY

Several litigation proceedings over cultural property have helped define the parameters of legal analysis of stolen cultural property. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*,²³ the plaintiff brought a replevin action in a U.S. Federal Court to recover mosaics that had been taken from a parish church in occupied northern Cyprus that had been closed after the Turkish invasion. The mosaics were eventually examined for purchase in the free port/pre-customs area of a Swiss airport before being brought into the United States by the defendant. The court used Indiana choice-of-law rules to affirm the application of Indiana law and held that the defendant could not acquire valid title or right to possession of the stolen property. When the mosaics went missing, Cyprus made immediate efforts to find them and sought the assistance of UNESCO.²⁴ Because the plaintiff employed due diligence to locate the mosaics and took substantial

22 Daniel. Shapiro, Opinion: Legal Issues in the Trade in Antiquities (1994) 3 International Journal of Cultural Property at 370.

23 U.S. Court of Appeals, 7th Cir., 1990, No.89-2809, rehearing denied.

24 Even under Swiss law, the defendant could not be a good-faith purchaser due to suspicious middlemen and the suspicious circumstances of the purchase.

and meaningful steps to recover them,²⁵ the court also employed the Discovery Rule to mark the basis of the replevin action. Under the Discovery Rule, a plaintiff's cause of action would begin when she discovers, or should have discovered, the location of stolen cultural property. Then, the court assessed the merits of the claim itself by measuring the plaintiff's right to possession, the unlawful detention of the objects and the actual unlawful possession by the defendant.²⁶ Essentially, the court applied the Common law principle of *nemo dat quod non habet*²⁷ to find that title to the mosaics remained with the plaintiff. Significantly, the case affirmed the applicability of the Discovery Rule to a replevin action and also underlined the necessity of demonstrating due diligence in attempting to locate and recover lost cultural property.

In *Winkworth v. Christie Manson & Woods Ltd.*,²⁸ the contrast between Common and Civil law traditions reflects contradictory impressions of justice in dealing with art laundering between states that have different transfer-of-chattel laws. The plaintiff's Japanese prints were stolen from his English residence and sold to a *bona fide* purchaser in Civil law Italy, who then returned them to England for auction with the defendants. The plaintiff sued in an English court for an injunction to prevent auction of the prints and for replevin. However, regarding whether English or Italian law applied, the court employed *lex situs*, the law of the place where the chattel was situated at the time of

the wrongful transfer,²⁹ and thus found that under Italian law, the Italian purchaser had acquired good title. The plaintiff lost his suit on the application of the laws of the state with the most significant relationship to

the contested transaction. *Autocephalous Greek-Orthodox Church and Winkworth* illustrate the problems associated with different application of conflict of laws rules even within the Common law system. The rules seem insufficient to reconcile the Civil and Common law consistently in similar factual circumstances, while at the same time Civil law exacerbates this deficiency by inviting continued exploitation of the differences between the two legal traditions.

Aside from emphasis on an original owner's property rights within Common law jurisdiction, legislation in the U.S. has buttressed the regime. The American *National Stolen Property Act* prohibits interstate or international transportation of stolen property. It was expanded in the 1970s to include the importation of illegally removed cultural property (that is, either stolen or contrary to export restrictions) from other countries. In *United States v. Hollinshead*, the Ninth Circuit Appellate Court clarified that, for the purposes of a breach of the act, the U.S. government need only prove that the appellant trafficker, who in that case was indicted for importing a stolen Mayan stele from Guatemala, knew that the item was stolen. In *United States v. McClain*, the Fifth Circuit upheld the applicability of the act to circumstances in which



25 This included contacting international scholars, museums and their associations, auction houses, the media, as well as UNESCO.

26 Keith Higher & George Kahale, "International Decisions" (1992) 86 *The American Journal of International Law* 128 at 131.

27 One cannot give that which one does not possess; a thief cannot pass good title.

28 [1980] 1 Ch. 496.

29 *Bürgerliches Gesetzbuch* (Civil Code) BGB § 932 (Ger.) at 1456.

the exporting country has asserted national ownership (but not exercised actual possession, as required in *Ortiz*) over cultural property. Additionally, the court underlined the need for clear foreign standards of ownership so that U.S. courts would only apply legal standards that were appropriately specific.

In 1999, a U.S. Court of Appeal applied both *Hollinshead* and *McClain* to a civil forfeiture proceeding regarding the introduction's ancient Greek artifact from Sicily. After being transferred repeatedly within Italy, the artifact was sold to a Swiss dealer and finally to an American dealer in Switzerland where counterfeit export papers concealed the item's true provenance. The American collector Steinhardt purchased it and held it in his American home until 1995 when U.S. customs authorities seized it. It was confiscated because it had entered the country with falsified documentation. As well, the artifact's importation violated the *National Stolen Property Act* because Italian law deemed it stolen. U.S. federal authorities won their forfeiture proceedings (the decision was affirmed on appeal). Italy did not file a civil suit. It was the first time that an American court applied civil forfeiture to illegally transferred cultural property.

While American judgements (by statutory direction) have recognized aspects of foreign law that attempt to regulate the international transfer of artifacts, they are characterized by the application of domestic laws regulating the movement of goods. They fall short of, and point to a need for, standard export control laws that would govern all international trade in cultural property, or at least a mutual recognition of export control laws. The effort to do so has been weakened by opposing perspectives on cultural property trade. Regulation of the movement of goods also does not address the substantive issue of ownership conflicts arising from differences between Common and Civil law.

Not only is harmonization lacking between E.U. member states' domestic laws, but it also places the disproportionate burden on source nations to use transfer deterrents such as strict export controls and export licensing.

However, there has been an effort, especially in *Ortiz* and *Autocephalous Greek-Orthodox Church of Cyprus*, to incorporate isolated substantive elements of private law into rulings regarding stolen cultural property. Importing the Discovery Rule into a replevin action addresses the difficulty that plaintiffs have in locating missing items within limitation periods and making a claim to recover them. This is especially true in the circumstances of newly excavated archaeological finds. Additionally, by giving substantial weight to factual findings of due diligence (either on the part of the defendant while ascertaining clean provenance or on the part of the plaintiff while locating the item), the importance of contextual events surrounding the transfer of cultural property is emphasized. This stresses the importance of: (1) checking stolen objects registries, (2) investigating the background of parties involved in a transfer and (3) exercising caution when offered off-par prices or questionable documentation.

LEGAL COMPATIBILITY WITH INTERNATIONAL CONVENTIONS

Not only is harmonization lacking between E.U. member states' domestic laws, but it also places the disproportionate burden on source nations to use transfer deterrents such as strict export controls and export licensing. These procedures can be determinative as to the application of domestic law to cultural property, since once an item leaves the country, it loses the protection of that country's laws and may be subject to

lex situs. It would be more productive to have parallel import control in market nations, but there is no obligation for member states to apply import restrictions beyond those for property stolen from museums or monuments.³⁰ The capacity of the E.U. to administer interstate rules is limited by state consent and Treaty of Rome jurisdictional subsidiarity and, of course, does not include non-E.U. jurisdictions such as Switzerland. The lack of a truly pan-European agreement leaves individual states to employ multiple bilateral regulatory measures, which promotes inconsistent legal application, heightened bureaucracy and incomplete participation—in short, the very conditions that fuel the black market in cultural property.

As with any market, the market for cultural property must be well-organized in order to minimize waste of both wealth and goods.

Private organizations have provided some assistance in tracking down objects by constructing databases that contain compilations of art and artifacts. One such database is the Art Loss Register (ALR), to which submissions may be made of stolen items. It is the world's largest independent database of stolen art works and antiquities³¹ providing a body which prospective buyers, as part of their due diligence, should consult in order to verify the provenance of suspect items. Prompt access to such resources can address the citizen collector's losses and the need for workable private law remedies. But while databases are important tools, their use is neither standardized nor obligatory in either conventions or law, thereby limiting their potential for usefulness to adjudicators.

A SOLUTION: THE INVISIBLE HAND

First, it cannot be ignored that the free market has an insatiable capacity for setting the price of goods, even for those such as cultural property that also possess intangible value. Though this observation is often made in support of the internationalist perspective, it is made here because it points to the need to find a solution that operates within market influences. It is, perhaps, not ideal to discuss cultural heritage vis-à-vis the market. Licit and illicit markets in cultural property exist, and the role of law should be to deter the entry of art and artifacts into the black market in order to protect objects themselves, as well as original owners' rights. This means that a licit market in cultural property must function, but that it should do so with maximum transparency and available information so as to heighten the security for *all* participants. In such a context, the maximization of wealth continues to motivate people and institutions, and these market actors will affect the future welfare of cultural property. As with any market, the market for cultural property must be well-organized in order to minimize waste of both wealth and goods.

What type of environment is most likely to offer protection to cultural property? The intuitive answer is one in which the cultural property is valued not only by the purchaser, but also by other parties involved in a transfer—the acquirer, seller, carrier, etc. The central quality to paying full market value is that the market is open to everyone. The scrutiny associated with public markets encourages fair, orderly practices.

Second, a market analysis also suggests that the risk that an item entered the market due to illicit circumstances should be borne by the party best-equipped to do so.

³⁰ Vitrano, *supra* note 5 at 1177.

³¹ "Assistance from Recovery Service", *Lawyer*, Nov 21, 1995, at 16, available in LEXIS, News Library, Lawyer File.

Certainly, market actors—seller and potential buyers—must be made more responsible for the licit status of their purchases because they are *willing* participants. It is unjust to externalize the costs of a transaction by shifting them to extra-market actors (governments, victims of theft, and insurers). With reference to cultural property vis-à-vis legal regulation, this obligation is one of exercising due diligence in verifying clean provenance and legal export. A purchaser that must prove good faith can most easily perform this task, since it is easier to investigate the history of one item than for a claimant owner to comb the world for a missing item or parts thereof.³²

ESTABLISHING TITLE

The real problem with attaching a value to reliance on allegations of good provenance is that this risk has different consequences in different jurisdictions. The international market cannot properly value an important element of a transaction involving cultural property. In order to enhance the reliability and orderliness of the market, it must be regulated consistently, and this means streamlining different legal analyses into a unified whole.

The foremost consideration in this paper's proposition for resolving cultural property disputes is that cultural property, even as a commodity, must not be subject only to the laws that govern normal chattels. Each item is a piece of human heritage, may not be reproducible and, due to its appreci-

ating value, is more likely a target for theft. Therefore, this paper submits that the application of common legal tests to questions of title to cultural property should have as its object the defence of original title, extinguishable only in certain circumstances described further below. The transfer of original title, as exercised in Common law, involves the willing participation of both owner and purchaser, ensuring an item's protection in the care of a true owner, as opposed to that of a thief.

The notion within both international conventions and Civil law that a *bona fide* purchaser should be eligible for compensation from a dispossessed owner for returning an object is not tenable. Why should someone have to pay the customer of a thief to reclaim his own property? While an owner can take reasonable steps to protect his or her property, he or she cannot be held absolutely responsible for subsequent theft. A purchaser is in a better position to verify licit provenance and should be responsible for doing so since, unlike the original owner, the purchaser is a *willing participant* in the transfer of illicitly obtained goods, the very transfer that can affect title. Indemnification of a purchaser by the original owner is an unprincipled and obvious attempt to avoid the central issue of exclusive title. Its application can also be problematic in many cases because the asking prices of various dealers and the passage of time (from initial loss, through subsequent sales, to the point of recovery) would inflate the compensatory market value of what a final *bona fide* purchaser paid.³³

32 A portrait painting, for example, might be taken and transported without damage, but a torso cut (for easier theft) from an immobile statue leaves the statue severely damaged. A Canadian example would be the effect upon a totem pole if the top three metres were cut off and then further divided into thirds for sale in different overseas art markets.

The author personally encountered such circumstances in the summer of 1998 when he was working at an archeological excavation in Italy. Over the course of one particular day, his team nearly unearthed a partial, but excellent specimen of a bowl in soil strata dating from late Imperial Rome. During the night, a thief hastily removed it from the remaining earth, depriving the team of the opportunity to properly wash, examine, date, draw and catalogue the item before turning it over to regional museum authorities. In the process of removing it from the ground, the bowl may have been damaged in such a way as to retain its market value, but to suffer the loss of certain clues (i.e. artisan markings) that provide important information to archaeologists.

33 In the *Steinhards* case, the market value of the *phiale* increased from US\$20,000 in the early 1980s to US\$1.15 million in 1995, including a 15% dealer's commission.

Requiring compensation for a purchaser of stolen or lost items essentially protects the profits taken by thieves and dealers in such goods.

Original title should be protected from being passed on to any *bona fide* purchaser. This paper suggests that this is more just than allowing any *bona fide* purchaser to acquire title in accordance with the current, limited legal standards. This is more functional since, while one can take measures to prevent the loss of an item, once it actually is stolen, it is difficult to mitigate against the loss of unique items of cultural property. The *bona fide* acquisition of even stolen goods is a policy preference designed for a functional domestic market in more ordinary goods that are readily available. The loss of a television or stereo can be easily mitigated through the purchase of an identical item and readily covered by insurance due to the common value (and little historical significance) of the item. But Civil law and *market ouvert* exceptions within Common law jurisdictions are wrong to apply this policy to unique, non-reproducible pieces of cultural property.

Once a governing law has been chosen, the critical determinative test in the legal analysis should be what constitutes a bona fide purchase.

However, the issue of title transfer between Common law versus Civil law jurisdictions is a conflict not easily resolved. The primacy of the *lex situs*, and the application of the domestic law of the site of property transfer as the preferred choice-of-law rule governing transfers of title to

chattels, means that differing state legal regimes will continue to be applied to cultural property disputes.³⁴ Therefore, the best manner in which to design a legal regime that can be similarly applied in different jurisdictions is by modifying the *components* of the legal tests (i.e., due diligence thresholds) so that the law can best distinguish between (a) the *situs* where an owner validly acquired, possessed and transferred title to an item and (b) the *situs* where this was not the case.³⁵ It also requires a second stage of a standardized and more thorough regulatory framework.

COORDINATING THE LAW WITH INFORMATION MANAGEMENT

Once a governing law has been chosen, the critical determinative test in the legal analysis should be what constitutes a *bona fide* purchase. A standard of diligence could require the use of a group of dependable registries that function in the same capacity as the ALR. An information file associated with a given work of art could also be maintained and reside with purchaser as a form of registration that must accompany any transfer and be filed anew each time title passes. Any proper registration file would contain sufficient information to account for the provenance of an item over relevant limitation periods and also contain contacts (either with owners, dealers or databases) against which the registration information can be verified.

The contemporary availability of the ALR and other databases against which to check provenance, in addition to their utility, suggests that market actors should be legally required to use them.³⁶ Such parties include not only market actors, but also

³⁴ Pecoraro, *supra* note 13 at 7.

³⁵ This distinction can also account for provenance of new archaeological finds.

³⁶ The Curator of Antiquities at the Getty Museum has suggested making inquiries to the culture ministries of governments of countries that were the possible sources of the piece. Counsel to the Boston Museum of Fine Arts also drew attention to the importance of consulting legal advice from counsel in the country of presumed origin and checking that no encumbrances exist on the item. See seminar commentary in Shapiro, *supra* note 22 at 369-70.

dispossessed owners who would make the market a more predictable, and thus safer, place by immediately reporting their losses to relevant law enforcement authorities and databases. Not having to do so makes non-reporting a tactical, rational option for such owners.³⁷ However, non-reporting collectively encourages illicit sales because it induces detrimental reliance by an innocent purchaser.³⁸ The consultation of databases and other sources are especially relevant for dealers in cultural property (who purport to pass good title), since they are repeat market actors with experience in the field and the likely target for legal action from both purchasers and dispossessed owners in any dispute. They have a greater incentive to verify licit provenance. Diligent merchants are in a better position to protect against losses through insurance or other risk management means and their increased legitimacy would attract other potential good-faith buyers. If legal tests of diligent market behaviour included owner reporting and buyer consultation with databases, then bona fide purchases simply cannot include stolen items and purchasers cannot claim ignorance. One author suggests that immediate registry reporting (with a few months' grace period for museums) should supplant limitation periods altogether for items of cultural property;³⁹ however this envisages quite sophisticated owners. However, the vast majority of stolen cultural property comes from private homes and not from institutions, illustrating the necessity to monitor individual market actors.⁴⁰ Not only are homeowners less likely to inventory residences regularly, but they do not operate under the mandate of galleries and

museums to collect for the sake of public access and instruction. This latter group's mission is incompatible with poor management of cultural property and so should be held to stricter standards of exercising its diligence expeditiously. There remains a place for the application of limitation periods, but in precise circumstances.

REDEFINING LIMITATION PERIODS

Limitation periods, as I have implied above, are a concession to an undefined sense of justice in the face of unregulated market efficiency. As such, they are driven by policy. A truly international set of limitation periods must be established for two reasons. First, predictable limitations help to clarify transaction liabilities, which can then be more easily allocated between buyer and seller. Second, any time limitation is effectively weighed in balance inversely with the finding of fact of *bona fide* due diligence. For example, in Italy, where there is no limitation period and a *bona fide* purchaser gains immediate title, most analysis during a dispute over provenance is focussed on the circumstances of the transaction, which are then amplified. Conversely, where a post-discovery limitation period runs for decades, any lack of action can seem inappropriate, given the large opportunity to act.

It is suggested that the first limitation would be a notification period (not a limitation period in which to bring an action) for reasonable discovery of the theft. If due diligence efforts are standardized between both Common law and Civil law states to require immediate notification to law

³⁷ This may include trying not to invite a tax audit for potentially unclaimed capital gains, inheritance and other taxes.

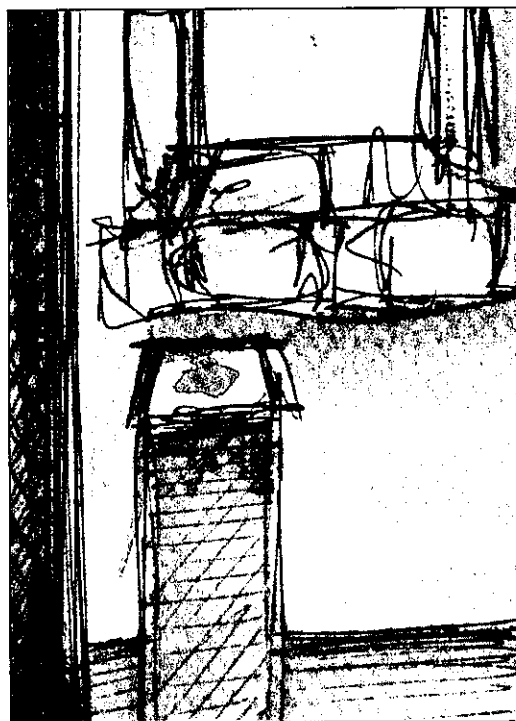
³⁸ Stephanos Bibas, "The Case Against Statutes of Limitations for Stolen Art" (1996) 5 *International Journal of Cultural Property* at 85.

³⁹ *Ibid.* at 90.

⁴⁰ More than 50% of stolen items reported between 1991 and 1996 to the Art Loss Register, an international database for stolen cultural property with which dispossessed owners can register their losses, were stolen from private homes. See *Art Loss Register News* (Feb 1997) at 4.

enforcement authorities and databases, then notice on the part of the dispossessed owner would demonstrate obvious *bona fide* due diligence. It is also important to limit the application of absolute limitation periods for bringing an action forward to situations where the dispossessed owner failed to make notification within the notification period. Where a notification was properly made, there should be no ultimate limitation period. This discourages illicit possessors from being able to simply conceal the stolen items and wait for limitation periods to expire, during which time the cultural property is likely to appreciate in market value. Clarifying the substance of due diligence for judges and sharpening timelines is especially important to guide an internationally uniform application of law, one that functionally addresses the realities of an international market in cultural property. In the end, real legal solutions are needed. Italy was not able to have its proper title to the *philae* recognised in an American court, and its own law was ineffective

against Mr. Steinhardt. Fortunately, Italy was able to repatriate the item, not on the grounds of substantive law, but rather due to the fact that its forged importation documents had infringed U.S. customs law, and the American authorities decided to pursue this violation. However, thousands of other dispossessed owners around the world, from cosmopolitan cities to towns in Afghanistan are not so fortunate. Profiteers will continue to prosper as long as no comprehensive international system exists to combat the theft of irreplaceable art and artifacts. The regime that this paper has proposed would have protected the integrity of Italy's title over its artifact and extended liability for its theft to all those who sought to profit from its illicit removal—from thief to dealers and buyers. Only by using the tools of modern information technology and the pressure of cross-border economic liability, coupled with a consistent protection of original title, can the law effectively be brought to bear upon this sensitive aspect of our heritage. ■



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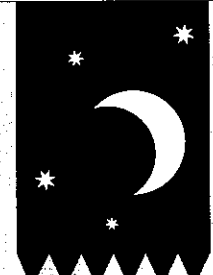
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