**INTRODUCTION**

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INTRODUCTION

In this Spring volume of the Creighton International and Comparative Law Journal, we bring readers articles featuring members of the Creighton University School of Law community. Our lead article comes from Professor Raneta Mack who writes about the jury trial process in Japan. The remaining articles were submitted by the Journal’s very talented staff of student authors, which included both second and third year law students.

Once again the topics chosen for this volume reflect the variety of interests of the Journal’s authors and readers. The articles address a wide range of issues, including Article 9 in Japan’s constitution, foreign domestic help in Asia, development in sex trafficking laws, and the recent conflict in Libya. The Journal is dependent on the hard work and dedication of its writers, staff, and faculty at Creighton University School of Law, and we are honored to feature members of that community. I look forward to seeing many of our student writers featured in this volume continue the Journal’s publication next year. I hope you enjoy this volume of the Creighton International and Comparative Law Journal.

Nicole Bohe
Editor-in-Chief, 2011-12
I. INTRODUCTION

Japan’s first jury trial in more than sixty years apparently went off without a hitch in August 2009.1 The defendant, a seventy-two-year-old man charged with murdering his sixty-six-year-old neighbor, had confessed to the killing prior to trial, explaining that he attacked his neighbor with a knife because she knocked over some bottles of water on his property.2 Thus, the jury of six laypeople and three professional judges had only to decide the level of culpability and the severity of punishment, not whether the defendant was guilty of committing the criminal act.3 The jury ultimately convicted the defendant of murder and sentenced him to fifteen years in prison.4

* Professor of Law, Creighton University School of Law. I would like to thank Aaron Robison (Creighton Law Class of 2012) for providing excellent research assistance during the preparation of this article. I would also like to thank the Creighton University School of Law for providing summer research grant assistance to support my scholarship.


2 Tabuchi & McDonald, supra note 1.

3 Id. According to one news report, four of the six jurors were women and the other two were men. Id.

4 According to the Supreme Court of Japan, during sentencing, to help educate lay assessors on sentencing norms during deliberations, they will be shown graphs and other data which indicate trends in sentencing in precedent cases of the same type of offense. Supreme Court of Japan, Outline of Criminal Justice in Japan, Section 6 (Trial) Note 35,
Prior to the reinstitution of jury trials in Japan in 2004 (known as “saiban in”), there was a great deal of skepticism and reluctance about adding citizen participation to the criminal justice process. The Japanese culture of deference to authority was thought to be a significant impediment to impaneling lay jurors who would be willing to participate in the process. Additionally, the lack of transparency in the criminal justice system based upon a foundation of “benevolent paternalism” had left much of the population in the dark about the operations of criminal justice. Unfortunately, this notion of a secretive criminal justice system far removed from the citizens subjected to it had deep historical roots in Japan.

In an attempt to address these concerns, Japan instituted a jury system based upon a model used in many inquisitorial systems of http://www.courts.go.jp/english/proceedings/criminal_justice.html#2_6_d (last visited February 18, 2012).

Tabuchi & McDonald, supra note 1. Public opinion surveys to evaluate attitudes towards the lay assessor system initially revealed that 70% of citizens did not want to serve on lay assessor panels. The reasons for this reluctance varied from “not wanting to judge people at all” to fear that jury service would interfere with caring for children or elderly family members. Interestingly, the percentage of women expressing reluctance (75%) was higher than the percentage of men (64%). Kent Anderson & Leah Ambler, The Slow Birth of Japan’s Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement, 11 J. JAPAN. L. 55, 69 (2006) [hereinafter Anderson & Ambler]. The Supreme Court of Japan was among the entities most skeptical about the introduction of the lay assessor system. To diminish the impact of lay participation, the court initially suggested that “if a system based on lay participation had to be introduced, a non-binding advisory, mixed-court was preferred.” Id. at 59.

Lester W. Kiss, Reviving the Criminal Jury in Japan, 62 LAW & CONTEMP. PROBS. 261, 283 (1999) (explaining that the purpose of lay jury participation could be defeated by lay persons always deferring to the opinions of judges even if not rationally persuaded).

Benevolent paternalism is a criminal justice theory that permits broad discretion, intrusiveness, and the infringing of individual rights by police and prosecution officials as long as suspects are treated in a manner that promotes rehabilitation. Joseph Rozenshtein, Japan’s Jury: A Weak Start at Reform, 4 COLUMB. E. ASIA REV. 22, 28 (2001). The Justice System Reform Council, the governmental body that recommended establishment of the lay assessor system, acknowledged that the newly proposed system aimed to, among other things, remove a longstanding barrier between the government and the governed. They opined that “[i]f the people become more widely involved in the administration of justice... the interface between the justice system and the people will become broader in scale and deeper, public understanding of the justice system will rise, and the justice system and trial process will become easier for the public to understand.” JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), available at, http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html [hereinafter JSRC Recommendations].

Rozenshtein at 25-26 (describing the Tokugawa period in Japanese history (1603-1868) during which citizens had no access to the criminal justice system and criminal justice dispositions were considered official secrets).
justice, i.e., lay jurors deliberating with professional judges. Although this is not a jury of one's peers in the purest sense, there are advantages to having individuals skilled in the law in the deliberation room, especially if the citizenry has been effectively shielded from the criminal justice process for a prolonged period, as happened in Japan. Of course, there is also significant concern that the professional judges may dominate the proceedings, and this concern is particularly acute in Japan with its culture of deference to authority.

To combat the potential for judicial dominance, Japan codified the “principle of free conviction” and a juror voting process designed to reduce such influence. Each of the nine jurors has a vote, but even if all three professional judges vote guilty, five of the lay jurors can essentially “veto” the judges by voting not guilty. However, if all six lay jurors vote guilty, they need at least one professional judge in agreement to prevail.

Allowing jurors to directly question defendants and witnesses during the trial is another feature that enhances citizen participation in Japan’s jury trial process. This level of juror participation is dramatically different from the process across most of the United

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9 For example, in France, three professional judges and nine lay assessors form the jury panel when the Court of Assizes rules in the first instance. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 296 (Fr.). The judges and the lay assessors deliberate together and guilt is determined by a vote of at least eight members of the panel. Id. at art. 359.

10 Empirical research on the German mixed jury system revealed that “jurors are likely to defer to the judge too often and too quickly,” thereby discounting the inherent value of citizen participation. Matthew Wilson, The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?, 24 WISC. INT’L L.J. 835, 855 (Winter 2007) (quoting Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 VA. L. REV. 311, 374-75 (2003)). See also, Daniel Senger, The Japanese Quasi-Jury And The American Jury: A Comparative Assessment Of Juror Questioning And Sentencing Procedures And Cultural Elements In Lay Judicial Participation, 2011 U. ILL. L. REV 741, 752 (2011)(explaining that “in the Soviet Union, the jury system was replaced by a lay assessor system when the Bolsheviks took power in 1917. The system involved so little power for the lay assessors relative to the professional judge that the lay assessors came to be referred to as ‘nodders’ for nodding along with the professional judge”).

11 Anderson & Saint, supra note 1, at 268-69 art. 62. The Principle of Free Conviction states that: “Regarding decisions in which lay assessors’ participate, judges and lay assessors are both entrusted to decide freely based on the strength of the evidence.”

12 Anderson & Saint, supra note 1, at 273 art. 67. The Verdict section provides that: “A decision involving lay assessors’ participation...will be by majority opinion of the members of the judicial panel, which shall include both an empanelled judge and a lay assessor holding that opinion” (emphasis added).

13 Id. at art. 56. If the court questions a witness, “a lay assessor may, upon informing the chief judge, question that person concerning those matters that are required to be decided with lay assessors’ participation.” See also id. at art. 59: If the “defendant makes a voluntary statement...lay assessors may, at anytime ... request a statement from the defendant concerning those matters that are required to be decided with the lay assessors’ participation.”
States, in which jurors are, for the most part, seen but not heard from until the verdict.\textsuperscript{14} The practice of allowing in court inquiries by jurors is similar, however, to some inquisitorial systems in which lay jurors are allowed to question defendants and witnesses after asking the presiding judge for permission to speak.\textsuperscript{15}

In Japan’s first jury trial under the new system, lay jurors demonstrated their understanding of the core issues in the case and took advantage of the opportunity to question the defendant in court by asking him about the particular knife he used (why a survival knife instead of a kitchen knife?) and questioning why he didn’t seek help for the victim even though he thought she could die (the defendant claimed that he thought another neighbor would call for help).\textsuperscript{16} Although this particular jury trial appeared to go smoothly and the lay jurors took an active role as expected, this is a process that is still in its infancy, which means there will inevitably be some bumps in road.

For example, Japan has an exceptionally high conviction rate (greater than 99\% by most estimates).\textsuperscript{17} While this can certainly be attributed, in part, to prosecutorial selectivity, it is also clear that most of the criminal cases in Japan are presented to the courts

\textsuperscript{14} In the United States, judges on the federal and state levels may, at their discretion, permit jurors to ask questions which are posed by the judge. Such questioning is typically permitted: “(1) for clarification in a lengthy, complex trial; (2) for clarification if the attorneys are unprepared or obstreperous, or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up; and (3) if a witness is difficult, if a witness’ testimony is unbelievable and counsel fails to adequately probe, or if the witness becomes inadvertently confused.” United States v. Collins, 226 F.3d 457, 462-63 (6th Cir. 2000). But, because of the potential risks associated with unfettered jury questioning, “[a]llowing juror questions should not become a routine practice, but should occur only rarely after the district court has determined that such questions are warranted. In exercising their discretion, trial judges must weigh the potential benefits of juror questioning against the possible risks and, if the balance favors juror questions, employ measures to minimize the risks.” \textit{Id.} at 464.

\textsuperscript{15} C. Pr. Pén. \textit{supra} note 9, at art. 311. In France, the jurors may put questions to the accused and to the witnesses after asking the presiding judge for leave to speak. They have a duty not to show their opinion. \textit{See also Strafprozeßordnung [StPO] [Code of Criminal Procedure]} §240. Under the German Code: “(1) The presiding judge shall permit the associate judges, upon request, to address questions to the defendant, witnesses and experts [and] (2) The presiding judge shall give similar permission to the public prosecution office, to the defendant, and to [defense] counsel, as well as to the lay judges.”


\textsuperscript{17} However, “[t]he conviction rate in Japanese criminal cases - 99.8 percent - cannot be compared directly with those of other countries because there is no plea bargaining in Japan and prosecutors bring only those cases they are sure to win. But experts say that in court, where acquittals are considered harmful to the careers of prosecutors and judges alike, there is a presumption of guilt.” Norimitsu Onishi, \textit{Coerced confessions: Justice derailed in Japan}, \textit{N.Y. Times}, May 7, 2007.
wrapped neatly with pre-trial confessions by defendants. In most instances, such confessions are obtained without the benefit of counsel and within the secret confines of the interrogation room. Japan has resisted repeated calls for general audio- or videotaping of entire interrogations, explaining that recording could impede the interrogation process. This systemic reliance on unounselled confessions will likely present two challenges to the newly established jury system. First, what will happen when jurors are presented with a challenge to the credibility of a confession? Can Japan continue to resist calls for recorded interrogations when the voluntariness of confessions becomes critical to determinations of guilt or innocence? Second, what will happen if, or when, the conviction rate in Japan declines? Finally, will Japan be able to maintain the requisite level

18 Id. Explaining that in Japan, “[c]onfessions have been known as the king of evidence.... Especially if it’s a big case, even if the accused hasn’t done anything, the authorities will seek a confession through psychological torture.” Id. (Quoting Kenzo Akiyama). Reliance on confessions is part of a long tradition dating back to the Tokugawa period. To preserve social stability and prevent the undermining of state power, “Tokugawa officials relied heavily on written confessions which were considered the strongest indicators of fact, even to the extent that torture was sanctioned in the pursuit of their extraction.” Rozenshtein, supra note 7, at 26.

19 The Japanese Justice Ministry issued a report explaining that electronically recording interrogations aids in “deterring inappropriate interrogation and preventing false charges.” However, “the report does not necessarily call for electronically recording the entire process of interrogation” likely due to the resistance of public prosecutors (a survey of 1042 prosecutors asked whether they support electronic recording revealed that “86 percent were reluctant about introduction of total recording and 58 percent even opposed partial recording”). Editorial, Report on interrogation recording, THE JAPAN TIMES ONLINE. Aug. 23, 2011, http://www.japantimes.co.jp/text/ed20110823a2.html.

20 In August 2011, the Justice Ministry ordered expanded use of “visualization” on an experimental basis in “cases subject to lay judge trials in which the accused denies the charges, creating such recordings for all cases subject to lay judge trials.” Visualization had previously been limited to lay judge cases in which the accused admitted the facts. Despite the connotation of the term “visualization,” during the trial, lay judges do not see an actual recording of the defendant’s interrogation. In most instances, “visualization” “does not refer to a recording of the interrogation itself. Instead, prosecutors write interrogation reports and then are recorded reading them aloud for 15 to 30 minutes on a DVD.” More interrogations ‘visualized’ / Justice minister wants procedure used in all lay judge cases, Aug. 10, 2011, THE DAILY YOMIURI ONLINE, http://www.yomiuri.co.jp/dy/national/T110809006050.htm.

21 Historically, acquittals in Japan have been regarded as “a disgrace that might undermine respect [for the government]...and an assault on the regime’s social projects as well as on its claim to power.” Rozenshtein, supra note 7, at 26. In the two and a half years since the institution of the lay assessor system, there is already precedent that suggests a devaluation of lay judge acquittal verdicts. For example, in June 2010, the Chiba District Court acquitted a defendant of charges that he smuggled drugs in a can of chocolates. According to the Court, the defendant’s “claim that he was unaware drugs were in the can ‘could not necessarily be deemed false.’” However, in March 2011, the Tokyo High Court reversed the district court’s ruling concluding that the defendant “fabricated stories every time his
of citizen participation in the jury trial process? During the first trial, a lay juror withdrew due to an apparent illness and had to be replaced. As mentioned above, Japanese culture exhibits strong deference to authority. This inclination is in sharp conflict with the responsibilities of jury service, which will sometimes require challenging the prosecutor’s evidence and might require debating with the professional judges. Will lay jurors come to accept these challenges as a natural part of the process or will jurors simply seek to avoid jury service altogether?  

Overall, when viewed as an isolated component, Japan’s establishment of a jury trial system is a bold effort to democratize its criminal justice process after decades of judicial dominance. Lay citizen participation in the criminal process adds transparency and a level of credibility to the criminal process. However, when placed in the broader context of Japan’s criminal justice system, the lay juror process is but an incremental quasi-adversarial adjustment sitting atop a long inquisitorial tradition. A myriad of issues will inevitably arise from the tension created by the competing values of two traditions.

To explore some of those issues, this Article will examine the foundational and systemic impact of transitioning to a lay participation jury in an inquisitorial system accustomed to near-perfect conviction rates. To begin, Part I of the Article will discuss Japan’s Act Concerning Participation of Lay Assessors in Criminal Trials (hereinafter “Lay Assessor Act”), the statute outlining the criteria for participation in the jury trial process as well as the responsibilities of lay assessors.

Next, for purposes of comparison, Part II will explore Russia’s transition to a lay jury system in the early 1990s. Russia’s “experiment” with jury trials is a very instructive comparative assessment because, like Japan, Russia reestablished jury trials in 1993, after a sweeping reform of its criminal justice system.  

As will be discussed, the revival of lay participation in the criminal justice system was short-lived because a mere fifteen years later, Russia has eliminated jury trials for most cases primarily due to a perception that leniency by jurors was resulting in excessive acquittals.
Indeed, today, Russia has virtually scrapped its jury system process. The political and social dynamics that led to Russia’s shift away from citizen participation in the criminal justice system is a cautionary tale that will be discussed with an eye toward analyzing whether Japan’s new system might suffer a similar fate. Because both Russia and Japan incorporated citizen participation into judge dominated systems with near universal conviction rates, Part III will examine the Japanese citizen jury participation model through the prism of Russia’s experience to determine where potential pitfalls may lie as Japan seeks to enhance transparency and democracy in its criminal justice system.

II. JURY SYSTEMS IN JAPAN

A. THE PRE-WWII EXPERIENCE

This most recent iteration of democratic participation in the criminal justice process is not Japan’s first foray into a jury trial system. From 1928-1943, Japan had a jury trial system that was very limited in its authority and function. However, this early Showa period jury fell far short of meaningful citizen participation in the criminal process insofar as it could only be comprised of tax paying adult men whose income exceeded a certain amount. With respect to the procedural aspects of the lay jury system,

[crimes that could go before a jury were limited to a narrow range of serious infractions, and defendants could opt for a bench trial if they wanted one. The crucial issue concerning the effectiveness of this jury system was that the presiding judge could overrule the jury if he did not like the verdict; in other words, the verdict did not bind the court at all. Neither party could appeal to the higher court.]

prosecutors, acquitting 15 to 20 percent of the time.” Ellen Barry, After Dismissal of Jury, Judges Convict Russian, N.Y. TIMES, Dec. 29, 2010, at A6 (discussing how a Russian jury was abruptly dismissed in a trial when it appeared that they might be leaning toward acquittal).


26 See Kanako Ida, Introducing Citizen Participation in Japanese Courts: Interaction with Society and Democracy from the Perspective of the American Jury System 14 (USJP Occasional Paper 06-03, 2006), available at http://www.wcfia.harvard.edu/us-japan/ research/pdf/06-03.Ida.pdf. See also Dobrovolskaia, supra note 25, at 233 (“jury members had to be male citizens over thirty years old, reside in the same city, town or village for at least two years, pay more than three yen in national direct taxes, be literate, and possess Japanese citizenship”).

27 Ida, supra note 26 at 6; see also Dobrovolskaia, supra note 25, at 232 (“[M]embers of the pre-war jury did not decide whether the defendant was guilty or not guilty. Instead, the judge submitted questions on the points of fact...to the jury and had the option of ignoring the jury’s answers and calling another jury”).
Given the inherent risks and few benefits to defendants in this system, it is perhaps not surprising that the jury trial system was used less frequently over time.\(^{28}\) An internal analysis of the system in a publication known as the *Jury Guidebook*\(^{29}\) revealed that the lay jury system “had not yet ‘penetrated all of the Japanese society.’”\(^{30}\) The *Jury Guidebook* proposed several theories as to why the jury system had not lived up to expectations. Those reasons included a lack of continuing financial support by the government and public indifference to the law due to a societal perception that “law is something to be followed, not known.”\(^{31}\) The *Jury Guidebook* determined that because “[l]aw was coercively imposed upon the people...the public therefore was completely uninterested in its provisions.”\(^{32}\) This attitude had become so entrenched that it became “the traditional way of looking at the law, and this perspective has been difficult for our people to rid itself of.”\(^{33}\)

Finally, in the midst of a world war that challenged Japan’s resources and its commitment to due process for its citizens, the jury

\(^{28}\) “The Pre-War Jury Act was passed in 1928, but it was not used very often: in fact, the number of cases judged by jury decreased from a peak of 143 in 1929 to two in 1942.” Ida, supra note 26, at 7.

\(^{29}\) The *Jury Guidebook* was written by the Japanese Jury Association, an organization dedicated to explaining the “beauty of the Jury Act as the law of unprecedented importance.” Dobrovolskaia, supra note 25, at 278. According to its preface, the *Jury Guidebook* “[aimed] to provide a summary of the main points regarding the Jury Act for jury candidates in the hope that this will enable readers to carry out their duty flawlessly and impartially and is therefore written in extremely plain language.” Id. at 244. The *Jury Guidebook* also encouraged jurors to bring it with them during jury service and to take notes in a journal included within the *Jury Guidebook*. According to the authors of the *Jury Guidebook*, such journal notations would “certainly become a precious souvenir and an item of honor that is likely to decorate your family archives for a long time.” Id.

\(^{30}\) Id. at 238. The *Jury Guidebook* explained that a lack of insight into the operations of the lay jury process had resulted in mistakes and misconduct on the part of jurors. For example, in one case, a juror who was to make decisions regarding the facts constituting a crime revealed his ignorance regarding his duty as a juror by addressing the following odd question to the presiding judge: “Is this a case of suicide by agreement or of forced suicide?” This question caused great disturbance in the courtroom. [The *Jury Guidebook* concluded that] this incident is shameful, and the ignorance of that juror fills us with utter amazement.

Id. at 278.

\(^{31}\) Id. at 247. Through the lens of history, scholars examining the rise and fall of the Showa period jury have identified both internal and external factors that led to its demise. Within the system, the jury’s power was undermined by judicial authority to ignore the jury’s findings. Whereas, externally, the lay jury system was deemed incompatible with the inquisitorial system of justice. Id. at 237, note 27.

\(^{32}\) Id.

\(^{33}\) Id.
system was suspended. The specific reasons for suspension related to both the internal and external challenges to the system identified above. To wit, the internal structure of the system provided little benefit to defendants, leading most to avoid its application. Procedural hurdles, particularly the judge’s authority to ignore the jury’s findings, “frustrated attorneys, sometimes to the point where they would prefer to waive jury trial as a way of expressing piety to the authority of the judge in hopes of leniency in sentencing.”

However, these procedural deficiencies in isolation probably would not have completely doomed the system. Instead, the deathblow was likely delivered by a coalescence of historical, political and societal pressures. These external factors included the jury system’s basic incompatibility with the inquisitorial system in Japan at the time, the political climate (a rising tide of fascism), and the Japanese culture in which people were accustomed to experienced judges deciding cases instead of untrained laypeople.

In the Act calling for the suspension of the jury system, the Minister of Justice commended the lay jury system and expressed hope that it might be reintroduced in the future:

The jury system is appropriate in order to manage trials in a democratic way. It is difficult, however, to manage this system practically. Since the Jury System Act went into effect, only a few cases have been decided by jury. We need to scrutinize whether this system matches the conditions of our country. If we revive the jury system again, we will have to have large courthouses. Given the present circumstances, this is just impossible. I do not intend to deny the jury system in the least and obviously it should be reintroduced at some point; however, we would like to research this issue fully for the future.

More than half a century would transpire before Japan would once again consider the question of how “[the justice system] and the legal profession [could] be reformed so as to make the law (order), which serves as the core of freedom and fairness on which [the country] should be based, broadly penetrate the entire state and all of

34 “The Jury System Suspension Act ... in 1943 provided that ‘the jury system will be re-activated when the War is over.’ Yet, “after the War the government did not let the criminal jury system be revived in Japan. The Jury Act is literally still sleeping.” See Takashi Maruta, The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction, 72 INT’L REV. PENAL L. 215, 219 (2001).
35 Kiss, supra note 6, at 269.
36 Dobrovolskaia, supra note 25, at 238 n. 27. See also Kiss, supra note 6 at 269. (“Many scholars are convinced that as a result of the hierarchy in Japanese society, the Japanese people prefer trial by ‘those above the people’ rather than by ‘their fellows,’ and that this caused the Japanese to distrust juries from the beginning.”)
37 Ida, supra note 26, at 15.
society and become alive in the people's daily life."  

B. THE PUSH FOR REFORM

After decades of judge dominated trials and a criminal justice system with a near perfect conviction rate, what finally led Japan to begin the process of reestablishing the jury trial system? Like the factors that led to the suspension of the earlier system, the reasons were both internal and external. Internally, the judge-dominated system came to be seen as authoritarian, secretive, and isolated from the citizens it served. The jury system was promoted as an antidote to those systemic issues because it would involve the people directly in the process of their government. In effect, the jury system would provide a quid pro quo of sorts between the government and the governed in that it would:

-Promote a more democratic society that brings the norms and operations of the judiciary to the attention of the citizenry. Also, it would enhance the court system's legitimacy and bolster respect by creating the perception that disputes are resolved openly and fairly in the Japanese courts.

Along similar lines, the Justice System Reform Council (“JSRC”) summed up the overriding populist intent of the jury reform legislation when it observed that:

What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country.

The external factors that led to reform were equally compelling. The 1980s brought calls for reform of Japan's government administrative structure. While initially limited to the commercial sector, the reform movement quickly spread to the legal

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38 JSRC Recommendations, supra note 7, at Chap. 1 Introduction.
39 Kiss, supra note 6, at 264 (describing how “prosecutors conduct the factfinding and draw legal conclusions, and judges simply ‘rubber stamp’ their results,” which often include “voluntary confessions”).
40 JSRC Recommendations, supra note 7 (observing that “[t]he people, who are the governing subjects and the subjects of rights, must participate in the administration of justice autonomously and meaningfully, must make efforts to form and maintain places for rich communication with the legal profession, and must themselves realize and support the justice system for the people”).
41 Wilson, supra note 10, at 848.
42 JSRC Recommendations, supra note 7.
43 The momentum for such reform resulted from a stagnating economy and a desire to reduce the national debt. Wilson, supra note 10, at 842.
profession generally and to the judiciary specifically. A desire to fully participate in the “globalized” era led reformers to view “judicial reformation as the ‘final linchpin’ in restructuring the shape of Japan.”

Overall, the JSRC’s mission was to facilitate a more accessible and user-friendly justice system, ensure public participation in the system, redefine the legal profession, and reinforce its function. This agenda was supported by the theory that deregulation in Japan would reduce government intervention in many aspects of life; therefore, the public must be afforded better access to the judicial system and legal profession in order to ensure its protection.

Against this reform oriented backdrop, the first effort to construct a jury trial system since the suspension of the previous system in 1943 emerged. The legislation, known formally as an Act Concerning Participation of Lay Assessors in Criminal Trials (“Lay Assessor Act”), was enacted by the Japanese Diet on May 28, 2004. While the legislation encountered little resistance on its path to enactment, it was not without its critics, chief among them the Japanese courts.

As mentioned above, after the suspension of jury trials in 1943, judges resumed their dominant role in the criminal justice hierarchy. It is, therefore, not surprising that legislation requiring them to share power and consider the opinions of those untrained in the law would give rise to significant apprehension. As momentum for the lay jury system increased, the judiciary’s trepidation about the dilution of its power was often cloaked in language that focused on the potential burdens to other actors in the lay jury process. For instance, in a September 2001 letter opposing the reestablishment of jury trials, the Japanese Supreme Court identified several factors that would likely impede the full realization of a jury trial system.

Such factors included the enormous burden on citizens who had heretofore been excluded from the inner workings of an efficient and effective criminal justice system. The Court openly questioned how citizens could be adequately trained for such an enormous task and how the justice system could provide assurances that there would be no errors in the process due to this experiment with citizen democracy. And, last, but almost certainly

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44 Id. at 843
45 Id.
46 Id. at 847 (explaining that the “Supreme Court of Japan was diametrically opposed to the introduction of ‘jury trials’ in any form [b]ecause the Supreme Court...adamently believe[d] that the system was never broken...[and] that there [was] certainly no reason for it to be ‘fixed’”). See also Senger, supra note 10 at 753 (discussing the Japanese Supreme Court’s objections to a full jury system).
47 Wilson, supra note 10, at 847.
48 In a stinging comparative critique of the U.S. jury trial system, the Japanese Supreme Court simply “could not fathom how twelve ordinary citizens prone to inconsistency and error could arrive at verdicts more just and fair than three professional judges.” Id.
49 Such criticism likely resulted in a provision in the Supplementary
not least among the criticisms, was the issue of resources. Including lay jurors in the criminal trial process meant construction of new courtroom facilities, compensating lay jurors and accounting for lost productivity while jurors were away from their primary employment.\(^{50}\) What ultimately emerged from the vigorous debate on both sides was compromise legislation that created a European style mixed court with professional judges deliberating alongside lay jurors.\(^{51}\)

C. THE LAY ASSESSOR ACT

1. The Fundamentals

Article 1 of the Lay Assessor Act defines its purpose as “promotion of the public’s understanding of the judicial system [which] thereby [raises] their confidence in it.”\(^{52}\) Although one of the rationales for the new lay jury system was to “reflect the people’s sturdy social common sense on the content of trials,” the law was not made retroactive to cases pending when the law came into effect.\(^{53}\)

section, Art. 2, paragraph 1 of the Lay Assessor Act that provided:

[T]o encourage citizens to participate in criminal trials substantively based on personal conviction and to deepen citizens’ understanding and interest in the system for lay assessors’ participation in criminal trials, the Government and the Supreme Court shall by the enforcement date implement measures to explain, so that they are clearly and easily understood, things such as the lay assessors’ duties in deliberations and the hearing of cases, the procedure to select lay assessors, and the significance of citizen participation as lay assessors in trials.

Anderson & Saint, supra note 1, at 280-81 art. 2. Eventually, the Lay Assessor Promotions Office was created as a joint-venture among the Ministry of Justice, Supreme Court, and Japanese Federation of Bar Associations to disseminate information about the lay jury system. “Activities proposed at the time the office was created included filming a public relations motivated television drama, conducting mock trials in various regions, and making promotional posters representing each of the three parties comprising the legal profession in Japan.” Anderson & Ambler, supra, at 68.

\(^{50}\) “As of the end of 2008, facility costs related to the lay judge system alone totaled approximately JPY 23.1 billion (US$231 million), and additional preparatory expenditures exceeded JPY5.5 billion (US$55 million).” Matthew J. Wilson, Japan’s New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time, 33 FORDHAM INT’L L. J., 487, 494 (2009). Going forward, “[b]ased on current estimates, the Supreme Court of Japan estimates yearly expenditures of JPY2 billion (US$20 million) for lay judge compensation and JPY1.2 billion (US$12 million) for lay judge travel related expenses.” Id. at 494-95.

\(^{51}\) Japan’s lay juror system does differ, however, from European mixed panel systems. Senger, supra note 10, at 748 (discussing how Japan’s model is procedurally different from mixed panel models in Italy, France and Germany).

\(^{52}\) Anderson & Saint supra note 1, at 236 art 1.

\(^{53}\) JSRC Recommendations, supra note 7, at Chap 1, Part 3(2).
The new mixed jury system provides that a judicial panel comprised of three professional judges and six lay assessors will handle cases “involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with hard labor,” and cases involving “crimes in which the victim died due to an intentional criminal act.” The new law does not contain a provision allowing defendants to waive trial by lay jury. There are, however, certain circumstances that might permit the court to remove cases from the lay jury’s jurisdiction. Article 3 provides that the prosecutor, defendant, defense counsel or the court, sua sponte, may determine that a case is to be handled solely by a panel of judges when conditions are such that it would be difficult for lay assessors to fulfill their duties. Examples of such circumstances include:

[L]ay assessor candidates’ fear of significant violation to their peaceful existence or their fear of added injury to…assets or life arising from the defendant’s statements or statements of an organized group, or at the behest of a member of the defendant’s organized group, or where there has been violence, or reports of violence, towards present lay assessor candidates or lay assessors....

The separately allocated powers of judges and lay assessors are set out in Article 6. Both judges and lay assessors will make decisions concerning sentencing judgments, exonerations, innocence, and transfers to family court. Their chief responsibilities will be “recognizing facts, applying laws and ordinances and determining sentences.” By contrast, the judges on the panel alone have complete authority concerning interpretation of laws and ordinances.

However, the courts were given discretion to try pending cases with a judicial panel if they deemed it appropriate to consolidate a pending case with one that fell under the jurisdiction of the new law. Anderson & Saint, supra note 1, at 281 art 4.

However, in cases in which “it is recognized that there is no [factual] dispute concerning the facts at trial as established by the evidence and the issues identified by pre-trial procedure, the court may decide...that the trial and hearings be conducted by a judicial panel composed of one judge and four lay assessors” barring any objection by the prosecutor, defendant and defense counsel. Anderson & Saint supra note 1, at 236-37 art 2. Because the verdict requires a majority of the panel including one lay assessor and one judge, the judge holds veto power with the smaller panel. However, “because matters referred to the small panel will likely only cover cases where there is nothing in controversy, this is not expected to be problematic.” Anderson & Ambler, supra note 5 at 66.

Anderson & Saint supra note 1, at 236-37 art 2.

See Anderson & Ambler, supra note 5, at 62. This is a vast improvement over the pre-war system which allowed such waivers and arguably contributed to the demise of the lay jury system. Id. at 62 n. 41.

Anderson & Saint supra note 1, at 238 art 3.

Id. A determination by the District Court to accept or reject a request under paragraph 3(1) may be immediately appealed. Id. at 239.

Id. at 240 art 6.

Id. at 240-41.
litigation procedure, and “other decisions except those decisions involving lay assessors' participation.”

Chapter 2 of the Act, entitled “Lay Assessors,” contains the bulk of the provisions regarding lay assessors’ authority, selection, appointment, disqualification, and dismissal. Lay assessors must act independently, honestly, and fairly. They are also under a duty to “not disclose secrets from deliberation.”

In terms of appointment, lay assessors are selected from among those with voting rights in the Lower House. However, no person shall be qualified to serve as a lay assessor if he/she has not completed compulsory education, has been imprisoned, or has significant physical or mental incapacities. Also prohibited from service are members of the National Diet, Ministers of State, and employees of specified national administrative institutions. Judges, lawyers, prosecutors, judicial clerks, notaries public, judicial police officers, court personnel, professors of law, and legal apprentices are also among those in the long list of people who are prohibited from serving as lay assessors. Persons who have the option to decline service include those aged seventy and older, members of local councils, students, those who have been lay assessors within the past five years, and those who have serious illness or injury, significant childcare responsibilities, or business obligations. The Act also provides that people bearing certain relationships to specific cases may not serve as lay assessors. Such persons include the defendant or victim in the case, their relatives or representatives, witnesses or expert witnesses, or people who have made claims or complaints in the case. Finally, “persons [whom] the court recognizes might not be able to act fairly in a trial according to the prescribed laws cannot become lay assessors in the relevant case.”

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61 Id. at 241.
62 See generally id. at 241-65 chap. 2. This Chapter also covers the appointment of reserve lay assessors “where it is recognized as necessary considering the length of the trial and other circumstances.” Id. at 242 art. 10. However, the number of reserve lay assessors cannot exceed the number of lay assessors on the panel. Id.
63 Id. at 241 arts. 8 & 9.
64 Id. at 242 art. 9. This particular provision was the subject of much controversy. Indeed, “[t]he bar association and others voiced their opposition to extreme restriction on a lay judge's ability to openly communicate about their trial experience” because transparency and communication could serve to further educate the public about the lay jury process. Wilson, supra note 50, at 517. The Lay Assessor Act includes a compromise provision that limits lay jurors' ability to speak but “does not impact the ability of citizen judges to discuss their personal feelings about their overall experience as lay judges.” Id.
65 Anderson & Saint supra note 1, at 243 art. 13.
66 Id. at 243-44 art. 14.
67 Id. at 244 art. 15.
68 Id. at 245-46 art. 15.
69 Id. at 246-47 art. 16.
70 Id. at 247-48 art. 17.
71 Id. at 249 art. 18.
The selection of lay assessors for trial is not open to the public.\textsuperscript{72} The chief judge directs the selection process, which includes questioning the lay assessor candidates regarding their legal qualifications to serve.\textsuperscript{73} Potential lay assessor candidates have a duty to answer all questions truthfully and must answer all questions barring an appropriate reason to decline responding.\textsuperscript{74} Lay assessor candidates may still be disqualified at this stage if the questioning discloses that they lack the necessary legal qualifications or if there is a fear that they would act unfairly during the trial.\textsuperscript{75} In addition to the non-appointment of lay assessor candidates for specific reasons, the prosecutor and defendant may each challenge the appointment of up to four lay assessor candidates without specifying a reason.\textsuperscript{76} The court determines whether such challenges will be successful.\textsuperscript{77}

Once selected, lay assessors may be dismissed for a variety of reasons including a failure to take the oath, failure to attend the proceedings, and/or failure to participate in the deliberation process.\textsuperscript{78} Lay assessors may also be dismissed if there is a fear that they may act unfairly or if it is discovered that they made a false entry on the juror questionnaire or for abusing the dignity of the court.\textsuperscript{79} Once appointed, a lay assessor’s duties terminate when either (1) there is “notice of the completion of the trial,” or (2) there is a determination that the trial will be handled by a single judge or a panel of judges.\textsuperscript{80}

The lay assessor’s work may officially begin prior to trial if pre-trial proceedings require the questioning and inspection of witnesses.\textsuperscript{81} During the trial, a lay assessor’s participation is limited

\textsuperscript{72} Id. at 256 art. 33. The only persons allowed to be present are the judges, court clerks, the prosecutor and defense counsel. Id. at 256 art. 32 The court may also allow the defendant to attend, if necessary. Id.

\textsuperscript{73} Id. at 256 art. 33. The court must also give due consideration to “the feelings of lay assessor candidates” so that requests by individual candidates for determinations of non-appointment do not occur in the presence of the lay assessor candidates. Id.

\textsuperscript{74} Id. at 256 art. 34. The chief judge conducts the questioning of jurors, but attending judges, the prosecutor, defendant, or defense counsel may request the chief judge to ask specific questions of the lay assessors. “When it is found appropriate, the chief judge will do the requested questioning of the lay assessor candidates.” Id. at 257 art. 34.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 258 art. 36. The prosecutor and the defendant may also challenge the appointment of reserve lay assessors. Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 260 art. 41.

\textsuperscript{79} Id. at 261 art. 41. Abusing the dignity of the court can include engaging in abusive language or inappropriate speech in court or a failure to heed the orders of the chief judge. Id. After appointment, lay assessors themselves may apply to the court to resign their position as a lay assessor for reasons of hardship related to illness or family or work issues that arose after appointment. The court then reviews the lay assessor’s application and makes the determination as to whether the lay assessor should be dismissed. Id. at 264 art. 44.

\textsuperscript{80} Id. at 265 art. 48.

\textsuperscript{81} Id. at 266 arts. 52 and 53. A lay juror must appear at pre-trial proceedings or risk dismissal and punishment.
to those aspects of the process they are required to decide. Lay assessors may pose questions to witnesses upon informing the chief judge. If matters within the lay assessor’s province are to occur outside of court, lay assessors may attend and participate with the permission of the chief judge. When victims or their legal representatives offer testimony, lay assessors may question them for purposes of clarifying their statements. When the defendant chooses to make a voluntary statement, lay assessors may request a statement from the defendant concerning matters within the province of the lay assessors’ decision-making authority. The Act does not appear to provide an opportunity for lay assessors to question the defendant generally. This limitation is consistent with the defendant’s rights during trial, which include the right to silence and the option to make a statement.

During the deliberation process, lay assessors are required to attend and to express an opinion. Decisions are made in accordance with the principle of free conviction, i.e. “judges and lay assessors are both entrusted to decide freely based on the strength of the evidence.” The chief judge is responsible for “inform[ing] the lay assessors of any rulings on the interpretation of laws [and/or] procedures” made by the panel of judges. To enhance the educative value of the lay assessors’ participation and to bolster trust in the outcome of the deliberative process, the chief judge shall:

consider matters such as conscientiously explaining the necessary laws or ordinances to the lay assessors, making arrangements so that deliberations are easily understandable for the lay assessors, providing sufficient opportunity for the lay assessors to voice their opinions, and so forth, so that lay assessors are sufficiently able to execute their duties.

The verdict is determined by a majority of the panel members, but it must include both a lay assessor and a judge in the opinion. In the event there is division of opinion regarding the

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82 See supra note 55 and accompanying text.
83 Id. at 267 art. 56.
84 Id. at 267 art. 57
85 Id. at 268 art. 58.
86 Id. at 268 art. 59. Pursuant to Article 311 of the Japan’s Code of Criminal Procedure, a defendant may choose to remain silent at all times throughout the trial or may selectively refuse to answer particular questions. KEISOHO [CODE OF CRIMINAL PROCEDURE], art. 311.
87 Anderson & Saint, supra note 1, at 268 art. 59.
88 Id. at 273 art. 66.
89 Id. at 268-69 art. 62.
90 Id. at 273 art. 66.
91 Id.
92 Id. at 273 art. 67. Although not entirely clear from the language of the Act, “it is asserted that a five or six lay person majority to acquit without a judge consenting would result in a not guilty verdict, but a five or six lay person majority to convict without a judge consenting would not result in conviction.” Id. at 273 n 49.
nature of the sentence, a process for gaining majority opinion requires combining votes for the least favorable result for the defendant with votes for the next favorable opinion until a majority that includes the votes of a judge and a lay assessor is achieved. By law, a shroud of secrecy surrounds the deliberation process including the nature of the opinions held by panel members as well as the number of people holding a particular opinion. To enhance the deterrent impact of this provision, criminal penalties are included in the Lay Assessor Act. Lay assessors are subject to a fine and/or jail time if they leak deliberation secrets (or other secrets learned during their employment), thoughts about the weight of the sentences, or facts they believe should have been found in the defendant’s case.

There are also several provisions designed to protect lay assessors from any sort of retribution for actions during their service as jurors. Employers may not treat lay assessors adversely for serving on a jury nor can anyone contact a lay assessor regarding the case or for the purpose of learning information about the deliberations. Once again, to emphasize the seriousness of the concern about lay assessor safety, the Lay Assessor Act outlines criminal sanctions for solicitation or threatening lay assessors for the purpose of influencing their opinions or to learn other information regarding their decisions.

The Supplementary Provisions of the Lay Assessor Act, which further illuminate its purpose, address Pre-Enforcement Measures that required the Japanese government and the Supreme Court to implement measures to explain the lay assessor process to citizens in an easily understood fashion. This educational initiative encouraged “citizens to participate in criminal trials substantively based on personal conviction and to deepen citizens’ understanding and interest in the system for lay assessors’ participation in criminal trials....”

93 Id. at 274 art. 67.
94 Id. at 274-75 art. 70.
95 Id. at 277 art. 79. Criminal sanctions also apply to lay assessors who make fraudulent statements during the selection process, fail to appear after being summoned (or for proceedings thereafter if selected) without appropriate reason, or who fail to take the oath without appropriate reason. Id. at 278-79 art 81-83.
96 For instance, Article 80 makes it a punishable offense for prosecutors, defense counsel, or defendants to “reveal the name of a lay assessor candidate” without an appropriate reason. Id. at 278 art. 80.
97 Id. at 275 art. 71.
98 Id at 275 art. 73.
99 Id. at 276-77 articles 77 & 78. Persons found guilty of these crimes can be subject to a fine of ¥200,000 and/or imprisonment for up to two years. Id.
100 Id. at 280 art. 2. Indeed, the government embarked upon an aggressive advertisement/educational campaign that included traditional public relations methods (websites, newsletters, flyers, television, and video) as well as a few non-traditional approaches (at one festival the Minister of Justice dressed as Santa Claus to serve as master of ceremonies for a quiz regarding the new lay assessor system). Anderson & Ambler, supra note 5, at 70-76.
Finally, the Act recognizes that systemic change will not only require citizens to understand and to make adjustments, but that “[t]he nation shall endeavour to adjust the environment as necessary to allow the smooth operation of the system to involve lay assessors’ participation in criminal trials according to a belief in the indispensability of having citizens able to participate easily in trials as lay assessors.”  

1. The Risk of Incremental Change

Japan’s new lay assessor system is noteworthy for its intense focus on transparency and citizen involvement in the criminal justice process. However, it is clear from the pre-Act debate as well as from the specific language of the Lay Assessor Act, that the Japanese government chose a jury trial approach that potentially retains a judicial stronghold on the decision making process in the deliberation room. There is nothing inherently wrong with this method of jury trial, and it exists in many European countries. The risk for Japan, however, is that retaining this particular fragment of the inquisitorial system might exert such enormous pressure on the emerging adversarial system in both subtle and obvious ways that it forces the system back to a de facto judge dominated system. When other components of the inquisitorial approach are considered, such as the paternalistic approach that courts have traditionally taken, the near perfect conviction rates (supported by secret police interrogations), and the general lack of citizen interest in participation due to fear of challenging authority, then the perfect recipe for a reversion to the old system looms large.

Consider Italy as an example. In 1988, Italy entirely reformed its criminal justice system from inquisitorial to adversarial through legislative enactment. During this process, several adversarial components were introduced into the system that gave

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101 Anderson & Saint supra note 1, at 281 art. 3.
102 See Kiss, supra note 6, at 271.
103 One scholar has argued that the “history of Japanese criminal justice from at least the seventeenth century shows that, time and time again, Japan’s government has supported popular sovereignty and due process only to the degree that they augment governmental stability and legitimacy. The structure of the new Japanese jury is the product of this same governmental mentality.” Rozenshtein, supra note 7, at 23
104 For a very detailed and insightful analysis of Italy’s transition to an adversarial system, see William Pizzi & Mariangela Montagna, The Battle to Establish an Adversarial Trial System in Italy, 25 Mich. J of Int’l L. 429 (2004). Italy is distinct from Japan in that Italy attempted a more sweeping transition of its criminal justice system. The Italian transition is nevertheless useful because it provides an example of the inevitable tension that results when trying to build adversarial structures on inquisitorial foundations.
105 According to Pizzi & Montagna, “[t]he goal of the 1988 Code was to create a trial system that was more fair and open, and one that the drafters felt was more consistent with the values of an open democratic society. But there was another reason for changing the old trial system—a secondary reason, but still an important one nonetheless: the hope to gain some much needed efficiencies in the system.” Id. at 437.
parties more control over the criminal trial (as opposed to the judge) and that required in-court testimony (as opposed to trial by dossier). However, the basic foundation of judicial control, which included a responsibility to achieve the “correct” outcome in a particular case, led to a slow erosion of the newly introduced adversarial principles. Before long, hearsay evidence was being routinely introduced and defendants were being convicted based upon evidence that they could not directly challenge in court, resulting in a striking reemergence of the inquisitorial tradition.

It was not until Italy undertook to change the constitutional foundation of its system that the judges took notice of the new orientation of the Italian criminal justice system toward an adversarial approach. Thus, Italy provides a compelling example of the risks inherent in changing specific components in a system without concomitant foundational modifications. The tension between strong foundational tradition and modern structural components will inevitably pull the system toward reversion, especially when tradition is synonymous with a paternalistic judiciary tasked with obtaining “correct” verdicts and high conviction rates.

III. THE RUSSIAN JURY TRIAL EXPERIENCE

Trial by jury is, probably, the privilege of a stable society. It must be stable in the economic, social, political and legal respects. In the opposite case, trial by jury is doomed to live out a miserable existence. Trial by jury in Russia is a vivid example of that.

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106 In Italy, a trial judge “has always been viewed as having a paternalistic obligation to protect the defendant. Thus, a judge may feel compelled, if the defense lawyer is not skilled, to call a witness who should have been called by the defense lawyer or to assist in the examination of a witness.” Id. at 449.

107 The Italian Constitutional Court determined that such hearsay evidence should be admissible because “trial judges, as triers of the facts, need to be able to examine as much information about the crime as they can learn at trial.” Id. at 454.

108 Id. at 460-465.

109 Pizzi and Montagna aptly analogize this tension to the planting process: “Transplants of judicial systems across legal cultures, like the transplant of plants across climates, are difficult matters. A few such transplants make take hold and even thrive, but many may become weak and eventually die out.” Id. at 430.

110 Marina Nemytina, Trial By Jury: A Western Or A Peculiarly Russian Model? 72 INT’L REV. OF PENAL L. 365, 370 (2001). See also, Ellen Barry, In Russia, Jury is Something to Work Around, N.Y. TIMES, Nov. 15, 2010, http://www.nytimes.com/2010/11/16/world/europe/16jury.html?pagewanted=all (observing that “the number of jury trials remains so small—around 600 a year out of a total of more than one million—that they vanish into a justice system that in some important ways has changed little since the Soviet days.”)
A. Early Jury Trials and the Bolshevik Repudiation

Russia’s transition to a lay jury system and its gradual movement away from that process is an instructive model for Japan. While Russia introduced an all layperson jury, its transition is similar to Japan’s in that both countries retained traditional inquisitorial components, such as the right to appeal an acquittal, that could overshadow newly introduced adversarial elements and eventually reduce them to the level of hollow symbolism. This section will trace Russia’s path toward reestablishing a system of trial by jury and explore the travails that such transition caused in the Russian criminal justice system.

Trial by jury in Russia was first introduced in 1864 as a legal reform measure during the reign of Tsar Alexander II. The interposition of lay citizens into the criminal justice process was viewed as a means to inject popular democracy into the system and combat rampant corruption.

Despite political challenges and efforts to limit its jurisdiction, the jury system thrived in Russia and was a model of citizen participation until the Bolshevik revolution abolished it in 1917. In its place, the Bolsheviks introduced a system of “people’s courts,” which, despite its name, included one professional judge and two to six people’s assessors. In addition to replacing the lay jury system, other inquisitorial components such as strong prosecutorial influence, few defense rights and a weak judiciary that often favored or substituted for prosecutorial authority were also introduced. In this Bolshevik reformed system, “[t]he prosecutor directed a purely

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111 The jury trial process was institutionalized pursuant to the Court Charter of 1864, but it did not have universal appeal. “[S]upporters of the institution considered it a trial of ‘public consciousness,’ ‘common sense,’ [and] ‘truth proved by life.’” Opponents, on the other hand, “called it ‘mob punishment,’ ‘trial without any sense of purpose,’ [and] ‘a toy in the hands of the prosecution and especially the defense.’” Nemytina, supra note 110 at 365. See also John C. Coughenour, Reflections on Russia’s Revival of Trial by Jury: History Demands That We ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime, 26 Seattle U. L. Rev. 399, 401 (2003) (explaining how opponents warned that “public resentment of law and authority would lead to rampant jury nullification”).

112 Russia’s jury trial system was rudimentary democracy as there were no literacy, education, or property requirements for prospective jurors. Guilt or innocence was decided by simple majority. Coughenour, supra note 111, at 401-02. Jurors apparently took their responsibilities seriously, returning verdicts of ‘not guilty’ in approximately 40% of cases. In cases of political crimes against the state, the percentage was even higher, which “made representatives of state institutions hostile to the institution because of the political situation in Russia and the rise of the revolutionary movement.” Nemytina, supra note 110, at 365.

113 Indeed, the fifty-plus years of jury trials, which included 7.5 million jury verdicts, has become known as the “Golden Age of Russian Law.” Coughenour, supra note 111, at 405.

114 Id. Despite the appearance of democratic participation, the people’s assessors became known as “nodders” because they often simply nodded in agreement with professional judges. Id. at 406.
inquisitorial process in which coerced confessions, false, politically-motivated prosecutions, and falsifications of evidence were routinely carried out. Criminal suspects had virtually no protection against the often illegal methods of criminal investigators.\footnote{115} The judiciary was characterized by corruption and lack of independence. This meant that “[j]udges were poorly paid and often under-educated professionals [who]...were bound to follow the orders of [Communist party] officials, whose telephone calls enjoyed more probative value than any evidence or argument presented in court.”\footnote{116}

Not surprisingly, acquittals were noticeably rare in this system and the jury of one professional judge and two lay assessors often functioned as one voice—that of the professional judge.\footnote{117} Over time, “[t]he blurry separation of powers in the Soviet criminal justice system thus perpetrated illegality and injustice. It is this system that Gorbachev inherited and set out to reform during his perestroika, or restructuring.”\footnote{118}

B. THE PUSH FOR REFORM

The reform of Russia’s jury system was part of a legal reform package instituted in the early 1990s that sought to give judges greater authority and increased independence from Communist party politics.\footnote{119} During the initial stages of this reform movement, incremental change to the people’s court system was proposed. Specifically, the new trial by jury would be comprised of an expanded panel of lay assessors who would be “the sole arbiter of guilt and innocence, and [who would] deliberate with the professional judge only at the sentencing stage.”\footnote{120}

On October 21, 1991, the “Concept of Judicial Reform” advocated a sweeping overhaul to the criminal justice system.\footnote{121} The newly proposed changes included the introduction of adversarial proceedings, the presumption of innocence, the right to remain silent, and the institution of three “flavors” of adjudication: trial by layperson jury, single judges and three judge panels.\footnote{122}

Nearly two years later, on July 16, 1993, the Jury Law was enacted and heralded “not as something borrowed from the West in
the course of democratic changes, but as a native legal tradition that was being revived.” The law was, however, incremental in its implementation in that it reintroduced jury trials on an experimental basis only in several regional courts. The jury trial process was further limited to thirty-five serious felonies. Finally, this new right to trial by lay jury would co-exist alongside the previously existing trial by people’s assessors, with the decision on which form to use left solely to the accused. Although trial by jury symbolizes transparency and democratic participation in the criminal justice system and promotes ideals of justice and fairness at the hands of one’s peers, Russian defendants did not rush to avail themselves of the trial by lay jury process. There were likely many reasons for this initial reluctance to use the system, but two of the most prominent explanations were “anxiety and lack of knowledge of the new procedure,” and the “insignificant salary paid to court-appointed counsel...for the increased work and pressure involved with jury trials.”

The jury trial process also engendered sharp yet familiar criticism from opponents who argued that public resentment of governmental authority would lead to a sharp rise in acquittals.

C. WHAT WENT RIGHT...AND WRONG

Although jury trials were initially proposed for all crimes punishable by deprivation of liberty for one year, the right to a jury trial was only made available to criminal cases within the original jurisdiction of territorial or regional courts. This meant that the right was limited to approximately thirty-five serious felonies punishable by death or ten to fifteen years imprisonment. Accused persons were also entitled to representation by counsel, either retained or approved by the court.

However, despite the introduction of these adversarial components, some aspects of the pre-reform inquisitorial system remained. First, judges retained the authority to send cases back for further investigation on the motion of the prosecutor, defense, or its own motion even after the preliminary investigation had been completed. Prosecutors were obviously reluctant to have poorly

123 Nemytina, supra note 110, at 366. Essentially, Russia hoped to resurrect its Golden Age.
124 Because jury trials were considered an experiment, nine regions were chosen on the basis of their “even mix of industrial and agricultural activity, and [because they] were free of political, nationalist, or economic tensions.” Thaman, supra note 115, at 81. See also Nemytina, supra note 110, at 366 (explaining how there was a presumption that jury trials would be established in the whole of Russia between 1993-96).
125 Thaman, supra note 115, at 80.
126 A defendant may choose “whether his/her case will be tried by a panel of three professional judges, a judge and two people's assessors, or by a jury.” Nemytina, supra note 110, at 367.
127 Thaman, supra note 115, at 90.
128 Coughenour, supra note 111, at 409.
129 Id. at 407.
130 Id. at 408.
131 Thaman, supra note 23, at 372 (observing that “[w]ith increasing
investigated cases presented to juries.\textsuperscript{132} When such weak cases did go forward, jurors used their newfound authority to express outrage toward prosecutors for weak cases or sympathy for defendants by issuing an increasing number of acquittal verdicts, a rather alarming development for a system so accustomed to guilty verdicts even on the sparsest evidence. Essentially, trial by jury served as a corrective force as “the need to convince a jury...forced prosecutors to examine more critically the charges contained in the investigator’s indictment.”\textsuperscript{133}

Another inquisitorial system throwback, the narrative style of witness testimony, also proved problematic in front of juries and made it particularly difficult to exclude prejudicial or illegally obtained evidence.\textsuperscript{134} The victim or aggrieved person also has a role in Russian jury trials, sometimes questioning witnesses and/or presenting their own narrative, tearful accounts of what occurred or how they have been impacted by the crime.\textsuperscript{135}

As far as appeals, pursuant to Article 369 of the Russian Code of Criminal Procedure, prosecutors, defendants, and victims can appeal judgments of conviction or acquittal on the following exclusive grounds:

1. discrepancy between the court conclusions, expounded in the sentence, and the factual circumstances of the criminal case established by the court of the appeals instance…;
2. violation of the criminal procedural law…;
3. an incorrect application of the criminal law…;
4. unjustness of the administered punishment….

On the basis of one or more of these grounds, the appellate court may, among other things, overturn an acquittal and convict the defendant.\textsuperscript{136} Arguably it is this right to appeal an acquittal and to have it overturned and replaced with a conviction that poses the most significant threat to the system of trial by jury. Under these circumstances, the judiciary ultimately retains its stronghold on the...
criminal justice system wielding statutory authority to diminish the impact of democratic participation in the criminal justice system.\textsuperscript{138} Indeed, the statistics on reversals of acquittals in Russia reveal that courts are apparently determined to retain their power at the expense of the continued legitimacy of the lay jury system. Since the institution of the jury trials:

The Supreme Court of the Russian Federation (SCRF) has shown great zeal in reversing such jury acquittals. The statistics relating to acquittals in the first nine years of jury trial, when it was restricted to just nine regions of the RF, are revealing. In 1994, 18.2\% of jury cases ended in acquittal, in comparison to only 1\% in non-jury trials. Yet of the 19 judgments reversed by the SCRF, nine were acquittals, and only one acquittal was upheld on appeal. In 1995 the acquittal rate fell to 14.3\%. 17.3\% of these acquittals were reversed. In 1996 the acquittal rate rose to 19.1\%, but the SCRF reversed 34.2\% of those challenged on appeal. In 1997 the acquittal rate rose to 22.9\% but the SCRF reversed 48.6\% of those appealed. Finally, in 1998, the acquittal rate fell slightly to 20.6\%, but 66\% of those were overturned on appeal. In 2000 the acquittal rate fell to 15.2\%, and was 15.6\% in 2001. In 2001, the SCRF reversed 43\% of acquittals as opposed to only 6.7\% of convictions. 32.4\% of all acquittals were reversed in 2002 as opposed to 5.9\% of all convictions.

By 2003, the first year that the jury trial began expanding throughout Russia only 15\% of cases ended in acquittal, yet the SCRF reversed 24\% of those as opposed to only 5\% of convictions. The trend continued in 2004 when 53.5\% of all acquittals were reversed.\textsuperscript{139}

The procedural reasons for reversing acquittals have included, among others, the erroneous exclusion of evidence, errors in the judge’s summation (in some cases the judge will intentionally err to plant the seeds for reversal in the event of an acquittal), and errors in the jury deliberation (the jury failed to deliberate for exactly three hours prior to returning a majority verdict as required by statute).\textsuperscript{140}

In some instances, however, jurors are directly persuaded to

\textsuperscript{138} Coughenour, supra note 111, at 409.

\textsuperscript{139} Thaman, supra note 23, at 407-08. This is an alarming trend, but Thaman observes that there may be a strong societal impetus for the SCRF’s aggressive assault on acquittals. That is, “despite the acknowledged incompetence of investigative organs and their inability to present credible inculpatory evidence, [there] is the ugly fact that the murder rate in Russia has risen progressively since jury trials began in 1993, and...the SCRF is unwilling to release alleged murderers who are charged with brutally killing more than one person.” Id. at 408.

\textsuperscript{140} Id. at 413.
avoid acquittals. In one case, when jurors were thought to be leaning toward an acquittal, security officers approached at least two of the jurors and encouraged them to drop off the panel.\textsuperscript{141} When they both declined, the trial was delayed for several months, ostensibly due to the unavailability of a victim in the case, before the jury panel was eventually completely dismissed before rendering a verdict.\textsuperscript{142}

On January 2, 2009, Russian President Dmitry Medvedev signed a bill eliminating jury trials for certain crimes against the state.\textsuperscript{143} “The law does away with jury trials for a variety of offenses, leaving people accused of treason, revolt, sabotage, espionage or terrorism at the mercy of three judges rather than a panel of peers. Critics say the law is dangerous because judges in Russia are vulnerable to manipulation and intimidation by the government.”\textsuperscript{144}

With this most recent legislation, it appears that the systematic overhaul that was intended to democratize the Russian criminal justice system, promote judicial independence, and provide fair trials to defendants is regressing into its previous inquisitorial modus operandi. The foundational pressures of the inquisitorial system, including judges who remained active throughout the trial process and who maintained a commitment to obtaining correct verdicts, exerted strong pressure on the lay jury trial modification that was seemingly looked upon from the start as an “experiment.”\textsuperscript{145}

When other traditional inquisitorial components such as the right to appeal acquittals and strong victim participation are added to the equation, “the ambitious reforms increasingly appear to be democratic window-dressing for a system that functions in the same manner as its forerunner.”\textsuperscript{146}

\section*{IV. LESSONS FROM RUSSIA FOR THE FLEDGLING JAPANESE JURY TRIAL SYSTEM}

As Japan sets out to maximize citizen participation in its criminal process, several lessons can be gleaned from Russia’s experiment with the jury trial system. First, there must be an attitudinal shift away from an expectation of near perfect conviction rates. Early returns from the first two years of Japan’s lay jury system appear to indicate that the conviction rate remains high at 99.8%.\textsuperscript{147} On the surface it may appear that the introduction of the

\begin{itemize}
  \item Barry, supra note 110.
  \item Id.
  \item Id.
  \item Many of the judges tasked with ensuring the success of the new jury trial system were “holdovers from the Soviet system who spent their entire careers protecting state power and state interests in preference to individual rights.” Coughenour, \textit{supra} note 111, at 410 n. 93.
  \item Thaman, \textit{supra} note 23, at 360.
  \item \textit{Lay Judge Conviction Rate 99.8% So Far}, \textit{THE JAPAN TIMES ONLINE}, May 22, 2011, http://www.japantimes.co.jp/text/nn20110522a8.html. From
\end{itemize}
lay assessor system has had little impact on Japan’s criminal justice system. However, lurking just below the surface of the statistical evidence may be three factors that prevent a realistic assessment of lay citizen participation. First, many cases may come before the lay assessor panel “pre-packaged” with false or forced confessions extracted during long periods of detention. Indeed, prosecutors will typically “proceed with a case only if they are sure they will win and a confession has been called the king of evidence.” 148 The Japanese government has thus far resisted calls for electronic recording of the complete interrogation process, instead requiring only a limited recording of the confession portion. 149 Such a “[l]imited electronic recording does not capture the entire interrogative process, and has been primarily intended to serve the prosecutors’ own purposes.” 150 Until lay juries are able to view complete recordings of interrogations in context, it will be virtually impossible to discern how many cases might result in acquittals due to false or forced confessions.

The second factor that stands poised to undermine Japan’s jury system is one that plagued the Russian system: a strong foundation of judicial/prosecutorial dominance and control over the trial process. Indeed, this may be an even more compelling factor in the Japanese system because of the mixed jury panel and the Japanese traditional hierarchical society. Regardless of the justice system, judges are usually held out as authority figures entitled to respect and deference. This special regard is multiplied in a society like Japan in which it is considered impolite to “blatantly disagree with a superior.” 151 Therefore, unlike Russia, where the pressure on jurors to convict may come by way of sudden visits from security personnel, such influence may be manifest in the jury deliberation room in Japan. Because of societal conditioning, during deliberation, it is likely that the Japanese lay juror “would possibly speak up once or twice, but if the judge did not somehow reinforce the viewpoint, only a courageous Japanese juror would press the issue.” 152 Moreover, because lay jurors are bound by strict confidentiality requirements concerning deliberations, in the short term, it will be impossible to know the precise extent of undue influence in the form of judicial overreaching. Therefore, as one scholar has suggested, “policymakers should amend the Lay Judge Act to include a mechanism to enable whistle blowing and provisions that protect lay judges who seek to raise or correct an impropriety. Lay judges must be able to speak about the deliberations with the assurance that the government will not punish them for blowing the whistle on an

May 2009, when Japan’s lay assessor system was instituted, to March 2011, “3,377 people were indicted for crimes mandating trial under the lay judge system, of whom 2,060 received rulings…. 2,055, or 99.8 percent were found guilty, including two people found not guilty on some counts.” Id.

149 Wilson, supra note 50, at 551.
150 Id.
151 Kiss, supra note 6, at 275.
152 Id.
estemed governmental official or fellow lay judge.”

Finally, a factor that can fairly be said to epitomize the traditional inquisitorial model—the right to appeal an acquittal—remains part of Japan's criminal justice system just as it did in Russia. As the Russian example illustrated, the ability to appeal acquittals is a procedural “insurance policy” against declining conviction rates due to lay juries failing to reach the “correct” verdict. Of course, the ability to overturn judgments of acquittal rendered by lay assessor panels is inconsistent with the goal of enhancing perceptions of fairness and justice through lay participation in the criminal justice system. Instead, this procedural “checkmate” resurreccts and reinforces competing goals that place an extraordinarily high value on near perfect conviction rates, which means eliminating acquittals. Indeed, acquittals can be career-defeating events for judges and prosecutors in the Japanese criminal justice system. Thus far, there does not appear to be reason for concern regarding acquittals. Lay jury panels are maintaining the traditional better than 99% conviction rate. But, the jury trial process is still young in Japan so it remains to be seen whether the right to appeal an acquittal will become an obsolete relic of Japan’s inquisitorial tradition or a much used procedural resource to “correct” a declining conviction rate.

To help strengthen the nascent adversarial orientation of the Japanese system, defense attorneys, who were previously passive players, have now become critical components in the jury trial process. An active defense bar can serve as a bulwark against a reversion to the old ways of doing business and can reinforce lay assessors’ confidence that their verdicts will be based on a genuinely adversarial process. Unfortunately, in Russia, criminal defense attorneys became targets for criminal prosecution and disbarment simply because they dared to challenge the state’s evidence and provide their clients with a zealous defense. Japan must guard against the rise of similar antipathy toward those charged with protecting the rights of the accused. As Japanese defense lawyer Takano Takashi explains:

[W]e defense lawyers must empower lay judges to

153 Wilson, supra note 50, at 541.

154 Kiss, supra note 6, at 264 n.32 (explaining that “when a judge issues an acquittal, the faces of his superiors and the displeased faces of prosecutors with whom he’s become friendly will appear in his mind”); see also Wilson, supra note 50, at 507-08 (explaining how prosecutors can be subject to demotion or termination for even a single acquittal).

155 As is typical in inquisitorial systems, defense attorneys in Japan had “been little more than passive props in trial ceremonies that are scripted by prosecutors, certified by judges, and barely contested by the defense. This passivity has been recognized by lay judges, who report much more dissatisfaction with defense lawyers’ activities than they do with those of the prosecution.” David T. Johnson, War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice, 9 The Asia-Pacific Journal, (2011), available at http://japanfocus.org/-David_T.-Johnson/3554.

stand up to professional judges and defeat them in the deliberation room. For this to happen, defense lawyers must shed the feeling of uselessness that has been their biggest burden. Defense lawyers are habituated to being passive in the criminal process. We have been socialized to believe that what we do does not matter. But with lay judges in front of us, we are no longer talking to a wall. Now we have a real opportunity to make a difference, and we need to make the most of it. We must fight in open court to change a system that is stacked against us.157

CONCLUSION

As the new jury trial system nears its first official review in 2012, the Japanese government will likely use a number of metrics to assess whether the jury trial system has been a success. Undoubtedly the variance, if any, between the pre- and post-jury conviction rates will be one measure of success. During this evaluation, the Japanese government must recognize that near perfect conviction rates are a remnant of political systems that seek to maximize deterrence and social control at all costs. While deterrence must be a goal of any criminal justice system, the strategies used to achieve that goal should not overemphasize outcomes. Instead, a lay assessor process designed to enhance popular participation in the criminal justice system as a means to educate citizens and lend legitimacy to the system should be an end in itself. This means that safeguards must be implemented to reduce the influence of judicial and societal forces that would diminish lay assessors’ willingness to consider and choose from a full range of verdict options, including acquittal.

The jury trial system is still a very novel component of the Japanese criminal justice system. Therefore, much remains to be seen in terms of its progress toward the stated goals of “making the justice system more easily understandable to the general public, increasing education about the justice system, and...raising the transparency of the justice system to the public by promoting disclosure of information about the justice system.”158 For now, however, “the cages have started to rattle—and maybe the ripples of reform will continue to spread.”159

157 Johnson, supra note 155.
158 JSRC Recommendations, supra note 7, at Chap. IV.
159 Johnson, supra note 155.
JAPAN'S RIGHT TO FIGHT TERROR

JENNIFER ARBAUGH

I. INTRODUCTION

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes….In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.  

Since its drafting in 1947, this seemingly simple provision of the Japanese Constitution has had more written on it by Japanese scholars than any other constitutional provision. As a condition of Japan’s surrender following World War II, the United States occupied Japan and sought to create a democratic state that would support the United States in its efforts to contain the Soviet Union and Communism. In addition, the Allied powers sought to destroy Japan’s ability to wage war following the devastation of World War II. The Japanese Constitution also uniquely puts Japan under control of the United Nations, which is a world government.

Over time, this pacifist mindset has firmly entrenched itself into the culture of modern Japan. In fact, a large number of Japanese have pride in what Article 9 stands for, and many have internalized these pacifist ideals over time. Many believe that Article 9 has been the “single most determining factor which has kept Japan peaceful.” Some believe that Article 9 has prevented Japan from sharing in its part of responsibility in the world. They believe this provision has prevented Japan from being a “normal” state, and that it is humiliating that Japan has to serve in a supporting logistical role in global conflicts due to the limits of their constitution

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1 Nihonkoku kenpo (Kenpo) (Constitution), art. 9 (Japan).
3 Id.
4 Id.
6 Panton, supra note 2, at 131.
7 Id.
8 Id.
9 Panton, supra note 2, at 131.
and Article 9. In fact, Article 9 could be said to prevent Japan from attaining the status of a great world power.

For the first time since Japan’s surrender in World War II, Japan dispatched lightly armed forces in 2001 to foreign lands, including Afghanistan and Iraq, following the rules of engagement. But Japanese forces assisted in the war on terror by helping with reconstructive efforts in Iraq, not engaging in military battle. The war against terror has led many countries to view preemptive strikes as permissible, especially in cases involving non-state entities, such as terrorists, and states where there is a risk of terrorists acquiring weapons of mass destruction. In December 2002, President Bush stated that “because deterrence may not succeed, and because of the potentially devastating consequences of WMD [weapons of mass destruction] used against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures.” This claim of a right to preemptive self-defense provokes anxiety amongst many international lawyers. Concerned lawyers fear that a claim of preemptive self defense legitimizes massive military actions, such as Pearl Harbor, that seem to come with little warning and in the absence of war with a goal of eliminating any potential or latent adversaries. Since American academics suggested this strategy towards China during the Cold War, anxiety about preemptive self-defense is not unfounded.

This Article begins by examining the history of the pacifist Article 9, from Japan’s surrender at the end of World War II through the present day state of Article 9 in Japan. Following this history, interpretations of Article 9 are examined, looking at how the Japanese legislature attempted to justify its creation of the Japanese Self Defense Force and the Japanese Supreme Court’s reluctance to deal with Article 9. Following this background, the discussion turns

10 Id.
11 See Malcolm Cook & Andrew Shearer, Going Global: A New Australia-Japan Agenda for Multilateral Cooperation, The Lowey Institute for Int'l Pol'y: Perspectives 3 (2009), http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9e-be1e-e2c24a6a8c7060233&lng=en&id=100188 (discussing how Australia and Japan does not have international influence due to a lack of economic, political, and military support).
13 Id. at 131.
15 Id. at 530.
16 Id. at 525.
17 Id.
18 Id.
19 See infra notes 24-53 and accompanying text.
20 See infra notes 54-79 and accompanying text.
to the evolution of the Japanese Self Defense Force and the U.S.-Japan Security Arrangement. Finally, this Article examines Japan's role in the war on terror over the last decade, as well as the doctrine of preemptive self-defense and how this doctrine has reared its head through the war on terror. The Article concludes that Japan has not violated Article 9 by their participation in a preemptive war on terror with the United States based on an interpretation of Article 9, the broad acceptance of preemptive self-defense around the world, and the way terror changed the battlefield.

II. BACKGROUND

A. THE HISTORY BEHIND THE PACIFIST ARTICLE 9

The uniquely pacifist Japanese Constitution became effective on May 3, 1947, following the surrender of Japan in World War II. While there are other state constitutions that disavow using war in international relations, Japan’s constitution is unique in forbidding Japan from having a military or the right of war. After surrendering in World War II, the Allied Powers occupied Japan after Japan’s acceptance of the terms stated in the Potsdam Declaration. The principle aim in occupying Japan was demilitarizing Japan, which led to the writing of Article 9. General MacArthur (“MacArthur”), Supreme Commander for Allied Powers (“SCAP”), administered the occupation, and he sought to establish a government that was both peaceful and responsible through two components: eliminating any potential for Japanese society to remilitarize and establishing democratic order in Japan with total repudiation of the Meiji era feudal order. General MacArthur urged the government of Japan to amend the constitution in effect at the time, the Meiji Constitution.

The Japanese cabinet attempted to revise the Meiji Constitution to bring it in line with the goals of the Occupation. However, the Higashikuni cabinet was unable to create a satisfactory revision for MacArthur. As a result, MacArthur tasked the SCAP’s

21 See infra notes 80-112 and accompanying text.
22 See infra notes 113-151 and accompanying text.
23 See infra notes 152-200 and accompanying text.
26 Umeda, supra note 19, at 10.
28 Id. at 1606-7.
29 Umeda, supra note 19, at 4.
30 Southgate, supra note 22, at 1607.
31 See generally SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN: SEPTEMBER 1945 TO SEPTEMBER 1948
General MacArthur required that SCAP include the following three principles in the new Japanese constitution: “a new Emperor system; renunciation of war; and the end of the feudal system.”33 General MacArthur was the first to write that the new constitution of Japan should renounce war.34 Despite concerns in the Japanese government to having a constitution that was drafted by foreigners, Japan had little choice in the matter due to their unconditional surrender in World War II.35

Initially, MacArthur requested that Article 9 in the Japanese constitution contain the language “even for preserving its own security.”36 The Japanese government omitted this language during revisions; however, it adopted the article with only small changes.37 While the contents of Article 9 shocked the Japanese, MacArthur pushed for the adoption of the constitution; therefore, there was little the Japanese government could do but accept Article 9 as drafted.38

Following the drafting process, a Special Committee on Revision of the Imperial Constitution received the draft in June of 1946.39 The job of this Committee was to “Japanize” the text prior to the Diet (the Japanese legislature) receiving the draft for approval.40 In this Committee, the Chairman revised Article 9 with two significant additions, creating the ambiguities that would be exploited in the future by the Diet to justify their Self Defense Forces (“SDF”).41 The Japanese SDF is an armed organization, which maintains the “minimum level of armed strength” necessary for self-defense.42 The first amendment made by the Chairman added the text “aspiring sincerely to an international peace based on justice and order” to the beginning of the first paragraph.43 In doing so, the goal of Article 9 changed from one of the constitution being imposed on Japan to reflecting Japan’s own desire to foster peace and justice.44 Additionally, the Committee amended the second paragraph to read “in order to achieve the aim of the preceding paragraph.”45 This amendment changed Article 9’s purpose from an outright...

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32 Southgate, supra note 22, at 1607.
33 Umeda, supra note 19, at 6.
34 Id.
35 Id.
36 Southgate, supra note 22, at 1608.
37 Id.
38 Id.
39 Id. at 1609.
40 Id.
41 Id.
43 Southgate, supra note 22, at 1610; see also KENPO art. 9.
44 Southgate, supra note 22, at 1610.
45 KENPO art. 9
renunciation of war to only rejecting war merely as a policy tool. As a result of these amendments, later interpretations of Article 9 only denied Japan war potential for offensive purposes.

Several countries voiced concerns over these amendments, however MacArthur believed there was sufficient protection in the constitution to preclude future rearmament and remilitarization of Japan. Such constitutional protections included universal suffrage in Article 15 and the requirement in Article 66 that Ministers of State and the Prime Minister be civilians. However, Japan’s neighbors remembered the brutal imperialism and actions taken by Japan against their countries during World War II, and they remain suspicious and nervous of Japan’s rearmament even to this day.

Over the years, no amendments have ever been made to the constitution. In fact, the framers intended that it would be extremely difficult or nearly impossible to amend the constitution through Article 96. Article 96 requires that an amendment be made by an affirmative vote of two-thirds in both houses of the Japanese Diet and ratification be made by a majority. However, Article 96 does not prevent numerous interpretations of the constitution’s provisions by legislatures, academics, and the Japanese government.

B. Playing the Interpretation Game with Article 9

Interpretations of Article 9 by the Japanese government, international organizations, and academics have varied widely from those who believe it expresses absolute pacifism to those who believe it allows for at least a right to self defense. The interpretations change and adapt in relation to changes in the United States’ policy towards Japan, as well as international situations that surround Japan. As a result, Japan interpreted its constitution as providing for a Self Defense Force (“SDF”). Currently, Japan has a Ground Self Defense Force, Maritime Self Defense Force, and Air Self Defense Force.

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46 Southgate, supra note 22, at 1610.
47 Id.
48 Southgate, supra note 22, at 1611.
49 Id.
51 Gibbs, supra note 5, at 141.
52 Southgate, supra note 22, at 1602.
53 Id.; see also KENPO art. 96.
54 See Gibbs, supra note 5, at 141 (noting that lack of amendments has led to flexible interpretations of the articles).
55 Umeda, supra note 19, at 2-3.
56 Id. at 8.
57 Id. at 1.
58 Id.
A right of self-defense is a cornerstone in international law, written in Article 51 of the Charter of the United Nations (“UN Charter”) as well as in several Security Council Resolutions, which are legally binding when issued under Chapter VII. For example, resolutions following the terrorist attacks of 9/11 addressed the right to self-defense. In particular, Security Council Resolution 1373 (2001), stated the following rights to self-defense of any sovereign nation:

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations are reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. In addition to the UN Charter, the International Court of Justice stated that the individual or collective right to self-defense is established in customary international law.

On its face, it appears the Japanese gave up these rights in their Constitution, stating that the Japanese “renounce war as a sovereign right of the nation.” However, while Article 9 explicitly prohibits any buildup of a military, the Japanese legislature believes that the inherent ambiguities written into Article 9 justify Japan’s interpretation of an implied right to have a SDF. The legislature interprets war to mean an aggressive or offensive act; therefore acting in self-defense allows legislators to sidestep the constitution. Interpretation of Article 9 in this manner would logically allow the SDF to actually defend Japan.

While discussions have suggested it is time to amend Article 9 and allow Japan to remilitarize, safeguards placed during drafting keep the constitution of Japan as the supreme law of the nation.

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60 Id.
61 Id.
63 See KENPO, art. 9 (discussing the renouncement of war).
64 Southgate, supra note 22, at 1601-2.
65 Id. at 1602.
66 Id.
67 Gibbs, supra note 5, at 137; see also KENPO art. 98 (noting the constitution is the supreme law of land and shall be faithfully observed).
previously mentioned, significant hurdles are present in attempting to revise Article 9, which makes it nearly impossible to change the Japanese Constitution.\textsuperscript{68} In fact, since the Japanese Constitution has never been amended, there is uncertainty about what the process would even be.\textsuperscript{69} Any attempts at revision would be the responsibility of the Diet.\textsuperscript{70} With the recent rise of the Democratic Party of Japan, the new administration desires closer ties with Asian countries, such as China and South Korea, which will slow the efforts to revise the constitution.\textsuperscript{71} Currently, given the state of the economy, economic recovery takes precedence over any attempts to amend the constitution.\textsuperscript{72} 

As an advocate for amending the Japanese constitution, the United States supports revising Article 9, hoping Japan will take over more of its own defense and assist with initiatives worldwide.\textsuperscript{73} In addition, the United States favors efforts towards remilitarization, due to the U.S. military's resources being spread thin over the past decade.\textsuperscript{74} The United States has limited resources and cannot afford the burden of protecting and defending Japan as it has in the past, so the United States believes it is time for Japan to carry more of the burden for its defense.\textsuperscript{75} 

As the court of last resort, the Japanese Supreme Court has "the power to determine the constitutionality of any law, order, regulation or official act."\textsuperscript{76} However, the Supreme Court has shown a reluctance to issue an opinion on Article 9 and the creation of the SDF.\textsuperscript{77} For example, in the Nagunuma case, the Supreme Court stated that determining the SDF's constitutionality was not within the scope of judicial review because it involved a political judgment.\textsuperscript{78} The Japanese Supreme Court showed extreme deference towards the Diet, primarily due to the political question doctrine.\textsuperscript{79} As a result, the Court continues to resolve any constitutional questions on very narrow grounds.\textsuperscript{80}

C. EVOLUTION OF THE JAPANESE SELF DEFENSE FORCE AND THE UNITED STATES-JAPAN SECURITY ARRANGEMENT

General MacArthur quickly found that if Article 9 were interpreted literally to require total disarmament and

\begin{footnotes}
\item[68] Southgate, supra note 22, at 1602.
\item[69] Panton, supra note 2, at 132.
\item[70] See KENPO art. 96 (noting that the Diet initiates amendments to the Constitution).
\item[71] Panton, supra note 2, at 132.
\item[72] Panton, supra note 2, at 133.
\item[73] Panton, supra note 2, at 131.
\item[75] Gibbs, supra note 5, at 154.
\item[76] KENPO art. 81.
\item[77] Gibbs, supra note 5, at 147.
\item[78] Gibbs, supra note 5, at 148.
\item[79] Southgate, supra note 22, at 1624.
\item[80] Id. at 1624-25.
\end{footnotes}
demilitarization, he would live to regret the article. With the outbreak of war on the Korean peninsula in 1950, Japan found itself largely undefended due to SCAP forces being sent to Korea. MacArthur feared Japan could be destabilized due to his army's absence and Communist aggression. In fact, MacArthur feared the Soviet Union might attempt to invade Japan from the northern island of Hokkaido. Therefore, although initially resisted by the Japanese, MacArthur authorized the creation of a National Police Reserve of 75,000 to safeguard Japan's internal security. In creating the National Police Reserve, MacArthur also argued that the intent of Article 9 was never the complete demilitarization of Japan because Japan always possessed an inherent right to self-defense as a sovereign nation. During the revisions of the drafted Japanese constitution, the Japanese government specifically omitted the text that had stated "even for preserving its own security."

With increasing unrest in Asia and widespread Communist activity, U.S. policy makers felt Japan was important to U.S. interests in Asia. The United States pressured Japan to begin rearming, but Japanese officials resisted rearmament in the name of their new pacifist constitution. In 1951, the Peace Treaty of San Francisco ended the occupation of Japan by the Allied Powers. Japan began creating collective security arrangements—one of which was promptly created with the United States. The treaty stated that Japan had an inherent right of self-defense, both individual and collective, as stated in Article 51 of the UN Charter. In the Security Treaty of 1951 between Japan and the United States, the United States agreed to maintain forces in and around Japan for security purposes. In addition, Japan agreed to assume increased responsibility for its own self-defense in addition to the U.S. troops in Japan deterring attacks. By 1954, the Japanese had ultimately combined the air and maritime branches of their forces

81 Southgate, supra note 22, at 1612.
82 Id.
83 Id.
84 Umeda, supra note 19, at 11.
85 Southgate, supra note 22, at 1612.
86 Southgate, supra note 22, at 1611.
87 Southgate, supra note 22, at 1608.
88 Gibbs, supra note 5, at 145.
89 Id.
91 Southgate, supra note 22, at 1613.
92 Gibbs, supra note 5, at 146.
94 See id. at art. 3 (stating that Japan and the United States will maintain and develop the ability to resist armed attacks).
into the Self Defense Force. Technically, the troops remain civilians as mandated by the law that established the SDF.

In 1960, the U.S.–Japan Treaty of Mutual Cooperation and Security created a “more equitable relationship” between Japan and the United States than had existed under the 1951 agreement. Throughout the 1960–70s, opposition continued in Japan over the alliance with the United States; however, by the 1980s support for the United States–Japan alliance emerged. As a result of this treaty, guidelines are issued periodically to further demonstrate the commitment of Japan and the United States to one another and to clarify the provisions of the Treaty of Mutual Cooperation and Security. Most recently, due to the increasing tensions between North and South Korea, the guidelines expanded not only to include Japan but “areas surrounding Japan” as part of its right of self-defense. Depending on the situation, if an event is believed to have an influence on the peace or security of Japan, the SDF may become involved. Many of Japan’s neighbors in Asia believe that this option is too open-ended and are uncomfortable with this guideline.

Over the years, primary responsibility for all Japanese defense operations has increasingly fell to the SDF, with the United States decreasing their involvement due to the costs involved and the desire to stay out of conflicts that the United States does not start. In addition, the SDF may take cooperative measures with the United States in two categories: (1) cooperative actions or unilateral actions that are taken by either government, including search and rescue operations, relief activities, refugee activities, etc; and (2) supporting U.S. military operations both in Japan and its surrounding areas. As a result of the relationship with the United States, Japan basically acquired just enough capabilities in basic defense to repel potential aggressors, but no more.

During the Gulf War, Japan refused to participate in the conflict, citing Article 9 as the reason. The Japanese Supreme Court, as previously discussed, shows deference towards the legislature and considers the SDF a political question. The Diet

95 Southgate, supra note 22, at 1614-5.
96 Teslik, supra note 68.
97 Southgate, supra note 22, at 1615.
98 Gibbs, supra note 5, at 148.
100 Southgate, supra note 22, at 1617.
101 Id.
102 Id. at 1618.
103 Id. at 1617.
104 Southgate, supra note 22, at 1618.
106 Southgate, supra note 22, at 1622.
107 Id. at 1624.
refused to interpret Article 9 broadly enough to allow for Japan's participation in a conflict in the Middle East; the Diet limited the country's involvement to giving money to the efforts.\footnote{108} International criticism followed Japan's decision, with Japan being said to have engaged in "checkbook diplomacy."\footnote{109} Foreign critics believed Japan had done "too little too late" in the Middle East, contributing money to the coalition and then dispatching only after combat operations were complete.\footnote{110} Despite the negative attention Japan received in the international field, this still was not enough for Japan to change its policy.\footnote{111} The Prime Minister at the time, Kaifu, attempted to extend Article 9's meaning to cover the Gulf War conflict by having the cabinet rule that SDF participation could be used to enforce sanctions on Iraq.\footnote{112} However, Prime Minister Kaifu was not able to gain the support of the legislature due to immense public pressure indicating that action in the Gulf War would have a negative impact on Article 9.\footnote{113}

D. JAPAN'S ROLE IN THE WAR ON TERROR

Under the security agreement previously discussed, the U.S. and Japanese militaries agreed to participate in bilateral defense and assist each other should an attack occur on Japan or in any surrounding areas.\footnote{114} The Japan-United States Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines limit the contributions of the SDF, essentially limiting them to non-offensive tasks such as rear-area support or information gathering.\footnote{115} However, since the end of the Occupation, Japan continues to take steps toward strengthening its military.\footnote{116} This is perhaps due to the fact that many in Japan realize that Japan cannot afford to continue living in a "closed space."\footnote{117} The primary reason Japan desires remilitarization is due to the "rough neighborhood" that Japan finds itself in, with China and North Korea nearby.\footnote{118} Perhaps most alarming is the ongoing situation and international relations with North Korea, who continues to provoke the international community and develop nuclear weapons.\footnote{119}

Beginning with the financial package in the Gulf War in 1990 previously discussed, Japan's involvement in international affairs has

\begin{thebibliography}{99}
\item \footnote{108} Id. at 1622.
\item \footnote{109} Panton, supra note 2, at 135.
\item \footnote{110} Southgate, supra note 22, at 1631.
\item \footnote{111} Panton, supra note 2, at 135-6.
\item \footnote{112} Id. at 135
\item \footnote{113} Id.
\item \footnote{114} See generally Security Treaty Between the United States and Japan, U.S.-Jap., Sept. 8, 1951, 3 U.S.T. 3329 (stating that the parties will consult with each other should an armed attacked occur in Asia).
\item \footnote{115} Southgate, supra note 22, at 1604-5.
\item \footnote{116} Zachary D. Kaufman, No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution, 33 YALE J. INT'L L. 266, 266 (2008).
\item \footnote{117} SAMUELS, supra note 98, at 2.
\item \footnote{118} Teslik, supra note 89.
\item \footnote{119} See id. (noting a primary concern is North Korea's recent actions).
\end{thebibliography}
steadily increased. In 1992, Japan passed legislation allowing its soldiers to assist with UN Peacekeeping Missions. Following the passing of this legislation, the first deployment of troops to a foreign country since World War II occurred when Japanese troops participated in a UN Mission to Cambodia. Following the events of 9/11, former Prime Minister Koizumi pledged Japan’s support towards the United States, and the Japanese cabinet began looking for a way to provide support using their SDF without violating the constitution. The United States sought the assistance of Japan in the war on terror, telling the Ambassador from Japan to “show the flag” to express cooperation. The efforts concluded with the Anti-terrorism Special Measures Law. The law circumvented Article 9 by allowing Japan to dispatch its SDF to foreign soil with the prior consent of the foreign government to assist with noncombatant and humanitarian support.

In 2001, the Diet created and approved the Anti-Terrorism Special Measures Law, allowing the SDF to support the United States in the war on terror in an overseas noncombat capacity. In November 2011, the SDF sent warships to the Indian Ocean to support the U.S. Operation Enduring Freedom, marking the first time combat theater operations were conducted by the Japanese navy overseas since 1945. From 2001 to 2007, the SDF assisted with providing fuel to ships located in the Indian Ocean during the war in Afghanistan.

The Special Measures Law allows the SDF to support U.S. activities such as supply, transportation, and medical aid. In addition, the law authorizes the SDF to support these activities in the territory of a foreign state and on the high seas with the approval of the foreign state. While this law allows the SDF to be more proactive in their defense, it still must operate in areas that are not designated to be “combat” zones. The departure of Japanese troops to the Afghani theatre has arguably departed from the previously discussed guidelines to the U.S.–Japan Security Treaty that stated that for the SDF to be involved, the conflict should be in an area

120 Kaufman, supra note 108, at 266.
121 Id.
122 Id. 267.
123 Southgate, supra note 22, at 1619-20.
124 Umeda, supra note 19, at 22.
126 Umeda, supra note 19, at 22.
127 Southgate, supra note 22, at 1601.
128 Southgate, supra note 22, at 1599.
130 The Anti-Terrorism Special Measures Law: Tentative English Summary, supra note 118.
131 Id.
132 Southgate, supra note 22, at 1621.
surrounding Japan. Some have even argued it is a material breach of the constitution because deploying troops violates the prohibitions outlined in Article 9. Japan’s neighbors viewed the deployment of troops unfavorably and believed that Japan made a dangerous step towards future militarization and aggression. In passing the Anti-Terrorism Special Measures Law, the Japanese government required the SDF to conduct their operations in non-combat zones, with security of their troops being assured. By operating in non-combat zones completing support activities, the Diet hoped to assure the Japanese that this law would not go too far in removing the constitutional restraints towards remilitarization. However, many scholars also question whether there truly is a distinction between the combat zone and the rear (support) area.

In 2003, the SDF also became involved in Iraq due to the passage of the Iraq Special Measures Law: on its face, this law allowed the SDF to support the United States in noncombat operations. Over the course of four years, this law allowed SDF troops to be deployed to a country under occupation where some small-scale fighting still continued, with the SDF allowed only to use arms in limited defensive situations. As a result, foreign troops needed to protect the SDF troops in Iraq. Following the expiration of this Anti-Terrorism law in 2007, the Japanese cabinet again submitted a bill to continue their refueling operations to fulfill their responsibility in the international war on terror. This renewal of the law was met with great debate in Japan with some claiming it violated Article 9. Then Prime Minister Fukuda defended renewing the bill, stating that the area in which the SDF had been operating was a non-combat zone and, as a result, deployment of forces did not violate Article 9 of the Constitution.

Strict limitations are in place for the SDF when deployed to a foreign country. In order to balance the interests of Article 9 with the international pressure Japan faces from the world, the U.N. Peacekeeping Operations Law includes five principles developed for Japan’s participation. The first three principles are preconditions to the SDF becoming involved: (1) a cease fire must currently be in effect and maintained actively, (2) the host country or countries have

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133 Id. at 1603.
134 Id.
135 Id.
136 Southgate, supra note 22, at 1621.
137 Id.
138 Umeda, supra note 19, at 22.
139 Southgate, supra note 22, at 1600-1.
140 Umeda, supra note 19, at 25-6.
141 Id. at 26.
142 Gibbs, supra note 5, at 159.
143 Id.
144 Id.
145 See Southgate, supra note 22, at 1621 (noting that the size, composition, etc. of the SDF was defined by the law).
146 See Southgate, supra note 22 (discussing the principles for participation).
to give their consent before the Self Defense Force can participate, and (3) the United Nations must be impartial in terms of the conflict. The remaining two procedural principles include the following: (4) the use of arms should be limited only to cases of necessity or in self defense, and the United Nations may not order the use of arms; and (5) should one of the three preconditions be suspended or terminated, the participation of the SDF will end.

Additional developments towards remilitarization have included declarations in 2002 by former Prime Ministers stating that Japan could own nuclear weapons despite Article 9. In addition, the Diet approved the creation of a defense ministry in 2006. This full-fledged Ministry of Defense was the first one in Japan since World War II. In addition, by 2007, Japan ranked sixth in the world in military spending, reaching a total of $41.75 billion on military spending that year. It appears the SDF will likely continue its progression, changing from a force of self-defense to a full military irrespective of the constitution and Article 9.

E. Preemptive Self Defense in the War on Terror

Claims by the United States in 2002 to a preemptive right of self-defense led to concern and criticism from international lawyers. As previously discussed, the concern is that preemptive self-defense legitimizes sudden, massive military actions that occur with no warning in the absence of war, such as Pearl Harbor. Following the United States’ broad claim of a right to preemptive self-defense, many other states took it upon themselves to claim the same right. Some of these states even possess nuclear weapons. As a major player in the international arena, when the United States claims a certain right, there can be major implications for customary international law to be changed as a result.

While the Bush administration is typically associated with the idea of preemptive self-defense, signs appeared in previous administrations toward this idea, beginning with the Reagan administration. For example, in the National Security Decision Directive 207, it was stated that the United States must effectively

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147 Southgate, supra note 22, at 1631.
148 Id.
149 Kaufman, supra note 108, at 267.
150 Id.
151 Id.
152 Id.
153 Southgate, supra note 22, at 1633.
155 Id.
156 Id.
157 Id.
158 Id. at 525-6.
159 Id. at 527.
protect its citizens, property, and interests. In addition, former Secretary of State Shultz argued that limited military action should be utilized to handle terrorist threats while still at a manageable size, and a nation that had been attacked by terrorists should be permitted to use force to either prevent or preempt any further attacks. During the Clinton Administration, it was suggested that a preemptive right existed, but new security documents gave attention to terrorism and became more reactive in line with Article 51 of the UN Charter. However, the strategy for security during the Clinton administration in 2000 was for the United States to reserve the right to act militarily in self defense through striking at terrorist bases, as well as those states that sponsor, support, or assist terrorists.

Following the attacks of 9/11, President Bush stated in June 2002 that it was necessary to attack the enemy, disrupt their plans, and confront threats to our nation’s security before they could emerge. By September 2002, the new U.S. security strategy clearly stated and expanded to claim a right to preemptive action. In a world in which weapons of mass destruction are a reality, the United States needs the ability to defend itself against enemies through preemptive means. Former national security adviser Condoleezza Rice stated that this is not a green light to attack other nations, and the instances where a preemptive right exists will be small. By 2006, the National Security Strategy moderated the broad claims of this right by the United States; however it did retain preemptive force.

The UN Charter states in Article 51 that the use of force is authorized if an armed attack occurs:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it

161 Reisman & Armstrong, supra note 154, at 528.
162 Id. at 529.
163 Id. at 530.
164 President George W. Bush, Commencement Address at the United States Military Academy at West Point, (Jun. 1, 2002), available at http://www.presidentialrhetoric.com/speeches/06.01.02.html.
165 Reisman & Armstrong, supra note 154, at 530.
166 Id.
167 Id. at 531.
168 Id. at 531-2.
deems necessary in order to maintain or restore international peace and security.\textsuperscript{169}

The UN’s stance on the use of force is presented as one of two things: either the use of force is lawful because it is used in self-defense or it is not used in self-defense and is therefore unlawful.\textsuperscript{170} Under the UN Charter, the state must suffer an “armed attack” before the right to force through self-defense arises.\textsuperscript{171} In addition to the situation of an armed attack, the Caroline incident validates anticipatory self-defense.\textsuperscript{172} In the Caroline case, a British military unit secretly entered the United States and destroyed an American ship, the Caroline, which had been assisting Canadians who were fighting against British rule.\textsuperscript{173} The attack resulted in the loss of the ship and the deaths of two Americans.\textsuperscript{174} The British informed American officials the ship was destroyed in self-defense, and the United States demanded the British justify this self-defense claim by showing it was instant, overwhelming, there were no other means, and no time to deliberate in taking the action.\textsuperscript{175} From Caroline, states have not only the confirmed right to self-defense, but there are clear criteria for when anticipatory self-defense may be used as well.\textsuperscript{176} The Caroline test requires a country to show that force is necessary because of an imminent threat, and that the response to the threat is proportionate.\textsuperscript{177}

Preemptive self-defense, which is discussed in the UN Charter, differs from anticipatory self-defense.\textsuperscript{178} Preemptive self-defense is the claim that a state is entitled to use high levels of violence unilaterally, without prior authorization to stop a development that has not yet become threatening or operational, but that if allowed to continue could be seen by the preemtator as needing to be neutralized at a higher and potentially unacceptable cost.\textsuperscript{179} Anticipatory self-defense means that an imminent threat has been discovered, and that there is “palpable evidence of an imminent attack.”\textsuperscript{180} In contrast, preemptive self-defense is seeing only a contingency or possibility of a threat.\textsuperscript{181} In order to reach the

\begin{thebibliography}{99}
\bibitem{169} U.N. Charter art. 51.
\bibitem{170} Reisman & Armstrong, supra note 154, at 525.
\bibitem{171} U.N. Charter art. 51.
\bibitem{174} Id.
\bibitem{175} Id.
\bibitem{176} Id.
\bibitem{177} Rouillard, supra note 164.
\bibitem{178} Tait, supra note 165.
\bibitem{179} Id.
\bibitem{180} Id.
\bibitem{181} Id.
\end{thebibliography}
threshold for preemptive self-defense, one would simply need to show the mere threat or possibility of attack at some future point.182

A UN Panel on Threats, Challenges and Change agreed with those that believed there should be a less strict requirement of an “armed attack” in order for self-defense to be justified.183 The need for a less strict requirement arises in situations where there is a threat that although not imminent, it is claimed to be very real.184 An example of such a threat exists in States that have the capability to make nuclear weapons.185 Since Article 51 handles situations of armed attack, not imminent threats, it appears the UN panel has attempted to reconcile the United States claims to pre-emptive self-defense.186 The ICJ has clearly stated that a State that believes it is the victim of an “armed attack” must declare its opinion that it has been attacked.187 Customary international law does not permit another State to act in collective self-defense on its own opinion of the situation.188

Those who agree with the idea of preemptive self-defense believe it is necessary due to the evolution of weaponry over the years, since countries have weapons capabilities that can be rapid and destructive with very little or no warning.189 In response, critics of preemptive self-defense caution that assessments of a situation will vary based on the country analyzing the issues.190 While one country may see their acts as preemptive self-defense to a serious threat, another country may look at the same situation as a serious misjudgment due to differences in cultures and values.191

The UN Security Council has remained silent on preemptive self-defense rights, evidenced by not showing support (or nonsupport) of the United States’ preemptive involvement in Iraq, perhaps because the United States could veto any resolution as a permanent member of the council, and not so much because the Security Council believed other members shared the same views.192 Prior to the invasion of Iraq, President Bush sought the authorization of the Security Council, but he failed to receive authorization.193 Since 9/11,

182 Id. at 526.
184 See id. (noting that it becomes more difficult to apply the Caroline criteria where there is only a threat of use of force).
185 Id.
186 Reisman & Armstrong, supra note 154, at 532-33.
187 Id. at 533.
188 Id.
189 Id. at 526.
190 Id.
191 Id.
192 Reisman & Armstrong, supra note 154, at 537.
the Security Council’s view is that any state or non-state actor that chooses to aid, harbor, or support terrorists would be accountable.\textsuperscript{194} Since the United States made their claim to preemptive self-defense, many other governments debated this right, some choosing to support the mission in Iraq and others refusing to participate in Iraq.\textsuperscript{195}

Of the states participating in Iraq, Japan maintained troops in Iraq starting in 2003, although their role involved helping in non-combat operations, such as humanitarian and construction projects.\textsuperscript{196} The SDF assistance was geared toward helping the Iraqi people, focusing on issues such as water supply, medical, reconstruction of facilities, and transportation.\textsuperscript{197}

In 2003, Japan’s Defense Minister, Ishiba stated that Japan had the right to preemptive self-defense.\textsuperscript{198} Since these statements were made, no Japanese officials publicly disavowed the claim to a right of preemptive self-defense.\textsuperscript{199} In opposition of the United States’ recognition of the right, many states and governments refuse to recognize a right to preemptive self-defense or the claim as being indicative of international law.\textsuperscript{200} While claims of preemptive self-defense are not compatible with recent ICJ decisions on the use of force for self-defense, it appears self-defense rights relaxed only for the war against terrorism.\textsuperscript{201} Some remain concerned that justifying Iraq under a claim of a right to preemptive self-defense leads to the risk that less law-abiding states may take it as permission to use aggressive force.\textsuperscript{202}

\section*{III. ARGUMENT}

\textbf{A. INTERPRETATIONS OF ARTICLE 9 HAVE SHOWN JAPAN IS WITHIN ITS CONSTITUTIONAL RIGHTS TO HAVE A SELF DEFENSE FORCE AND PARTICIPATE IN PREEMPTIVE SELF DEFENSE}

Legislators in Japan have stated that creating and maintaining the Self Defense Force (“SDF”) is allowable under Article 9 because war is an aggressive act.\textsuperscript{203} The Japanese developed a SDF based on their inherent right of self-defense.\textsuperscript{204} The Japanese government maintains that their actions and laws passed in support

\begin{itemize}
\item \textsuperscript{194} Reisman & Armstrong, supra note 154, at 538.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Reisman & Armstrong, supra note 154, at 540.
\item \textsuperscript{197} JAPAN DEFENSE AGENCY, OVERVIEW OF JAPAN’S DEFENSE POLICY 6 (May 2005), available at http://www.mod.go.jp/e/publ/w_paper/pdf/2006/english.pdf.
\item \textsuperscript{198} David McNeill, Japan Warns That It Will Attack if North Korea Aims Missile, THE INDEPENDENT (London), Sept.15, 2003.
\item \textsuperscript{199} Kaufman, supra note 108, at 267.
\item \textsuperscript{200} Reisman & Armstrong, supra note 154, at 547.
\item \textsuperscript{201} Id. at 548.
\item \textsuperscript{202} Id. at 549.
\item \textsuperscript{203} Southgate, supra note 22, at 1602.
\item \textsuperscript{204} Id.
\end{itemize}
of the war on terror do not violate the Japanese constitution because the policy of Japan remains defense-oriented.\footnote{Umeda, supra note 19, at 28.}

The Japanese Supreme Court repeatedly refuses to take a stance on the constitutional validity of the SDF, despite numerous opportunities.\footnote{Southgate, supra note 22, at 1629.} As a result, it seems to suggest that the Supreme Court believes there is a “permissible purpose for the SDF in the defense of Japanese sovereignty.”\footnote{Id.} General McArthur himself stated that the SCAP had not intended “the demilitarization of Japan to prevent any and all steps for preservation of the nation.”\footnote{Southgate, supra note 22, at 1612.} As a sovereign country, Japan “possessed the inherent right of self-preservation.”\footnote{Id.}

The 1997 Guidelines created a role for the SDF beyond Japan into areas surrounding Japan.\footnote{The Guidelines for U.S.-Japan Defense Cooperation (September 1997).} Based on the 1997 Guidelines, the term “areas surrounding Japan” is not a reference to geography, but rather it is determined by the situation.\footnote{Id.} The definition of “situation” was also described as any events that “will have an important influence on Japan’s peace and security.”\footnote{Southgate, supra note 22, at 1617.} Similar to the stance taken by the United States, limited military action should be used to handle terrorist threats while still manageable and to preempt any further attacks rather than waiting to absorb the first blow.\footnote{See Reisman & Armstrong, supra note 154, at 538-546. (describing actions taken by various countries).}

The Anti-Terrorism Special Measures Law were legally passed in the Japanese legislature; in keeping within the bounds of Article 9, the law allowed Japan to provide SDF to the United States within a scope that kept them apart from the use of force.\footnote{Southgate, supra note 22, at 1620. While SDF members may use weapons in their own defense or in unavoidable situations, their primary duties are support activities and not combat operations.\footnote{Id.}

B. A RIGHT TO PREEMPTIVE SELF DEFENSE HAS BEEN CLAIMED AND ADOPTED BY NUMEROUS COUNTRIES

Numerous coalition partners joined the United States in the fight on terror and in claiming a right to preemptive self-defense.\footnote{Southgate, supra note 22, at 1620-1.} Australia is one coalition partner of the United States, and Australia defends the preemptive strike doctrine against terrorism as an
interpretation of the UN Charter Article 51. The Defense Minister of Australia stated that when an attack is imminent, a state it not required to wait and take the first blow (aka anticipatory self-defense). However, when facing the non-state actors (terrorists) operating in a very non-traditional manner from multiple bases, the indicators and warning that one would receive in a traditional attack are not there. The British Foreign Secretary also supported pre-emption stating that in light of the 9/11 attacks on the United States, countries learned that it is better to take action preemptively rather than waiting until that threat or attack materializes. In fact, operations occurring overseas may be the best means of self-defense because the country is not waiting for the problem to arrive on their territory.

Even non-U.S. coalition partners criticizing the preemption policy have claimed they believe they are entitled to the right of preemption. For instance, China has been a vocal critic of the United States’ involvement in the war on terror, believing that it utilizes judgments that are subjective and easily abused in order to start war. However, the Chinese government appeared to say that, in the context of Taiwan, they themselves have a limited right of preemptive attack. France is another vocal critic of the Iraq war that has announced a defense policy that allows them to take preemptive action against threats outside their borders.

C. JAPAN HAS NOT VIOLATED ARTICLE 9 IN ASSISTING THE U.S. IN THE PREEMPTIVE WAR ON TERROR

In dispatching SDF to fight in the war on Terror, Japan’s Special Measures law allowed its SDF to conduct limited operational activities. The intent in passing the Anti-Terrorism Special Measures Law was to allow Japan to assist the United States with support activities, including medical care, supply, repairs, and servicing. All support services by Japanese forces were to occur in areas that are non-combat zones and where the security and safety of

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217 Reisman & Armstrong, supra note 154, at 538.
218 Id.
219 Id.
221 Reisman & Armstrong, supra note 154, at 542.
222 See generally id. at 544 (discussing comments made by officials in other countries such as India and China).
223 Id.
224 Id.
225 Kaufman, supra note 108, at 269.
227 Southgate, supra note 22, at 1604.
forces can be assured.\footnote{228}{Basic Plan Regarding Response Measures Based on the Anti-Terrorism Special Measures Law (Nov. 16, 2001), http://www.kantei.go.jp/foreign/policy/2001/antiterrorism/1116keikaku_e.html.} Japan’s contributions to the efforts of its allies to fight terrorism leads to “endeavors to prevent and eradicate international terrorism in order to ensure the peace and security of the international community including Japan itself.”\footnote{229}{Statement by Prime Minister Junichiro Koizumi on the Passing of the Anti-Terrorism Special Measures Bill (Oct. 29, 2001), http://www.kantei.go.jp/foreign/koizumispeech/2001/1029danwa_e.html.} The Prime Minister of Japan stated that the fight against terrorism is a genuine concern of Japan and all other countries,\footnote{230}{Id.} Japanese officials feel that with the “proliferation of terrorists,” Japan must become more engaged in the international community.\footnote{231}{Kaufman, supra note 108, at 269.}

**IV. CONCLUSION**

This Article began by discussing the history of Article 9 of the Japanese Constitution, including Japan’s surrender following World War II through the present day state of Article 9 of the Japanese Constitution.\footnote{232}{See supra notes 24-53 and accompanying text.} Interpretations of Article 9 were also examined, including the ways in which Japan has justified its creation of a Self Defense Force (“SDF”).\footnote{233}{See supra notes 54-79 and accompanying text.} This Article then turned to the evolution of U.S.–Japan Security Arrangements and the Japanese SDF.\footnote{234}{See supra notes 80-112 and accompanying text.} The Article looked at Japan’s role in the war on terror, including the role of preemptive self-defense.\footnote{235}{See supra notes 113 to 151 and accompanying text.} Finally, the Article concluded that Japan has not violated Article 9, based on its interpretations of its laws and its actions in the war on terror.\footnote{236}{See supra notes 152 to 200 and accompanying text.}

Japan’s creation of the SDF, and the SDF involvement in Iraq, did not exceed the bounds of Article 9. Due to the lack of combat duties for Japanese troops, Japan deployed to foreign areas where they received permission from the host country, and Japan is allowed to be involved in preemptive conflicts. Article 9 has been interpreted to allow the Japanese to have a Self Defense Force and to act in their self defense when the situation requires it, whether there has been an armed attack or not. As an U.S. ally, Japan should share in the alliance burden by assisting with the war on terror. With the advent of weapons of mass destruction and nuclear weapons, the battlefield has changed and deadly attacks can be mounted against a country with little or no notice. The war on terror is a war on a non-traditional enemy, a war against extremist groups, and not against any one particular country. In addition, the lines of the battlefield have been blurred, with terrorists using tactics and weapons at any time and any place. While no direct threats have been made on Japan, terrorists often strike with little warning or outside
traditional war guidelines. Due to the various interpretations of Article 9, it may be time for Japan to amend their constitution to silence the critics who believe they should stay out of world conflicts. If Japan wants to be seen as a more “normal” nation, with the ability to lend a hand to efforts against terrorism, amending the constitution to allow non-aggressive involvement would be an effective step forward for the nation.
ADDRESSING THE SEX TRAFFICKING CRISIS: HOW PROSTITUTION LAWS CAN HELP

KRISTINA DAY

I. INTRODUCTION

In 2002, the National Security Presidential Directive 22 (“NSPD-22”) issued the following statement about the United States’ stance against sex trafficking and how prostitution contributes to the sex trafficking crisis:

U.S. anti-trafficking policy is based on an abolitionist approach to trafficking in persons, and our efforts must involve a comprehensive attack on such trafficking, which is a modern day form of slavery. In this regard, the United States Government opposes prostitution and any related activities, including pimping, pandering, or maintaining brothels, as contributing to the phenomenon of trafficking in persons. These activities are inherently harmful and dehumanizing.\(^1\)

Despite this strong opposition in the United States against prostitution as it relates to sex trafficking, a number of states have recently passed laws that decriminalize acts of prostitution for minors, the population that needs the most protection, without providing any long-term solutions.\(^2\) Additionally, in November 2010, the Texas Supreme Court held that a minor under age fourteen


cannot be prosecuted for prostitution because, at that age, a child cannot consent to sex as a matter of law.\textsuperscript{3} Eliminating police jurisdiction over potential trafficking victims, especially for those who are minors, prevents the victim’s escape: for only when the victims are arrested and detained do they ever receive the care and rehabilitation they so desperately need.\textsuperscript{4}

This Article will bring awareness as to how counterproductive prostitution laws, specifically those that make prostitution legal, thwart the fight against sex trafficking worldwide.\textsuperscript{5} To develop effective laws against trafficking, legislators must recognize the link between prostitution and trafficking.\textsuperscript{6} First, this Article defines “prostitution” and “sex trafficking,” and describes how the two concepts interconnect.\textsuperscript{7} Next, the Article will describe how policies on prostitution have shifted historically, and, in general, which policies are more prevalent today.\textsuperscript{8} It then explains the three jurisdictional classifications of prostitution and provides a brief evaluation of the effects of the particular system in each jurisdiction.\textsuperscript{9} Then the Article describes and explains why laws used to combat sex trafficking have been largely ineffective.\textsuperscript{10} Finally, the Article shows how current laws on prostitution have a negative impact on the anti-sex trafficking movement and concludes with a possible solution to effectively curb the sex trafficking crisis.\textsuperscript{11}

II. BACKGROUND

During 2003, the Trafficking in Persons report showed that 600,000–800,000 people were trafficked worldwide.\textsuperscript{12} Eighty percent of the victims were female and roughly seventy percent of the females were trafficked for sexual exploitation.\textsuperscript{13} Although the United States threatens to impose sanctions on other countries that fail to combat

\textsuperscript{4} See Janice Shaw Crouse, The Dangerous Linkage of Naiveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps; otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).
\textsuperscript{5} See Melissa Farley, Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly, 18 YALE J.L. & FEMINISM 109, 142 (2006) (noting that existing prostitution laws must be integrated into state anti-trafficking laws to effectively challenge sex trafficking globally).
\textsuperscript{6} \textit{Id.}
\textsuperscript{7} See infra notes 12-27 and accompanying text.
\textsuperscript{8} See infra notes 28-35 and accompanying text.
\textsuperscript{9} See infra notes 36-79 and accompanying text.
\textsuperscript{10} See infra notes 80-114 and accompanying text.
\textsuperscript{11} See infra notes 115-178 and accompanying text.
\textsuperscript{13} Id.
sex trafficking, the majority of trafficking victims are U.S. citizens.\textsuperscript{14} In order to make significant progress in reducing sex trafficking in the United States and abroad, the United States must recognize that prostitution and sex trafficking are inextricably linked.\textsuperscript{15} As such, the domestic laws on prostitution have a significant effect on the international sex trafficking crisis, but legislators continue to ignore this interconnectedness.\textsuperscript{16} If the government does not coordinate sex trafficking and prostitution laws, then both domestic trafficking victims and measures to counter the trafficking movement will be harmed.\textsuperscript{17}

Prostitution is understood as sexual activity for hire.\textsuperscript{18} What constitutes sexual activity and the legal statuses of such acts vary depending on the jurisdiction.\textsuperscript{19} Sex trafficking, on the other hand, is when “[a person] is coerced, forced, or deceived into prostitution—or maintained in prostitution through coercion—that person is a victim of sex-trafficking.”\textsuperscript{20} Those that engage in transporting, harboring, recruiting, receiving, or obtaining the person for a sexual purpose is engaged in trafficking.\textsuperscript{21} This includes victims who are trafficked internationally, as well as those who are trafficked domestically.\textsuperscript{22} Thus, sex trafficking is intertwined with prostitution, as trafficking is the process that delivers victims into prostitution and compels the trafficked victims to stay.\textsuperscript{23}

As mentioned above, the legal status of prostitution remains the subject of a heated global debate.\textsuperscript{24} While most people can agree on the harmfulness of sex trafficking, activist groups and governments around the world are divided in their views of


\textsuperscript{15} Id. at 430.

\textsuperscript{16} See Martti Lehti and Kauko Aromaa, \textit{Trafficking for Sexual Exploitation}, 34 CRIME & JUST 133, 133 (2006) (commenting that roughly 60-80 percent of sex trafficking is domestic and that most sex trafficking cross-border is regional).

\textsuperscript{17} Heiges, supra note 14, at 429.


\textsuperscript{19} Id. at 836.

\textsuperscript{20} \textit{TRAFFICKING IN PERSONS REPORT}, supra note 12, at 7.


\textsuperscript{24} Davis, supra note 18, at 837.
prostitution and how the law should treat it. However, an essential component of that debate—one that is consistently overlooked—is how prostitution laws subsequently affect law enforcement’s ability to identify and prosecute sex traffickers. “Without acknowledging the ways in which the dominant prostitution enforcement paradigm obstructs anti-trafficking policies, it is unlikely the U.S. will achieve significant success in reducing sex trafficking either in this country or abroad.”

A. LEGISLATIVE APPROACHES TO PROSTITUTION

Over the last 150 years, policies on prostitution have shifted, from legalization to prohibition. Towards the end of the 19th century, Europe and North America based their prostitution policies on legalization, as a result of the increase in domestic and migratory prostitution. However, such policies gradually became more restrictive, moving from legalization to prohibition. This shift towards more restrictive prostitution policies came in response to a number of concerns, including the ability to control related criminal activity, a concern for the public order, the anti-trafficking movement in the 1980s, and the spread of HIV/AIDS.

More recently, a number of countries and states in the United States are moving away from prohibiting acts of prostitution to

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26 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps: otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).

27 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad, 94 MINN. L. REV. 428, 430 (2009).


29 Id.

30 Id.

legalization or decriminalization. This shift is a direct result of the women’s rights movement and the general change in principles, beliefs, and moral attitudes of the people. As discussed in more detail below, a number of jurisdictions have decriminalized or legalized prostitution in an attempt to make life safer for their women and children. However, unfortunately, the legal approaches that propose to make life safer for women and children by decriminalizing or legalizing prostitution are wrong, for such laws have a dismal effect on law enforcement’s ability to identify traffickers and rescue victims.

Because there is often confusion over the legislative approaches to prostitution, it is helpful to discuss the terms used to describe the legislative approaches to prostitution in varying jurisdictions and give an example of each: (1) decriminalization, (2) criminalization, and (3) legalization or regulation.

1. Decriminalization

Under a system of decriminalization, all laws and provisions against acts of prostitution are repealed or removed. The difference between decriminalization and legalization is that there are no special state-imposed restrictions in a decriminalization regime. Some jurisdictions recognize prostitution as a legitimate business, which allows the state to subject the business to conventional employment and health regulations. As a result, prostitutes have the same responsibilities and rights as other workers, i.e., paying taxes.

32 See Lehti and Aromaa, supra note 28 (stating that prostitution policies in Western countries went from a prohibitionist ideology to decriminalization).
33 Lehti and Aromaa, supra note 28, at 134.
35 See Janice Shaw Course, The Dangerous Linkage of Naivete and Good Intentions, Concerned Women for American (2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps; otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).
36 See Dr. Elaine Mossman, INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION, 11 (2007), available at http://www.justice.govt.nz/policy/commercial-property-and- regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/documents/report.pdf (commenting that there is confusion over the legislative approaches for acts of prostitution); see also Martti Lehti and Kauko Aromaa, supra note 28, at 134 (discussing the three prevailing legal frameworks used to regulate prostitution).
37 Mossman, supra note 36, at 12.
38 Id.
39 Id.
40 Id.
However, under decriminalization regimes, a jurisdiction distinguishes “between (i) voluntary prostitution and (ii) that involving force and coercion or child prostitution—the latter remaining criminal.”

Thus, even though adult prostitution is legal, it remains a crime to prostitute, traffic, pimp, or buy children.

In 2003, New Zealand decriminalized adult prostitution and has since seen an increase in street prostitution and the prostitution of children. Street prostitution increased 200-400 percent in Auckland, New Zealand alone after it decriminalized prostitution. The Prostitution Law Review Committee released a report on the effects of the Prostitution Reform Act implemented in New Zealand, which stated the following:

The report released by the Prostitution Law Review Committee today clearly shows that the Prostitution Reform Act is not making life safer for many of New Zealand’s most vulnerable men, women and young people….Even the Committee’s research shows that the Act has failed. Most worryingly there are still significant numbers working on the streets. It is well documented that street workers face even more dangers than those operating from brothels, yet these numbers have failed to drop….The Act fails to provide alternatives for those caught up in prostitution. There is no pathway to help sex workers change their lives, and no recognition of the abuse that purchasers of sex are subjecting prostitutes to.

Ultimately, prostitution perpetuates abuse, stigmas, and violence that decriminalization cannot stop. Since New Zealand decriminalized prostitution, the U.S. Department of State reported that it observed “internal trafficking of women and children [in New Zealand] for commercial sexual exploitation…instances of debt bondage and document confiscation, and women from Asia, the Czech Republic, and Brazil ‘working illegally’ as prostitutes.” Despite that the decriminalization of prostitution has not been effective in places like New Zealand, a number of countries and states in the United States are moving towards legalization or decriminalization of prostitution.

41 Id.
44 Id.
46 Farley, supra note 43.
47 Id.
48 Compare Farley, supra note 43 (noting that trafficking and prostitution continued in New Zealand even after the country decriminalized prostitution), with Catharine A. MacKinnon, Trafficking, Prostitution, and
2. Criminalization

Jurisdictions that criminalize acts of prostitution make prostitution illegal. The offenses are defined in the jurisdiction’s criminal code, which aims to reduce or eradicate the sex industry. Those opposed to prostitution on religious, moral, or feminist grounds support systems that criminalize acts of prostitution: there are two primary support groups: prohibitionists and abolitionists. Prohibitionists believe that all acts of prostitution are unacceptable on moral, feminist, or religious grounds and are therefore illegal. Traditionally, countries in the Middle East have followed this approach. Conversely, abolitionists believe in a modified version of prohibition that permits the buying and selling of sex, while banning all other related activities. Because it is nearly impossible to perform an act of prostitution without breaking one of the prohibited related activities, prostitution is effectively illegal under an abolitionist’s approach. Great Britain and Canada currently follow this approach. Great Britain has never criminalized the sale of sex, but the “public nuisance” aspect of prostitution is illegal.


Mossman, supra note 36, at 5.

Id.

Id. at 11.

Id. at 5.

Id.

Lehti and Aromaa, supra note 28, at 134 (noting, for example, the law may permit sale of sex but ban soliciting, brothel keeping, and procurement).

Mossman, supra note 36, at 5.


Id. at 554.
Additionally, the laws in Canada ban solicitation for the purposes of prostitution, but do not prohibit commercial sex.\textsuperscript{58}

Sweden has taken a unique approach to criminalizing acts of prostitution.\textsuperscript{59} Sweden’s prostitution law confronts the demand for prostitution by criminalizing the buyers when they purchase a woman for sex.\textsuperscript{60} The law includes special police training to help law enforcement recognize that purchasers of sex are exploiters and extends help to those prostitutes who want to leave the sex industry.\textsuperscript{61} The country regards prostitution as a form of violence against children and women.\textsuperscript{62} Prostitution is officially recognized as exploitation and constitutes a grave social problem.\textsuperscript{63} Thus, while selling sex remains legal, all purchases of sexual services is criminalized and treated as sexual abuse and violence against women.\textsuperscript{64}

3. Legalization/Regulation

In a system based on legalization (or “regulation”), prostitution is legal, but the government subjects it to special conditions.\textsuperscript{65} For example, the government may require special registration, licensing, and mandatory health checks that businesses and workers have to follow to avoid criminal penalties.\textsuperscript{66} Ultimately, legalized regimes recognize the demand for prostitution but subject prostitution to laws in order to protect the health and public order.\textsuperscript{67}

\textsuperscript{58} Id. at 555.
\textsuperscript{59} See Lehti and Aromaa, supra note 28, at 141 (commenting that Sweden’s law on prostitution reflects the new trend of criminalizing the purchase of sex, while selling sex remains legal).
\textsuperscript{61} See MacKinnon, supra note 60, at 301, 302.
\textsuperscript{63} Id.
\textsuperscript{64} Compare Lehti and Aromaa, supra note 28, at 141 (noting that buying sex is a crime but selling sex is legal), with MacKinnon, supra note 60, at 301 (stating that Sweden treats prostitution as violence against women).
\textsuperscript{67} Mossman, supra note 65, at 12.
Many critique this characterization of prostitution as a reasonable career alternative.\textsuperscript{68} For example, one scholar critiqued the “sex work” categorization as follows:

There has been a deliberate attempt to validate men’s perceived need, and self-proclaimed right, to buy and sell women’s bodies for sexual use. This has been accomplished, in part, by euphemizing prostitution as an occupation. Men have promoted the cultural myth that women actively seek out prostitution as a pleasurable economic alternative to low-paying, low-skilled monotonous labor, conveniently ignoring the conditions which make women vulnerable to prostitution.\textsuperscript{69}

Despite such criticisms, a number of jurisdictions have legalized acts of prostitution, including the Netherlands, Victoria (in Australia), Nevada (in the United States), and Germany.\textsuperscript{70} Most Australian states repealed the law that made commercial sex illegal and have since adopted a number of measures to try to control the sex industry.\textsuperscript{71} For example, the prostitution law in Queensland, Australia has two legal forms of sex work: (1) a sole operator, where the sex worker works alone but is prohibited from making public solicitations for prostitution, and (2) sex work performed in a licensed brothel.\textsuperscript{72} All other forms of sex work remain illegal in Queensland, which include “unlicensed brothels or parlours, street workers, two sex workers sharing one premises (even if the workers both work alone in split shifts), and out-calls provided by a licensed brothel.”\textsuperscript{73}

While prostitution is typically legalized with the assumption that it will bring positive outcomes, this result has continually failed to materialize.\textsuperscript{74} Legalization has been proven to be ineffective in removing the stigma of prostitution; it has also failed to protect women from violence.\textsuperscript{75} The German government, which legalized prostitution, concluded that legalizing the sex industry failed to make


\textsuperscript{69} \textit{Id.} at 266.


\textsuperscript{73} \textit{Id.}


it safer for prostitutes, improve their working conditions, or create a means for prostitutes to leave the sex industry. Additionally, illegal forms of prostitution and trafficking explode under a system of legalization. This should come as no surprise because, from a business perspective, it makes sense for pimps to traffic the victims where prostitution is legal.

B. LAWS TO ADDRESS SEX TRAFFICKING

In addition to laws addressing prostitution, there are a number of state, federal, and international laws against sex trafficking. By 2003, thirty-nine states in the United States adopted anti-trafficking criminal laws. However, it is important to note that prosecutors rarely use these statutes to charge defendants because of the time and resources needed to prove force, fraud, or coercion, which is the required showing under the statutes. Conversely, states readily enforce prostitution crimes in jurisdictions—if they prohibit such acts—because prostitution crimes do not require evidence of force, fraud, or coercion.

1. United States’ Laws to Combat Sex Trafficking

The Trafficking Victims Protection Act (“TVPA”) is the preeminent law in the United States used to combat human trafficking. However, prosecutors may also utilize the Mann Act and the Racketeer Influenced and Corrupt Organizations Act (“RICO”) when pursuing charges.

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76 MacKinnon, supra note 70, at 305.
77 Id. at 304.
78 See id. (explaining that trafficking increases when prostitution is legal because the risk to pimps is diminished and the profits can be astronomical).
79 Id.
81 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad, 94 MINN. L. REV. 428, 437 (2009).
82 Id.
83 Id.
a. **Trafficking Victims Protection Act**

The TVPA defines severe forms of trafficking in persons as follows: “(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

The TVPA defines “sex trafficking” separately as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”

Without the force/fraud/coercion element required for severe forms of trafficking, this definition encompasses noncoerced migrant prostitution.

Under this definition, trafficking victims can be split into three groups: (1) minors less than eighteen years old involved in commercial sexual activity; (2) adults over age eighteen who are involved in commercial sexual activity by force, fraud, or coercion; and (3) children and adults forced into involuntary servitude, slavery, debt bondage, or peonage by force, fraud, or coercion.

Thus, the TVPA does not criminalize sex trafficking unless it is done by force, fraud, or coercion or if it involves trafficking of children.

b. **Mann Act**

Congress originally passed the Mann Act to prevent the transport of women across state lines. It has since been amended to criminalize the transport of any person under eighteen years old, either between states or abroad, with the intent that the minor engage in sexual activity.

The current 1994 amendment also made it illegal to travel to foreign countries for the purpose of engaging in sexual activity with a minor, if that act would violate federal law in

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87 Id. at § 7102(9).
90 TVPA § 112 (codified at 22 U.S.C. § 7109). The TVPA also criminalizes “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor.” Id. (codified at 22 U.S.C. § 7109). By contrast, “sex trafficking” of adults when force, fraud, and coercion are absent is not criminalized. See id. (codified at 22 U.S.C. § 7109). See also 18 U.S.C. §§ 1593(a), 1589(b) (making it illegal to obstruct trafficking investigations, to knowingly benefit financially from criminal trafficking activity and also introduced a conspiracy provision and defined a reckless disregard alternative to the culpability standard of the sex trafficking statute, which only applied to those who knowingly used force or coercion).
the United States. Further, U.S. citizens who commit sex offenses with minors abroad may be prosecuted under federal law, regardless of whether the act was considered a crime abroad.

While the Mann Act, as amended, seems progressive in its approach to combat sex trafficking, the legal effect has been minimal. Not only do countries abroad face problems enforcing child exploitation laws within their own country, but outside countries, like the United States, run into problems trying to meet federal evidentiary standards to prosecute sex offenders in the United States. While the current version of the Mann Act allows for prosecution of U.S. citizens who merely conspire to travel abroad with the intent of engaging minors in sexual activity, offenders are still more likely to be apprehended abroad while engaging in the criminal act. Furthermore, the prohibition only applies to sexual acts perpetrated upon minors less than eighteen years of age.

c. RICO

RICO is designed to eliminate organized crime. Even though RICO has effectively punished a number of criminals for various types of organized crime, it is rarely utilized in trafficking cases. There are a number of options that make RICO a highly effective instrument to dismantle complex criminal organizations and, when paired with the strength of the TVPA, it could be a very successful mechanism to eliminate sex trafficking enterprises.

2. INTERNATIONAL LAWS TO ADDRESS SEX TRAFFICKING

94 See Elizabeth Bevilacqua, Child Sex Tourism and Child Prostitution in Asia: What Can Be Done to Protect the Rights of Children Abroad under International Law, 5 ILSA J. INT'L & COMP. L. 171, 175 (1998) (explaining the legal effect of the 1994 amendments to the Mann Act which does not include a double criminality requirement, leaving those who commit sex offenses outside U.S. borders subject to federal law, despite whether the crime was illegal abroad).
95 See id. at 176 (discussing the legal effect of laws in different nations).
96 Id. at 177.
97 Id.
100 Id. at 762.
101 Id. at 761 (quoting text of the lucrative options that make RICO highly effective). RICO allows prosecutors to charge a perpetrator with a separate offense if he engages in a pattern of racketeering activity consisting of at least two specified illegal acts within a particular time period. RICO violators may receive prison sentences that exceed those allowed for the underlying offenses and may also be forced to forfeit any assets gained through the racketeering activity. Victims of RICO crimes may also bring civil suits against the perpetrators to receive financial restitution. Id.
The main international law used to combat sex trafficking is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. In addition, there are a number of UN-supported anti-trafficking programs, including the UN 1949 Convention for the Suppression of the Traffic in Persons and Exploitation of Prostitution of Others ("UN 1949 Convention"), which also address trafficking issues.

a. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Protocol") was written in conjunction with the UN Convention Against Transnational Organized Crime, both of which were designed to enable countries to work together to stop criminals from committing cross-border crimes. The Protocol uses the following “three P approach” to address the trafficking issue: prevention of trafficking, prosecution of traffickers, and protection for trafficking victims. Specifically, “[t]he Protocol on Trafficking commits countries to take law enforcement actions against traffickers, to provide some assistance and protection for TIP [“Trafficking in Persons”] victims, and to share intelligence and increase border security cooperation with other countries.” The Protocol treats consent as irrelevant as to whether trafficking has occurred and urges states to pass legislation that focuses on the demand for prostitution.

b. The UN Convention and Anti-Trafficking Programs

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105 LeRoy G. Potts, Jr., GLOBAL TRAFFICKING IN HUMAN BEINGS: ASSESSING THE SUCCESS OF THE UNITED NATIONS PROTOCOL TO PREVENT TRAFFICKING IN PERSONS, 35 GEO. WASH. INT’L L. REV. 227, 239 (2003). The purposes of the Protocol are as follows: “(a) To prevent and combat trafficking in persons, paying particular attention to the protection of women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.” Id. at 236 (citing The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, U.N. Doc A/55/383 (Dec. 25, 2003)).
106 Ribando, supra note 103, at 24.
The UN 1949 Convention strongly opposes prostitution and trafficking, declaring such acts as “incompatible with individual dignity and worth of the human person and endanger the welfare of the individual, the family and the community.” Thus, the UN 1949 Convention takes the position that prostitution is inherently harmful, even for consenting adult females, whether transported internationally or not.

Many UN agencies also have anti-trafficking programs. The UN Interagency Project on Human Trafficking in the Greater Mekong Sub-Region (“UNIAP”) is one of the leading anti-trafficking programs and was created to “facilitate a stronger and more coordinated response to trafficking in the Greater Mekong Sub-region (Cambodia, China, Laos, Burma, Thailand, and Vietnam).” The UN Children’s Fund (“UNICEF”) supports child victims of trafficking, including assistance with rehabilitation and reintegration into society. The United Nations Development Fund for Women (“UNIFEM”) has anti-Trafficking in Persons (TIP) programs to support women’s empowerment. In 2002, UNIFEM created a kit to help practitioners combat trafficking from a new perspective based on gender and rights.

III. ARGUMENT

A. CURRENT PROSTITUTION LAWS FAIL TO ADDRESS THE CONCERNS IN THE ANTI-TRAFFICKING MOVEMENT

1. Decriminalizing Acts of Prostitution Increases the Demand for Sex and Impedes on Law Enforcement’s Ability to Identify Trafficking Victims and The Traffickers

Policies on prostitution in Western countries are changing rapidly. Over the past ten years, decriminalizing and legalizing prostitution have been the most popular solutions to combat sex

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110 See Ribando, supra note 103, at 24 (describing the U.N. Interagency Project on Human Trafficking in the Greater Mekong Sub-Region (UNIAP), the U.N. Office on Drugs and Crime (UNODC), and a number of other U.N. anti-Trafficking in Persons programs). The United States works with and supports these U.N. measures and organizations: in addition, the United States supports the European Union (“EU”), the Group of Eight, and the Organization for Security to eliminate trafficking. Id at 26.
111 Id. at 25.
112 Id.
113 Id.
114 Id.
trafficking. Many people concerned about sex trafficking victims and their need for protection understandably question whether criminalizing such victims under prostitution laws is appropriate or necessary. This comes out of concern for sex trafficking victims and their need for protection, not criminalization. However, a jurisdiction that decriminalizes prostitution exacerbates the sex trafficking crisis by obstructing law enforcement’s ability to identify pimps and trafficking victims, effectively remove the trafficking victim from the situation, and to successfully prosecute the pimps.

Those in support of decriminalizing prostitution tend to believe that prosecuting trafficked girls is unnecessary if shelters and rehabilitation facilities are made available to them. However, the

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117 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), available at http://www.cwfa.org/content.asp?id=18444 (acknowledging T. Ditty, State Director for Concerned Women for America (CWA) in Georgia, who stated that decriminalizing prostitution would exploit trafficking victims, creating a wonderland for traffickers and pimps). See Farley, supra note 109, at 136 (discussing how legislation may traumatize the victims of sex trafficking).

118 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps; otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).

availability of such shelters and support services will not motivate trafficking victims, especially those who are minors, to get help for three reasons. First, many trafficking victims do not consider themselves a victim of human trafficking. Second, pimps manipulate their victims to keep them from seeking help and beat the victims into submission if they otherwise fail to obey. Third, police, not shelter operators, are the only agents able to identify trafficking victims and to effectively separate the victims from the enslaving control of their traffickers.

Even if upon arrest, law enforcement diverted trafficking victims directly into a rehabilitation center, there is nothing to encourage the trafficking victim to stay unless criminal charges are pending. Simply making shelters and rehabilitation facilities available will not effectively keep trafficking victims from the psychological and physical clutches of their pimps. Thus, police jurisdiction over victims through criminal prostitution laws is the only effective, recognized means to rescue trafficking victims. Decriminalization does not help these victims because it creates ideal conditions for pimps and traffickers, as it prevents the police from arresting them and keeps women and children enslaved.

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121 See Brenda Zurita, Children in Prostitution: What to Do?, Concerned Women for America (2010), http://www.cwfa.org/content.asp?id=18744 (explaining that shelters are not appropriate for every trafficking victim, for some victims fail to self-identify as such and will return to their pimp once released); see Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (emphasizing that legal means are essential to prevent child victims from returning to the “safety” of her pimp, to get the victims the rehab and services they need).


123 See Catharine A. MacKinnon, Trafficking, Prostitution, and Inequality, 46 HARV. C.R.-C.L.L. REV. 271, 288 (2011) (describing the dismal life of a prostitute being constantly raped, beaten, trapped, subject to trauma and torture, and relying on drugs to get you through).

124 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444.

125 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps; otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).

126 See Brenda Zurita, Children in Prostitution: What to Do?, Concerned Women for America (2010), http://www.cwfa.org/content.asp?id=18744 (explaining that shelters are not appropriate for every trafficking victim, for some victims fail to self-identify as such and will return to their pimp once released).

127 See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (emphasizing that legal means are essential to give trafficking victims the assistance they need).

128 See id. (quoting Tanya Ditty, State Director for the Concerned Women of America in Georgia).
2. **Laws that Criminalize Acts of Prostitution Fail to Recognize Buyers and Pimps as Primary Offenders**

By 2003, thirty-nine states in the United States adopted anti-trafficking criminal laws.\(^1\) As mentioned, these statutes are rarely used to charge defendants because of the time and resources needed for a successful prosecution.\(^2\) However, unlike anti-trafficking laws, state laws against prostitution are regularly utilized (if prostitution is a crime in that jurisdiction).\(^3\)

Unfortunately, state law enforcement officers tend to view pimps and buyers of sex as trivial, secondary offenders, and instead focuses on prosecuting the prostitutes.\(^4\) Despite lingering doubts, means do exist to motivate law enforcement to protect the wellbeing of prostitution victims and to seek their rescue and rehabilitation.\(^5\) Maintaining police jurisdiction over prostitutes enables law enforcement to identify sex trafficking victims, which not only allows officers the opportunity to provide protection and support services, but it also allows officers to glean information about the traffickers for future prosecution.\(^6\) Without this information, it is unlikely traffickers would ever be successfully identified and prosecuted.\(^7\) That fact, properly developed and understood, creates a powerful incentive to ensure sympathetic police treatment of victims.\(^8\)

3. **Laws that Legalize or Regulate Prostitution Do Not Decrease Violence Against Women**

Prostitution is not a crime under a system of legalization, but it is subject to close government regulation through health checks, licensing, and registration.\(^9\) Still, legalization is one of the primary


\(^2\) Id.

\(^3\) Id.

\(^4\) See id. at 438 (commenting that the courts and law enforcement have traditionally viewed pimps and buyers of sex as trivial offenders, while focusing on arresting and prosecuting the prostitutes).

\(^5\) See Janice Shaw Crouse, *The Dangerous Linkage of Naïveté and Good Intentions*, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (noting that educating law enforcement to recognize the crime is key to providing victims with the care they need).


\(^7\) See id. (stating that the victim’s cooperation is important to prosecution).

\(^8\) Id.

The causes of sex trafficking.\textsuperscript{138} “The popular fiction that all will be well in the world of prostitution once the sex industry is legalized or decriminalized, is repudiated by evidence that the degradation and exploitation of women, as well as the harm, abuse, and violence to women still remain in state-sponsored prostitution.”\textsuperscript{139}

\textit{a. Sweden’s Prostitution Model}

Sweden took a different approach to restricting acts of prostitution; while the selling of sex is legal, the purchase of sex is illegal.\textsuperscript{140} Under Chapter 6, Section 11 of the Swedish Penal Code:

A person who...obtains a casual sexual relation in return for payment, shall be sentenced for \textit{purchase of sexual service} to a fine or imprisonment for at most six months. The provision of the first paragraph also apply if the payment was promised or given by another person.\textsuperscript{141}

Prostitution and sex trafficking begin with the demand for victims to be used in prostitution and, as such, are inextricably linked.\textsuperscript{142} One scholar noted that the Swedish law recognizes this inseparability between the two: “Prostitution and trafficking in women are seen as harmful practices that cannot, and should not be separated; in order to effectively eliminate trafficking in women, concrete measures against prostitution must be put in place.”\textsuperscript{143}

The concrete measures Sweden put in place have seemingly been effective in reducing the number of street prostitutes and the rate of trafficking.\textsuperscript{144} Sweden’s law recognizes prostitution as a form of violence against women.\textsuperscript{145} It strongly prosecutes the buyers, extends help to prostitutes who want to get out of the sex industry, runs awareness campaigns to educate society on the harms of prostitution, and specially trains its law enforcement to understand the dynamics and psychological components behind the sex trade.\textsuperscript{146}

\textsuperscript{139} \textit{Id.} at 11.
\textsuperscript{140} Lehti and Aromaa, \textit{supra} note 137, at 141.
\textsuperscript{143} Raymond, \textit{supra} note 138, at 10.
\textsuperscript{145} Raymond, \textit{supra} note 138, at 11.
\textsuperscript{146} MacKinnon, \textit{supra} note 144, at 301–02.
However, Sweden’s policy on prostitution could be more effective with regard to the anti-trafficking movement.147 First, there should be higher maximum sentences and stricter penalties for those convicted of buying sex.148 Of all those prosecuted under the new prostitution law, none have served time in jail.149 That is not to suggest that imprisonment is the answer, but, because Sweden’s model recognizes the buying of women for sex as a form of violence against women, those prosecuted under the law should receive more than a fine of fifty days’ pay.150

Additionally, many of the conservative judges in Sweden have trouble viewing women or girls as sex trafficking victims.151 Sweden successfully resolved this problem by providing special training to law enforcement, but judges were not included in the training.152 To increase the overall effectiveness of the anti-trafficking law, judges must also receive training to understand the psychological elements of the sex trade.153

There must be cooperation between state agencies at the local, national, and international levels for law enforcement to be effective and to adequately protect trafficking victims.154

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147 Compare MacKinnon, supra note 144, at 302–03 (noting the need for improvement with regards to the implementation and drafting of the law, increasing judicial recognition, and improving means to help prostitutes get out of the sex industry), with Brenda Zurita, Children in Prostitution: What to Do?, Concerned Women for America (2010), http://www.cwfa.org/content.asp?id=18744 (suggesting that others who were parties to the crime be required to give testimony, make shelters a priority in areas where child prostitution has been identified, and educate and encourage the public to stop glamorizing prostitution).


152 Id.

153 Id.

154 Id.
B. The Swedish Law That Regulates Prostitution by Criminalizing the Purchase of Sex is Helpful in Building an Effective Model to Successfully Combat Sex Trafficking

The Swedish law addressing prostitution criminalizes those who buy women for sex. The law in Sweden has been effective in a number of ways. It views prostitution as a form of violence against women, initiates national prevention campaigns to decrease demand for prostitution, extends help to prostitutes trying to get out of the sex industry, and provides law enforcement with specialized training to effectively enforce the new policy. As such, the Swedish model would serve as an effective starting point for a successful prostitution law that simultaneously combats sex trafficking.

In addition to the policies outlined in the Swedish model, it is important that police maintain the ability to detain prostitutes in order to effectively address sex trafficking issues. Police are the only agents able to identify trafficking victims and effectively remove the victims from the psychological and physical clutches of the pimps. If the law is amended to criminalize only those who buy women for sex, the law in Sweden has been effective in a number of ways.


156 Compare 6 ch. 11 § Brottsbalken [BrB] (Swed.), available at http://webapps01.un.org/vawdatabase/uploads/Sweden%20-%20Unofficial%20translation%20of%20the%20Swedish%20Penal%20Code.pdf (noting that a person who transports, recruits, or takes other action to exploit that person for sexual relations or purposes will be sentenced for human trafficking), with Catharine A. MacKinnon, Trafficking, Prostitution, and Inequality, 46 Harv. C.R.-C.L.L. Rev. 271, 304 (2011) (commenting that Sweden’s approach is the only one that has ever been somewhat successful).


159 See Brenda Zurita, Children in Prostitution: What to Do?, Concerned Women for America (2010), http://www.cwfa.org/content.asp?id=18744 (noting that some advocates believe that there must be a comprehensive approach to helping children in prostitution, including arrest and detention of those children).

160 See id. (stating that one argument for arresting minors involved in prostitution is that it separates the minor from their pimp for a sufficiently long period of time, allowing the victim to finally receive the help they need).
sex, police will not have jurisdiction over trafficking victims and therefore have no effective means of identifying them and then providing them with the help they so desperately need.\textsuperscript{161}

While at first it seems counterintuitive, it is particularly important for police to maintain jurisdiction over minors in the sex industry.\textsuperscript{162} A number of states in the United States have recently passed legislation that directly conflicts with this notion, but Massachusetts appears to effectively address the issue involving minors in prostitution.\textsuperscript{163} Passed in late 2011, the Massachusetts law

\textsuperscript{161} See generally id. (discussing the Oakland Police Department procedure of arresting, incarcerating, and then offering services to the minor and noting that the child prostitutes are often sent to Juvenile Hall to protect them and prevent them from returning to their pimps).

\textsuperscript{162} See id. (stating that one argument for arresting minors involved in prostitution is that it separates the minor from their pimp for a sufficiently long period of time, allowing the victim to finally receive the help they need).

\textsuperscript{163} See 2011 Mass. Acts. H. 3808, \S 8, available at http://www.malegislature.gov/Bills/187/House/H03808 (defining sexually exploited children and providing for of the child with services but maintaining criminal charges to ensure the child complies with the requirements for services).

The Massachusetts law includes the following:

**SECTION 8.** Said section 21 of said chapter 119, as so appearing, is hereby further amended by inserting after the definition of "Sexually exploited child", any person under the age of 18 who has been subjected to sexual exploitation because such person: (1) is the victim of the crime of sexual servitude pursuant to section 50 of chapter 265 or is the victim of the crime of sex trafficking as defined in 22 United States Code 7105; (2) engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, in violation of subsection (a) of section 53A of chapter 272, or in exchange for food, shelter, clothing, education or care; (3) is a victim of the crime, whether or not prosecuted, of inducing a minor into prostitution under by section 4A of chapter 272; or (4) engages in common night walking or common streetwalking under section 53 of chapter 272.

**SECTION 9.** Said chapter 119 is hereby further amended by inserting after section 39J the following 2 sections: Section 39K. (a) Notwithstanding any general or special law to the contrary, the department of children and families, in collaboration with the department of mental health and other appropriate state agencies, shall: (i) provide for the child welfare services needs of sexually exploited children including, but not limited to, services for sexually-exploited children residing in the commonwealth at the time they are taken into custody by law enforcement or are identified by the department as sexually-exploited children, for the duration of any legal or administrative proceeding in which they are either the complaining witness, defendant or the subject child; and (ii) provide appropriate services to a child reasonably believed to be a sexually exploited child in order to safeguard the child's welfare. If a child reasonably believed to be a sexually exploited child declines services or is unable or unwilling to participate in the services offered, the department or any person may file a care and protection petition under section 24. Sexually exploited children shall have access to an advocate. The advocate or a member of the multidisciplinary service team established under section 51D shall accompany the child to all court appearances and may serve as a liaison between the service providers and the court. (b) The services that shall be provided under this section shall be
allows law enforcement to arrest and detain minors under age seventeen for prostitution violations.\footnote{164} However, these victims are given the opportunity to file a care and protection petition to provide the minor with rehabilitative services, instead of serving time in jail.\footnote{165} The key to the Massachusetts law is that it maintains active criminal charges if the minor does not comply with the requirements for services or the conditions of probation.\footnote{166} This provides an incentive for the minor to stay in the rehabilitation program instead of returning to the “safety” of their pimp.\footnote{167}

In order for these policies and programs to be continually effective, additional funding will be necessary.\footnote{168} “Measures to prevent trafficking and prostitution...will be inadequate unless governments invest in the futures of prostituted women by providing economic resources that enable women to improve their lives.”\footnote{169} Governments can get funding to provide real alternatives for women and children in prostitution by seizing traffickers’ assets.\footnote{170}

Ultimately, using the Swedish law on prostitution as a starting point will help lawmakers create an effective law to address sex trafficking.\footnote{171} Policies that should underlie that law include support for trafficking victims, strong prosecution of those demanding commercial sex, specialized training for law enforcement and judges, and proper funding to ensure the longevity of the laws and programs.\footnote{172}

available to all sexually exploited children, whether they are accessed voluntarily, through a court proceeding under this section or through a referral, which may be made by any person.\footnote{Id.} \footnote{164} See generally id. (noting that the state can provide services for those identified as sexually-exploited children).

\footnote{165} See generally id. (stating that a petition may be filed if the child declines or does not participate in the services).

\footnote{166} See generally id. (noting that services are provided, however the criminal charges remain if the minor does not comply with the requirement for services or the conditions of probation).

\footnote{167} See generally id. (maintaining the criminal charges against minors for prostitution if they fail to comply with the requirements for services and providing the child with an advocate).

\footnote{168} See generally id. (noting that services are provided, however the criminal charges remain if the minor does not comply with the requirements for services or the conditions of probation).

\footnote{169} See generally id. (maintaining the criminal charges against minors for prostitution if they fail to comply with the requirements for services and providing the child with an advocate).

\footnote{170} See generally id. (noting that services are provided, however the criminal charges remain if the minor does not comply with the requirements for services or the conditions of probation).


\footnote{172} Compare Brenda Zurita, Children in Prostitution: What to Do?, Concerned Women for America (2010), http://www.cwfa.org/content.asp?id=18744 (explaining that the best way to assist child prostitutes and trafficking victims is to focus on the demand and prosecute the buyers, train law enforcement, and provide shelter and services), with Picarelli and Jonsson, supra note 151, at 47, 48 (emphasizing...
VI. CONCLUSION

Understanding the connection between prostitution and sex trafficking is essential to creating effective laws that combat sex trafficking. Over the last 150 years, governments have scrambled to find a prostitution policy that reduces violence against women and children. However, when making these policy determinations, many governments have failed to recognize how prostitution laws impact the anti-trafficking movement. Specifically, when governments decriminalize acts of prostitution for minors, police jurisdiction over such persons is removed, thereby preventing officers from effectively identifying trafficking victims and their pimps. Ultimately, prostitution and sex trafficking laws should focus on education, protecting police jurisdiction over prostitutes, curbing demand for commercial sex, and maintaining criminal charges until child prostitution victims comply with rehabilitation services. As one scholar explains, “Arresting minors in prostitution and sex trafficking but not making counseling and support services available to them will leave them without help to create a better future. Decriminalizing prostitution for minors will leave them at the mercy of pimps and johns and without the judicial system to advocate for their treatment and rehabilitation.”

The prostitution policy in Sweden shows that, with special training, law enforcement can be effective in targeting the pimps and buyers of sex, while working to protect prostitutes and trafficking victims. In fact, in the current fiscal environment, police are the only advocates for victim shelter programs with sufficient credibility to maintain public support for such efforts. Because of this, tying victim support to law enforcement imperatives will increase support for rehabilitation programs and shelters, and will do so by orders of magnitude. While many people understandably question whether it is appropriate to criminalize prostitutes as a means of curbing the sex

the need for additional funding, special training for law enforcement and judges, and support for victims).


See Janice Shaw Crouse, The Dangerous Linkage of Naïveté and Good Intentions, Concerned Women for America (Feb. 12, 2010), http://www.cwfa.org/content.asp?id=18444 (stating that decriminalizing prostitution limits law enforcement’s ability to detain trafficking victims, which would separate the victims from their pimps; otherwise the victims would remain vulnerable to pimps who benefit from their exploitation).


Id.
trafficking crisis, it is necessary. As police departments have made clear – along with many survivors who credit their rescue to their arrest – police jurisdiction over victims through criminal prostitution laws is the best and, in most cases, the only effective means of helping victims to self-identify, providing them with assistance, and helping them to escape the physical and psychological clutches of their traffickers. In sum, effective domestic control is the only possible way to successfully combat sex trafficking on a global scale. While specific laws are necessary steps forward in the anti-trafficking movement, countries and states must also work together to stop the criminals involved in trafficking. This calls for harmonized national legislation and cooperation between state agencies at the local, national, and international levels for law enforcement to be effective and to adequately protect trafficking victims.
AN INVITATION TO MEDDLE: THE INTERNATIONAL COMMUNITY’S INTERVENTION IN LIBYA AND THE DOCTRINE OF INTERVENTION BY INVITATION

SEAN LYNCH

I. INTRODUCTION

The Great Socialist People’s Libyan Arab Jamahiriya (“Libya”) is a nation that has been the focus of the international community since well before its creation.1 Once an Italian colony, then a monarchy, Libya has been ruled by (its now former) leader, Muammar Gaddafi (“Gaddafi”) since 1969.2 Gaddafi was often the bane of the international community with ties to terrorist acts and wars; as well as causing domestic unrest with his brutal constrictions on freedom of expression that was a hallmark of his despotism.3 This domestic unrest came to a boiling point when Libya, under Gaddafi’s reign, fell prey to the Jasmine Revolution that was rapidly spreading throughout the Arab world.4 Gaddafi responded to the domestic unrest with a brutal campaign against the civilian protesters involving bombing campaigns from the Libyan Air Force and armed clashes with Gaddafi’s security forces.5 This campaign by Gaddafi led to the oppositional National Transitional Council clamoring for international intervention and left the international community attempting to navigate a tightrope between established international doctrine against intervention and the prevention of civilian casualties.6

1 See generally Libya Country Profile, BBC NEWS (last updated May 21, 2011, 3:37 PM), http://news.bbc.co.uk/2/hi/africa/country_profiles/8192918.stm (describing the international community’s colonial and history of occupation of Libya).
4 See Libya Crisis: Rebellion or Civil War?, BBC NEWS (Mar. 10, 2011), http://www.bbc.co.uk/news/world-africa-12690713 (describing Libya’s experiencing the effects similar to those of the protests in Egypt and Tunisia).
This Article is not intended to condemn the armed intervention by the international community on behalf of the Libyan people, but rather this Article argues that the international community failed to timely recognize the National Transitional Council as Libya’s legitimate government to justify use intervention by invitation.\(^7\) This Article provides a brief history of Libya and the Jasmine Revolution, and then examines how the Jasmine Revolution took hold of Libya in 2011.\(^8\) Next, this Article discusses the United Nation and international community’s response to the situation in Libya.\(^9\) This Article then discusses how the United Nations deviated from its established commitment against armed intervention.\(^10\) Next, the international consensus against armed intervention is discussed and the Article argues that this consensus should have been followed in Libya.\(^11\) Finally, the Article concludes with a discussion about the principle of intervention by invitation and how the international community’s response to the situation in Libya was not justifiable under this principle.\(^12\)

II. BACKGROUND

A. LIBYA: A BRIEF HISTORY

The Great Socialist People’s Libyan Arab Jamahiriya ("Libya") is a nation that has been subject to foreign influence since its inception.\(^13\) Historically, Vandals, Arabs, Turks, and Byzantines targeted Libya for acquisition.\(^14\) The Ottoman Turks originally held the area that is now Libya until it fell to Italy in 1911.\(^15\) In 1943, Allied forces gained control of Libya following Italy’s defeat in World War II.\(^16\) Italy then ceded control of Libya in a peace treaty in 1947.\(^17\)

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\(^7\) See infra notes 122-124 and accompanying text.

\(^8\) See infra notes 13-55 and accompanying text.

\(^9\) See infra notes 56-70 and accompanying text.

\(^10\) See infra notes 71-79 and accompanying text.

\(^11\) See infra notes 80-92 and accompanying text.

\(^12\) See infra notes 93-118 and accompanying text.

\(^13\) See generally Libya Country Profile, BBC News (last updated May 21, 2011, 3:37 PM), http://news.bbc.co.uk/2/hi/africa/country_profiles/819291.stm (describing Libya’s history as a territory being controlled by other nations).

\(^14\) Id.


\(^17\) Treaty of Peace with Italy, 1947 art. 23(4), Feb. 10, 1947, (renouncing “all right an title to the Italian territorial possession in Africa, i.e. Libya, Eritrea, and Italian Somaliland”).
Libya gained independence in 1951.\textsuperscript{18} In 1969, Colonel Muammar Gaddafí (“Gaddafí”) overthrew the monarch, King Idris, in a bloodless revolution.\textsuperscript{19}

Gaddafí’s movement was based on ideas that he encapsulated in his Green Book, which aimed to create an alternative to capitalism and communism while adhering to a unique slant on Islam.\textsuperscript{20} Gaddafí called this system the “Third Universal Theory.”\textsuperscript{21} He labeled this form of government a \textit{jamahiriya}, which, when translated, means a “state of the masses.”\textsuperscript{22} In theory, various committees controlled the political power, although, in reality, Gaddafí ruled unopposed.\textsuperscript{23} Gaddafí was inspired in his uprising by Gamal Abdul Nasser, an Egyptian nationalist figure of the 1950s and 1960s.\textsuperscript{24} Gaddafí’s forty-one year reign was marked by a series of unpredictable ups and downs that, at times, took the spotlight on the world stage.\textsuperscript{25} Under his leadership, Libya waged wars, supported acts of terrorism, and provided weapons to terrorist organizations.\textsuperscript{26} This period of defiant existence in the international community came to an end when Gaddafí, in response to the war on terror, announced that Libya would abandon its attempts to create weapons of mass destruction.\textsuperscript{27} He then opened Libya up to international tourism and trade.\textsuperscript{28} Gaddafí’s reign, in spite of his attempt to reconcile with the international community, was not immune from the political pressures in the region.\textsuperscript{29}

\textbf{B. \hspace{1em} ARMED UPRISING IN THE ARAB WORLD}

A twenty-six year-old Tunisian man’s self-immolation on December 17, 2010, sparked a movement that rocked the Arab
world. Mohamed Bouazizi, a street vendor, lit himself on fire to protest the seizing of his produce laden wheelbarrow and the physical mistreatment he received at the hands of public officials. Bouazizi’s death caused protests in his hometown, which rapidly spread to surrounding areas and, eventually, the capital city of Tunis. The Tunisian government responded with force by arresting demonstrators, having its security forces faceoff with protestors, and cutting the nation’s Internet access. A mere twenty-eight days following Bouazizi’s self-immolation the Tunisian government fell and President Zine al-Abidine Ben Ali fled to Saudi Arabia in exile. Gaddafi stated that the events in Tunisia “pained him” and commented on Libyan TV that “Tunisia now lives in fear. Families could be raided and slaughtered in their bedrooms and the citizens in the street killed as if it was the Bolshevik or the American [R]evolution.”

The spirit of this so-called Jasmine Revolution rapidly spread to other nations in the Arab world, being fueled by widespread discontent about unemployment, increasing costs of living, corruption, and autocratic leaders. Egypt fell in only eighteen days, with Hosni Mubarak being forced to step down and leave the country. Similar to his feelings regarding Tunisia, Gaddafi was not silent on the events ongoing in Egypt, stating, “Hosni Mubarak should be honoured – it would have even been better if he had remained president of Egypt.” Gaddafi, in response to the movements spreading throughout the region, stated, “Tunisia and Egypt, what did you accomplish with these revolutions? Substitution of one government regime for another?”

31 Id.
32 Id.
33 Id.
39 Id.
C. ARMED UPRISING IN LIBYA

Libya itself soon became the next nation in the Arab world to feel the effects of populist uprisings. On February 15, riots broke out in the city of Benghazi following the arrest of a human rights activist, which then turned into a conflict against the government with the protestors ultimately calling for Gaddafi’s resignation. This unrest preceded a planned demonstration against Libya’s regime by one day; the planned demonstration was entitled a “Day of Anger” and organized through social networking sites on the Internet. The February 15 protests continued through the night with nearly 2,000 participants throwing petrol bombs and stones and setting cars on fire. Government forces responded with water cannons and rubber bullets in an attempt to disperse the crowd. As the events were unfolding in Benghazi, police stations were set on fire in the cities of Zentan and Beyida.

What began as protests in Benghazi, Zentan, and Beyida soon developed into a battle between rebels and government forces for control of the country. The opposition forces organized from their base in Benghazi and soon began to capture western towns. Government security forces then began a retaliatory campaign, which involved the bombing of rebel strongholds and ground assaults. By March 6, 2011, a struggle for control was raging in the cities of Brega, Ras Lanuf, Bin Jawad, Zawiya, and Misrata, while the rebels had successfully taken hold of Ras Lanuf. The ongoing clashes caused Gaddafi to pledge, “We will fight until the last man and woman. We will defend Libya from the north to the south.”

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40 See Libya Crisis: Rebellion or Civil War?, BBC NEWS (Mar. 10, 2011), http://www.bbc.co.uk/news/world-africa-12690713 (discussing how Libya was feeling the effects similar to that of Egypt and Tunisia).
42 Id.
44 Id.
45 Id.
46 Id.
48 Id.
49 Id.
50 Id.
51 Qaddafi Vows to Fight to ‘Last Man and Woman’ as Loyal Forces Battle Rebels, FOXNEWS.COM (Mar. 2, 2011),
The battle between the anti-government forces and the government intensified rapidly with the rebels quickly seizing control of Eastern Libya.\(^{52}\) The battle escalated with Gaddafi’s forces executing air strikes against the anti-government forces to allegedly destroy facilities that stored the anti-government force’s weapon caches.\(^{53}\) However, some Libyan Air Force pilots defected during these missions, flying to Malta stating that they were ordered to bomb the civilian protesters (which they were unwilling to do).\(^{54}\)

As of March 2, 2011, the exact death toll was unknown, with U.N. Secretary General Ban Ki-moon citing reports that around 1,000 people had died in the conflicts in Libya since February 15, 2011, and one Libyan human rights organization claiming that possibly 6,000 people had been killed.\(^{55}\)

D. THE UNITED NATION’S RESPONSE TO INTERNATIONAL CONFLICT

The Charter of the United Nations ("UN Charter") provides, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\(^{56}\) The UN Charter provides for the use of force under Article 42.\(^{57}\) For the use of force to be legitimately authorized, the Security Council must determine that other means, which would not involve the use of force, have been exhausted with no success of stemming the disturbance to international peace and security.\(^{58}\)


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\(^{52}\) Id.

\(^{53}\) Id.


\(^{56}\) U.N. Charter art. 2, para. 4.

\(^{57}\) U.N. Charter art. 42, para. 1.

\(^{58}\) See id. (referring to the methods described in Article 41 of the U.N. Charter).

One of the most notable provisions of Resolution 1970 was the prohibition of arms being sent to Libya.61

On March 17, 2011, the United Nations Security Council adopted Resolution 1973 (2011) ("Resolution 1973").62 Resolution 1973 begins by demanding an, “Immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.”63 It also called upon Member States to perform all necessary means to protect civilians and areas populated by civilians, notwithstanding what was provided in paragraph nine of Resolution 1970.64 Resolution 1973 also established a no-fly zone over Libya and prohibited all Libyan aircraft from taking off, landing, or otherwise occupying Libyan airspace.65 This no-fly zone also applied to any aircraft that might be carrying any sort of weapons described in paragraphs nine and ten of Resolution 1970.66

E. THE INTERNATIONAL COMMUNITY’S RESPONSE TO THE ARMED UPRISING IN LIBYA

There were a variety of responses in the international community to the events in Libya.67 As the conflicts between Gaddafi’s security forces and the civilian, anti-government forces escalated, concerned parties within Libya and throughout the international community debated about the international community’s role in this conflict.68 A council of anti-government forces in Libya discussed whether to invite the United Nations and members of the international community to intervene against

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68 See Qaddafi Vows to Fight to ‘Last Man and Woman’ as Loyal Forces Battle Rebels, FOXNEWS.COM (Mar. 2, 2011), http://www.foxnews.com/world/2011/03/02/diplomats-nato-eu-mulling-libyans-fly-zone/ (describing the internal debates of the Libyan rebels and the international community’s create plans to enforce a no-fly zone).
Gaddafi’s forces. The council hesitated in seeking UN assistance because, as United States’ Secretary of State Hillary Clinton told the U.S. House of Representatives’ Foreign Affairs Committee, the anti-government forces wanted to be viewed as, “Doing this [overthrowing Gaddafi] by themselves on behalf of the Libyan people – that there not be outside intervention by an external force.”

### III. ARGUMENT

#### A. IT WAS NOT ACCEPTABLE FOR THE UNITED NATIONS AND INTERNATIONAL COMMUNITY TO USE ARMED FORCE IN ADDRESSING THE CONFLICT IN LIBYA

The Charter of the United Nations (“UN Charter”) prohibits the use of force; furthermore, there is a long-standing tradition in the international community against armed intervention in the internal affairs of a state. The situation in Libya was one that put the international community in a precarious position of having to balance the need to protect civilian lives from Gaddafi’s forces while adhering to the UN Charter and respecting a nation’s sovereignty. The responsibility to protect civilians is a state’s responsibilities as a sovereign nation. However, the state charged with protecting the civilian population is often the party putting the civilian lives at risk. When this occurs, it becomes increasingly recognized that the international community must intervene. With Libya’s conflict, the UN intervened by adopting Security Council Resolutions 1970 and 1973 under Chapter VII of the UN Charter. Resolution 1970 demanded a stop to the violence and Resolution 1973 demanded the immediate cessation of violence and attacks that were being perpetrated by Libyan authorities against civilians. Before the international community could use force to protect Libya’s civilian

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69 Id.
70 Id.
71 U.N. Charter art. 2, ¶ 4; see also Curtis Doebbler, The Use of Force Against Libya: Another Illegal Use of Force, JURIST: LEGAL NEWS & RESEARCH (Mar. 20, 2011), http://jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php (stating that one of the most fundamental tenets of international law is that states should refrain from using forcing against one another).
74 Id.
75 Id.
population, it had to establish that peaceful measures, such as these Resolutions, were ineffective. Yet it was unclear whether Security Council Resolutions 1970 and 1973 were properly determined to be ineffective prior to the international community using force to protect Libya’s civilian populations.

B. There is an International Consensus Against Intervention in the Political Affairs of Other Nations and the Consensus Should Have Been Followed in the Libyan Conflict

The purpose of a coup d’état is to remove the current governing regime in a brief period of time. Citizens of a country possess the right to change their system of government. A rule of law cannot deprive citizens of their right to change the government, whether by a ballot or bullet or by a majority or minority of the population. The international community generally tries to refrain from intervening during a coup d’état. The rationale is that intervening in the domestic affairs of a nation violates a state’s political sovereignty.

78 See U.N. Charter art. 42, ¶ 1 (condemning the use of force unless uses of means without the use of force have been exhausted).


81 Id. at 210.

82 Id. (quoting Gerhard Von Glahn, Law Among Nations: An Introduction to Public International Law 75 (7th ed. 1996).


The UN reiterated its preference against intervention into another country’s affairs in Resolution 1970.\textsuperscript{85} Specifically, Resolution 1970 called for an arms embargo of, “arms and related materiel [sic] of all types, including weapons, and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned.....”\textsuperscript{86} The Resolution went on to call for the cessation of any training in the use of such equipment, the providing of mercenaries, and the freezing of any assets within a Member State of individuals listed in the Resolution.\textsuperscript{87}

The UN adopted Resolution 1970 on February 26, 2011.\textsuperscript{88} The UN then adopted Resolution 1973 on March 17, 2011, a mere twenty days after Resolution 1970.\textsuperscript{89} Twenty days was not nearly enough time to determine if the methods adopted and proposed in Resolution 1970 were having a noticeable effect in hampering the violence that was ongoing in Libya.\textsuperscript{90} Consequently, the international community violated Libya’s sovereignty by using armed intervention before alternative methods were exhausted or even determined effective.\textsuperscript{91}

D. LEGITIMACY OF GOVERNMENT AND THE INTERVENTION BY INVITATION

An available loophole for the international community to take in order to intervene during a coup d’état, like what was being experienced in Libya, is through the doctrine of intervention by invitation.\textsuperscript{92} This intervention would then essentially be a product of


\textsuperscript{87} Id. at ¶ 9, 17.


\textsuperscript{91} See id. (stating, “Neither, however, meets the requirements of article 42 that a determination has been made that ‘measures not involving the use of force’ have failed.” Id).

\textsuperscript{92} See Christopher J. Le Mon, Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 2004), http://www.asil.org/insigh135.cfm (describing the availability of the Doctrine
the inviting nation’s sovereignty and not a violation of its sovereign rights.\textsuperscript{93} For the doctrine of intervention by invitation to be employed in Libya, a legitimate government needed to invite military assistance of the international community.\textsuperscript{94} The issue was that there were questions as to which party was the legitimate government in Libya: Gaddafi or the rebel government (aka Transitional National Council).\textsuperscript{95}

The legitimacy of a government is rarely under scrutiny.\textsuperscript{96} The need to determine the legitimacy of a government only arises when there is a need to see if the authority in question possesses the power to speak and act on behalf of the state.\textsuperscript{97} This need is realized in very specific and limited situations, such as whether:

The authority that can speak and act on behalf of the state in the international legal order must be determined ahead of any recognition of government (a), when accreditation within international organizations is sought by two warring governments (b), and, finally, when a state invites another state to carry out a military operation on its own territory (c).\textsuperscript{98}

The question of the authority’s legitimacy most commonly arises when there is a change in government that took place outside of the typical procedure provided for by the state’s constitution.\textsuperscript{99}

There is no objective method for determining the legitimacy of a government.\textsuperscript{100} As a result, each state enjoys comfortable leeway in deciding to recognize the legitimacy of a foreign power according to factors that it subjectively determines.\textsuperscript{101} This discretion led to differing levels of recognition of the Transitional National Council,

\begin{itemize}
\item \textsuperscript{93} See Id. (stating that the controlling government that has demonstrated that it is wielding the nation's sovereign rights, may it legally invite military aid from other nations)
\item \textsuperscript{94} Christopher J. Le Mon, \textit{Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces}, \textit{American Society of International Law} (June 2004), http://www.asil.org/insigh135.cfm.
\item \textsuperscript{95} See generally Ariel Zirulnick, \textit{Libya's Rebels Come to Washington}, \textit{The Christian Science Monitor} (May 24, 2011) (describing the varied responses by members of the international community as to the legitimacy of the government).
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{101} Id.
\end{itemize}
Libya's rebel government, by the international community. In May 2011, the United States recognized the Transitional National Council as one of Libya's representatives, yet not the sole representative: however, the Transitional National Council was the "de facto sole representative" since the United States asked the Libyan embassy to cease its operations in Washington, D.C. Similarly, the only representatives from the United States in Libya at that time were located in the rebel capital of Benghazi, not in Tripoli.

More receptive of the rebel cause in Libya, France was the first nation to recognize the Transitional National Council as the sole representative of the Libyan people. Likewise, Italy recognized the Transitional National Council in April 2011, which caused major economic repercussions in Italy since it was a major trade partner with Libya and received a quarter of its oil supply from Libya. Qatar was the second nation, and the first Arab nation, to recognize Libya's Transitional National Council. Finally, the United Nations Security Council awarded Libya's seat in the General Assembly to the Transitional National Council in a 114 to 17 vote.

After the Transitional National Council was recognized as Libya's legitimate governing regime it could ask for the international community to intervene within Libya's borders against Gaddafi's forces. The Transitional National Council would, in effect, be consenting to the international community committing an action that would, absent such consent, violate the U.N. Charter's prohibition on the use of force. Only where the inviting government is recognized as embodying the sovereign rights of the state will an invitation therefrom provide a legal basis, in and of itself, for military action according to the terms of the invitation.

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103 Id.
104 Id.
105 Id. France also served as the main driving force behind the UN's and NATO's response to the Transitional Council's requests for international assistance. Id.
106 Id. (noting that Qatar also pledged assistance to NATO in its operations in Libya, despite Qatar not being a NATO member).
107 Id.
109 See Christopher J. Le Mon, Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 2004), HTTP://WWW.ASIL.ORG/INSIGHT135.CFM (stating that "Since the adoption of the [UN] Charter, however, in situations involving civil wars where governmental legitimacy is most challenged—the government representing the state at the United Nations has been deemed to possess sufficient external legitimacy to legally invite foreign military intervention." Id.).
110 Id.
Since the adoption of the UN Charter, the government that represents a state at the United Nations has been determined to be the government with the legitimacy to invite foreign governments and the international community to intervene within its borders.\textsuperscript{111}

Initially, the Libyan rebels wanted to remove the Gaddafi regime without international support in order to be viewed as doing this for the Libyan people themselves.\textsuperscript{112} However, this plan quickly changed in March of 2011 when rebel leaders realized that mere man power would not be sufficient to overthrow the Gaddafi regime and the superior firepower, equipment, and training that the Gaddafi-loyalists possessed.\textsuperscript{113} As a senior member of Misrata’s governing council stated:

We [previously] did not accept any foreign soldiers in our country, but now, as we face these crimes of Kadhafi [Gaddafi], we are asking on the basis of humanitarian and Islamic principles for someone to come and stop the killing. Before we were asking for no foreign interference, but that was before Kadhafi [Gaddafi] used Grad rockets and planes. Now it’s a life or death situation.\textsuperscript{114}

The rebel fighters requested arms such as anti-tank weapons and portable air defenses to fend off Gaddafi’s air attacks.\textsuperscript{115} The recognition of the Transitional National Council as the legitimate government of Libya allowed the UN and international community to take invited, armed action on behalf of the Transitional National

\textsuperscript{111} See id. (discussing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at ¶ 246 (Jun. 27)) “It is difficult see what would remain of the principle of non-intervention if in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.” Id. at n.7 (citing Military and Paramilitary Activities in and Against Nicaragua).


\textsuperscript{113} See Leila Fadel and Liz Sly, Libya Rebels Want Military Help to Topple Khadafy, WASHINGTON POST (Mar. 2, 2011), http://articles.sfgate.com/2011-03-02/news/28645100_1_misurata-rebel-leaders-moammar-khadafy (describing that the Libyan rebels realized that they needed more than people power alone to successfully overthrow the Qaddafi government).

\textsuperscript{114} Agence France-Presse, Libya Rebels Plead for Foreign Forces or ‘We will die,’ THE RAW STORY (Apr. 19, 2011), http://www.rawstory.com/rs/2011/04/19/libya-rebels-plead-for-foreign-forces-or-we-will-die/.

Council within the Libyan borders without violating Libya’s sovereignty.  

IV. CONCLUSION

This Article provided a brief history of Libya and the Gaddafi reign. It then introduced the armed uprising in the Arab world, such as the conflicts in Egypt, Tunisia, and Libya. The Article then discussed the UN and international community’s perspective in responding to conflicts within countries. The Article then argued that the UN and members of the international community did not follow this consensus of intervention when dealing with the conflict in Libya. The Article acknowledged the added complexity in the Libya conflict since there was no clearly recognized legitimate government at the time intervention was contemplated. Without a recognized legitimate government, it became questionable as to when or whether the UN or members of the international community could legally intervene.

The situation in Libya presented the international community with a situation in which it had to attempt to navigate a tightrope of established precedent of non-intervention in the internal domestic matters of another nation, while trying to mitigate the potential loss of civilian lives. The situation in Libya unfolded rapidly and the need for action was interpreted as being urgent. However, the international community struggled to find justification for intervention that would not violate the UN Charter. Intervention by invitation would have been an available avenue for the international community if the Transitional National Council would have been recognized as Libya’s legitimate government prior to intervention occurring. When the Transitional National Council was awarded Libya’s UN seat, it was a recognition of the Transitional National Council’s legitimacy as Libya’s governing regime and allowed for the UN to respond to the Council’s call for intervention in Libya. However, this recognition came after the United Nations had called for action in Resolutions 1970 and 1973. This response was too late for the doctrine of intervention by invitation to be used as justification for the international community’s intervention in Libya.

116 See Christopher J. Le Mon, Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 2004), http://www.asil.org/insigh135.cfm (asserting that, since the UN Charter’s adoption, the government that controls the UN seat for that nation was exerting enough national sovereignty to legitimately invite other nations to intervene).

117 See supra notes 13-29 and accompanying text.

118 See supra notes 30-55 and accompanying text.

119 See supra notes 56-70 and accompanying text.

120 See supra notes 71-91 and accompanying text.

121 See supra notes 92-116 and accompanying text.

122 See supra notes 92-116 and accompanying text.
CHALLENGING THE NORMS: RE-EVALUATING SITUATIONS FACED BY FOREIGN DOMESTIC HELPERS IN ASIA

SEAN D. SCHAERRER

I. INTRODUCTION

In a city of over seven million people, approximately nine percent of all households in Hong Kong, China employ foreign domestic helpers (“FDHs”). In homes with young children, approximately one-third employ at least one foreign FDH. Such figures are astounding yet, not unique to Hong Kong. Other countries in both Southeast Asia and the Middle East also employ thousands of international labor migrants each year, most of whom are Filipino and Indonesian women. For the majority of these female FDHs, overseas employment is seen as a necessary sacrifice to support their families in countries where jobs are inadequate. However, this sacrifice can also be filled with suffering and turmoil.

This Article will first address the struggles faced by many Filipino and Indonesian FDHs who come to Hong Kong for employment opportunities. It will then discuss the complicated economic and social relationship that exists between FDHs, their

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3 See SHIRLENA HUANG, BRENT S. A. YEOH & MARJA M. ASIS, FILIPINO DOMESTIC WORKERS IN SINGAPORE: IMPACTS ON FAMILY WELL-BEING AND GENDER RELATIONS 1 (August 14, 2003). [hereinafter 2003 ESCAP Report], available at http://www.unescap.org/esid/psis/meetings/migrationaug2003/Phil.pdf. (noting that approximately 40 million migrants are legal labor migrants and that there has been an increase in labor migration in Asia since the 1980s).

4 Id. at 2. (stating 70 percent of all Filipino international migrant workers in 2002 were female).

5 See Id. at 3 (noting that remittances have become a key component of origin economies).

6 Id.

7 See infra notes 9-37 and accompanying text.
families, the receiving and sending countries. Finally, this Article will point to the current employment system in Hong Kong and how loopholes in the legal system allow for employers and private recruitment agencies to exploit the system. This Article argues for the elimination of private recruitment agencies, increased governmental support, and a facilitation to take place between the different stakeholders, which will result in achieving a mutually beneficial solution to the current, complex problem.

II. BACKGROUND

Since 1974, Hong Kong has opened its doors to thousands of FDHs from different Southeast Asian countries. As the number of Western expatriates has grown with Hong Kong’s flourishing global economy, fewer local women have been willing to take low-paying and low-status employment. Today, Hong Kong’s FDHs are predominantly female and non-Chinese. Recent immigration records showed that almost two-thirds of Hong Kong’s non-Chinese population was comprised of FDHs. While the majority of these domestic helpers have historically been Filipino, Indonesians now rival Filipinos because Indonesian women typically have limited education and work for lower wages.

Hong Kong is not the only place taking in large numbers of FDHs. Countries like Singapore, Malaysia, Saudi Arabia, and other Middle Eastern countries have also become popular destinations for Southeast Asian FDHs in recent years. However, Hong Kong continues to be a popular, neutral destination for Filipino and Indonesian FDHs because of its labor laws and established migration infrastructure.

In Hong Kong, FDHs are entitled to the same protections and benefits as other workers under the Employment Ordinance and the
standard employment contract. The standard employment contract provides a “Schedule of Accommodations and Domestic Duties” for FDHs, which specifies expectations for both employer and employee. For instance, the minimum allowable wage to be paid to a FDH is HK$3,740 per month. Every FDH is also entitled to one rest day of at least twenty-four continuous hours in every seven days. However, if there is an unforeseen emergency an employer may have their helper work on a rest day. It is also common for some FDHs not to receive any rest days early in their employment. By not having rest days, FDHs have less opportunity to meet other FDHs to compare salaries and work conditions. Furthermore, there is less opportunity for FDHs to seek aid from counseling and advice centers.

Since FDHs from the Philippines and Indonesia come from poor economies, they are more likely to work at less than minimum wage. This in turn makes it more common for FDHs to be taken advantage of by their employers. Many times FDHs are not informed of Hong Kong’s minimum wage nor is it defined in their contracts. It is also common for employers to withhold wages; therefore, if a domestic helper does discover she is being mistreated, there is a necessity to continue working because the helper likely does not have funds to leave. Under the Employment Ordinance and the standard employment contract, FDHs are arguably treated better than other Hong Kong workers at the same wage level. Yet far too many FDHs do not have the safe employment experiences that Hong Kong’s laws intend to provide.

Since FDHs do not work with fellow co-workers, they are susceptible to abuse behind the closed doors of their employers’ homes. FDHs cannot escape from their employers because Hong

20 Id. at 6.
21 Id. at 8. (HK$3,740 is approximately US$480).
22 Id. at 11.
23 Id. at 11.
25 Id.
26 Id.
27 Id. at 355.
28 Id. at 356 (noting how some Indonesian FDHs sign contracts without an explanation of what it says).
29 Id. at 355.
30 Id. at 356.
31 Id.
32 Id.
33 International Labour Organization & Asian Development Bank, Women and Labour Markets in Asia: Rebalancing for Gender Equality 15
Kong’s standard employment contract does not permit FDHs to live independently because employers are to provide for them.\textsuperscript{34} Given that FDHs are not seen, legislatures do not always specifically address FDHs’ problems.\textsuperscript{35} Consequently, many female FDHs are exposed to discrimination and abuse.\textsuperscript{36} This is because many of the young female domestic helpers are vulnerable, uneducated, and desperate to help their struggling families at home.\textsuperscript{37}

In a 2009 International Labour Organization report for Asia and the Pacific, a survey of Filipino and Indonesian FDHs working in Hong Kong showed the kinds of abuse suffered.\textsuperscript{38} Of those surveyed, forty-nine Indonesians reported verbal abuse compared to just three Filipinos and sixteen Indonesians reported physical abuse compared to two Filipinos.\textsuperscript{39} In addition to verbal and physical abuse, both Filipino and Indonesian FDHs reported abuse in the forms of sexual harassment and insufficient food and sleep.\textsuperscript{40}

Surveys conducted for age and education show that Filipinos are typically older and more highly educated than their Indonesian counterparts.\textsuperscript{41} While Filipinos had a greater age span, over two-thirds of Indonesian FDHs were under the age of thirty.\textsuperscript{42} Furthermore, half of the Filipinos had a college degree or higher while none of the Indonesians surveyed had completed any higher education.\textsuperscript{43} According to that International Labour Organization report, Filipinos had a greater awareness of applicable Hong Kong laws.\textsuperscript{44}

The Philippine government, unlike Indonesia’s government, has a highly regulated labor migration program.\textsuperscript{45} There are national organizations that help regulate overseas employment and employee

\textsuperscript{34} \textit{Practical Guide For Employment of Foreign Domestic Helpers}, supra note 20, at 5-6.

\textsuperscript{35} \textit{2011 ILO Report}, supra note 34, at 15.


\textsuperscript{37} \textit{2011 ILO Report}, supra note 34, at 17.

\textsuperscript{38} \textit{See 2009 ILO Report}, supra note 1, at 28 (listing types of abuses experienced by FDHs at training centers reflecting common experiences that could occur when they work in Hong Kong).

\textsuperscript{39} \textit{Id.} (The exact reason why Filipino and Indonesian FDHs are treated differently by their employers is uncertain).

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 23-24.

\textsuperscript{42} \textit{Id.} at 24.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 27.

\textsuperscript{45} \textit{2009 ILO Report}, supra note 1, at 14, 15.
welfare.\textsuperscript{46} Through those organizations, Filipinos in Hong Kong receive counseling, a twenty-four hour shelter, and assistance in settling disputes when employer relations deteriorate.\textsuperscript{47} In comparison, the Indonesian government has been slow to enact government programs and those that have been enacted are not like those in the Philippines.\textsuperscript{48} Perhaps the biggest reason for the disparities between Filipino and Indonesian FDHs are the private recruiting agencies of Indonesia that do not provide the array of services that the Philippines government is beginning to offer.\textsuperscript{49}

The rising need for FDHs in Southeast Asia correlates with high employment growth for Asian women, specifically women as compared to men.\textsuperscript{50} Asian markets are leading the world in economic recovery.\textsuperscript{51} However, overall economic growth does not correlate with labor market recovery, which means continued high unemployment rates and financial uncertainty.\textsuperscript{52} A joint report by the International Labour Organization and Asian Development Bank suggests the disparities between labor growth for women in Asia and the continuing low unemployment rate suggests a phenomenon that is unique to the rest of the world.\textsuperscript{53} The report suggests the reason for such disparity is because Asia is successful in creating labor opportunities for women in export-oriented industries.\textsuperscript{54} In a 2009 labor force participation analysis, less than a third of workers, both male and female, had either regular wage or salaried employment.\textsuperscript{55} Of the South-East Asian women employed, nearly forty-two percent work in the service or non-agricultural informal employment sector, which includes work as FDHs.\textsuperscript{56} In looking at Indonesia and the Philippines, about seventy percent of Indonesians and nearly fifty-eight percent of Filipinos worked in this type of employment.\textsuperscript{57}

The burden on women has increased as FDHs look for alternatives to poverty.\textsuperscript{58} For Filipinos, a FDH abroad can earn anywhere from US$407 to US$1,063 per month compared to just

\begin{itemize}
\item \textsuperscript{46} Id. at 14.
\item \textsuperscript{47} Id. at 15.
\item \textsuperscript{48} See id. at 15, 16 (stating how Indonesia is concerned about the FDHs’ welfare, but the government struggles to enforce employment standards because of external issues like private recruitment agencies).
\item \textsuperscript{49} See id. at 14–5, 16 (noting how the Philippines’ government heavily regulates FDH migration through three agencies that provide assistance in job verification, contract processing, training, and other welfare assistance programs in foreign countries).
\item \textsuperscript{50} See 2011 ILO Report, supra note 34, at 1 (stating that domestic work is an important source of informal employment that continues to grow).
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 5.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id. at 6.
\item \textsuperscript{56} Id. at 8, 9.
\item \textsuperscript{57} Id. at 11.
\item \textsuperscript{58} Id. at 26.
\end{itemize}
US$191 to US$320 per month in the Philippines.\textsuperscript{59} Furthermore, the home countries are reaping the economic benefits of remittances that flow into the countries from FDHs.\textsuperscript{60} According to the Philippines Department of Labor and Employment, the Philippines is one of the largest remittance recipient countries in the world next to China and Mexico.\textsuperscript{61} According to the 2006 records of the Central Bank of the Philippines, which is the nation’s central monetary authority, over US$13 billion was remitted and that number was expected to increase annually.\textsuperscript{62} Overall, ten percent of the Philippines Gross National Product in the 2000s came from remittance and local currency.\textsuperscript{63}

A Philippines study concluded that a deflation would have occurred in the country’s economy by 0.72 percentage point annually if not for remittances.\textsuperscript{64} These numbers alone indicate the significant contribution of overseas employment, which includes FDHs, has on the Philippines economy when they send money home to their families who then spend it on the local economy.\textsuperscript{65} In 2000, the region of the Philippines with the lowest poverty rate also had the greatest assistance from family members who worked abroad.\textsuperscript{66} The opposite could be said for regions with the highest poverty rate, as they in turn had the lowest amount of families relying on foreign workers.\textsuperscript{67}

In recent years, relationships have been created between foreign banks and remittance agencies in which Filipino FDHs can transfer money home for reasonable fees in safe and formal manners.\textsuperscript{68} In Hong Kong for instance, FDHs enjoy very low charge rates for money transfers to the Philippines.\textsuperscript{69} In 2004, Hong Kong had the lowest charge rates at only US$2.60 while Japan had the highest at US$18.00.\textsuperscript{70} For FDHs who only have one day off a week, convenience and ease are very important and that is why in Hong Kong, the Philippine National Bank and Citibank partnered together with convenience stores to make remittances quicker and more convenient.\textsuperscript{71}

As the economic benefits of being a FDH entice more and more women, there is a growing concern of its social costs.\textsuperscript{72} Especially since women play such an important role in the traditional

\textsuperscript{59} The Philippine Experience, \textit{supra} note 37, at 6.

\textsuperscript{60} \textit{Id.} at 5.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{See id.} (discussing the forecast from 2006 to 2007).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 6.

\textsuperscript{65} \textit{Id.} at 5.

\textsuperscript{66} \textit{Id.} at 7.

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{See generally id.} at 7-8 (describing newer methods to ease the process of sending remittances back to the Philippines).

\textsuperscript{69} \textit{Id.} at 8.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} 2003 ESCAP Report, \textit{supra} note 3, at 3.
Asian family. Today there is an increasing debate on what is considered good for the nation versus what is beneficial for the family. Even some of the middle and upper classes of Indonesia and the Philippines are embarrassed because they feel other countries look down at them as nations of housemaids. The dilemma may be best summarized by the following observation made by Patricia Sto. Thomas, in 2003, the Secretary of the Department of Labour and Employment for the Philippines:

I guess the price paid for overseas employment is sometimes high – it separates families, it breaks them up sometimes and people can get maltreated. In fact, some have died already ... we cannot close our eyes to that but we cannot close our eyes either to the fact that if one million people come back to this country and could not find jobs, we'd all be in trouble.

Mothers are considered to be vital to the family unit. Consequently, the migration of FDHs causes psychological difficulties for many families left behind, especially the children in these families. As mothers become the primary breadwinners, there is often a reversal of gender roles as males attempt to care for the children at home. The emotional toll created by the mother's absence, and the associated by-products of this absence, places great strain on the family. This absence can cause struggles in the marriage and potentially result in divorce.

Families of FDHs, especially children, are largely unaware of the trials and hardships faced by their mothers. Most FDHs do not want their families to worry about their well being; therefore, children grow-up believing their mothers are living a life of luxury as they see pictures of them in lavish homes and expensive cities. One Filipino migrant worker in Hong Kong said she did not tell her children about her problems because "they will not be able to help me anyway. Besides I do not want them to worry about my situation here." When a Filipino child was asked why she did not tell her

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73 Id. at 6.
74 Id. at 4.
75 Id.
76 Id. at 4-5. (noting that Thomas was Head of the Philippines Overseas Employment Administration from 1982-1987).
77 See id. at 11 (discussing how Filipino mothers are regarded as the ilaw ng tahana, meaning the light of the home in Tagalog).
80 Id. at 13.
81 Id. at 13.
82 Dizon-Anonuevo, supra note 78, at 2.
83 Id.
84 Id. at 3.
mother about her problems she said “she is so far away and will not be able to understand me.”

Consequently, many children grow up feeling abandoned by their mothers who seem to be enjoying a much better life abroad; the communication between both mother and child is often weakened. Feelings of abandonment often lead to children rebelling against their families. In a recent study, young children in families where the mother was absent showed poorer performance in school as compared to children whose mothers were not absent. The children whose mothers were absent also showed greater difficulty in social relationships. Ironically, studies show the children of overseas workers do not attain higher rates of education compared to the children of parents who do not leave, even though a child’s education is a huge expense and motivating factor for why the mothers sought overseas employment in the first place.

Since the overwhelming majority of FDHs are female, their own daughters have the responsibility of caring for the family left behind in the employee’s home country. Research has shown that this household burden falls to the younger females of the family because of traditional gender roles in Filipino families. Furthermore, in countries like the Philippines there is often a superiority complex among males, with many husbands and sons refusing to do household chores, which places the burden on young girls. One Filipino daughter said, “I am the only girl in the family and I do all the household chores. My brothers are not helping me at all. I do not even have time to rest.” This frustration among daughters causes them to confide with their friends and peers rather than their own families. As communication in the family deteriorates, social problems for children begin to develop.

As families are separated, many migrant mothers feel loneliness and guilt, which they often deal with by trying to parent or be involved with their children from far away. For example, mothers

85 Id.
86 Id. at 2-3.
87 Id. at 2.
88 2003 ESCAP Report, supra note 3, at 12.
89 Id.
90 Dizon-Anonuevo, supra note 78, at 5.
91 2009 ILO Report, supra note 1, at 11; Dizon-Anonuevo, supra note 81, at 6.
93 Dizon-Anonuevo, supra note 78, at 6.
94 Id.
95 Id at 7.
96 Id. at 3; 2003 ESCAP Report, supra note 81, at 5.
97 Dizon-Anonuevo, supra note 81, at 4 “It was so painful when I left my children. I miss them so much. So, whenever I have days off, I am usually inside shops, going around, and buying clothes, toys and things which I think they would like. It eases my loneliness and longing for them,” (as related by a Hong Kong FDH). Id.
will usually buy their families and children lavish, material gifts.\textsuperscript{98} However, then children begin to associate their relationship with material goods, and their mother’s love is seen in terms of gifts and money.\textsuperscript{99} As children get older, the gifts become more lavish and expensive.\textsuperscript{100} Children become dependent on these gifts and expect their mothers to pay for their education or even their own children once they are married.\textsuperscript{101} The oxymoron of this relationship is that FDHs have to stay longer in their overseas employment to support their family’s lavish lifestyle, even though the whole purpose of working overseas was to make enough money to ensure their families futures.\textsuperscript{102} The overseas work which was only meant to be for three to five years often turns into fifteen to twenty years as the families become dependent on a lavish lifestyle and fail to save money.\textsuperscript{103}

Although there are definite social concerns, initial studies in Indonesia and the Philippines suggest families are, overall, adjusting to their migrant mothers.\textsuperscript{104} This is largely because extended family has stepped in to help fill the void of absent mothers.\textsuperscript{105} However, infidelity, emotional estrangement, and children dropping out of school continue.\textsuperscript{106}

The boom of FDHs is also a mixed blessing for receiving countries or even a necessary evil.\textsuperscript{107} FDHs in Hong Kong provide cheap labor in areas where the rising middle and upper classes are unwilling to take the same low paying jobs.\textsuperscript{108} At the same time, Hong Kong is concerned with broader social issues like the gathering of thousands of FDHs, called weekend enclaves, at Hong Kong’s Statue Square, where thousands of FDHs will camp in the park.\textsuperscript{109} There is also growing concern of the social effects FDHs have on the families they serve.\textsuperscript{110} For instance in Singapore, a high-receiving country like Hong Kong, there are great concerns of the impact FDHs have on the employer’s children and the male members of the employer’s family.\textsuperscript{111} As more Singapore women join the workforce, there are concerns of leaving their families in the hands of FDHs who may impose unwanted influences on their family values.\textsuperscript{112} In Hong Kong, approximately fifty percent of working mothers with young children under the age of four rely on FDHs as care providers.\textsuperscript{113}

\begin{footnotes}
\item[98] Id. (describing these gifts as an expression of the mother’s love).
\item[99] Id.
\item[100] Id.
\item[101] Id.
\item[102] Id. at 5.
\item[103] Id. at 4-6.
\item[104] 2003 ESCAP Report, supra note 3, at 14.
\item[105] Id.
\item[106] Id.
\item[107] Id. at 5.
\item[108] Id.
\item[109] Id.
\item[110] Id. at 15.
\item[111] Id.
\item[112] Id. at 17.
\item[113] Cortes & Pan, supra note 2, at 9-10.
\end{footnotes}
only about thirty percent of working mothers have a family member take care of their child.\(^\text{114}\) In comparison to Taiwan, a nation with similar traditional Chinese family values, only approximately eight percent of children under the age of three are taken care of by nannies, including FDHs.\(^\text{115}\) Therefore, over ninety percent of young Taiwanese children are cared for by family members.\(^\text{116}\)

In Singapore, there is a concern that young children are influenced by FDHs who practically raise them and take care of all the household needs.\(^\text{117}\) In addition to the impact live-in FDHs may have on children, there is also concern of the role FDHs may have in fracturing the family.\(^\text{118}\) For example, there may be inappropriate sexual relations or even molestation between FDHs and male family members.\(^\text{119}\) Although FDHs have helped to improve Singapore’s economic stability, such concerns have caused added stress on families and uncertainty for their children’s future.\(^\text{120}\)

III. \textbf{ARGUMENT}

A. \textbf{MANY FDHS’ SUFFER ABUSE FOR ECONOMIC GAIN}

There is growing awareness of the abuse foreign domestic helpers (“FDHs”) face while working in Southeast Asia, but abuse continues even in places like Hong Kong where labor laws for foreign workers have been enacted.\(^\text{121}\) Although Hong Kong has well-developed labor and immigration laws on the surface, loopholes in the system and ambiguity in enforcing them has left many FDHs vulnerable to their employers.\(^\text{122}\) Consequently, the equality of FDHs in Hong Kong is not always a reality and cases of abuse can be common.\(^\text{123}\)

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize\textit{Id.} at 10.
\item \footnotesize\textit{Id.} at 9.
\item \footnotesize\textit{Id.}
\item \footnotesize2003 ESCAP Report, \textit{supra} note 3, at 17 (addressing what a generation of children raised by maids will turn out as, Singapore Minister of Labor, Lee Boon Yang, first raised this concern in 1988 and is known as the “maid dependency syndrome”).\(^\text{117}\)
\item \footnotesize\textit{Id.} at 18 (describing how one employer found her 23-year-old FDH parading around the living room at midnight in front of her husband wearing nothing but a negligee with little on underneath. The employer gave birth just two weeks before).
\item \footnotesize\textit{Id.}
\item \footnotesize\textit{Id.} at 19.
\item \footnotesize2009 ILO Report, \textit{supra} note 1, at 37.
\item \footnotesize\textit{See generally} HKSAR v. Leung Yee Kwan, [2002] CACC 382/2011 (H.K.), \textit{available at} 2002 WL 1341594 (describing a specific case of abuse of an FDH in Hong Kong).
\end{enumerate}
\end{footnotesize}
For example, in 2001 an Indonesian FDH was assaulted five times within the first forty-five days of her Hong Kong employment.\textsuperscript{124} The employer actually forced this female FDH to kneel or lay on the floor before each beating.\textsuperscript{125} The last assault was so severe, the FDH collapsed on the platform of a commuter train on her way to receive medical treatment for her injuries.\textsuperscript{126} A CT scan later showed numerous bruises across the FDH’s body, including a fractured rib, ruptured liver, and internal bleeding.\textsuperscript{127} After being taken to the hospital by emergency personnel, the FDH’s employer threatened to “have someone kill the [victim’s] husband and children” if she ever told anyone the source of her injuries.\textsuperscript{128}

There are many cases where FDHs receive serious and dramatic abuse.\textsuperscript{129} In part, this is because FDHs feel too desperate to report labor violations because they are in debt to the employment agencies that helped get them to Hong Kong in the first place.\textsuperscript{130} Furthermore, as the labor market for FDHs in Hong Kong becomes more competitive, there becomes a greater need to retain employment as job security decreases.\textsuperscript{131}

From a macroeconomics perspective, FDHs have also largely benefited the economies of their countries of origin.\textsuperscript{132} In the Philippines, FDHs have been given honorary distinction for their role in supporting the national economy through remittances.\textsuperscript{133} The Philippines has created incentive programs, which encourage FDHs to send money back home to stimulate the economy.\textsuperscript{134} Between the pressures of paying back the debt to private agencies, helping their national economies, and supporting their families back home, FDHs feel the need to stay employed after making it to Hong Kong.\textsuperscript{135}

It appears the Philippines wants to be a labor sending country because of the number of FDHs abroad.\textsuperscript{136} Ten percent of the Philippines Gross National Product is based on annual remittances.\textsuperscript{137} For many Indonesians and Filipinos, working as FDHs is the only way that they can financially support their

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\textsuperscript{124} Id. at ¶¶ 1, 3, 7.
\textsuperscript{125} Id. at ¶ 7.
\textsuperscript{126} Id. at ¶ 8.
\textsuperscript{127} Id. at ¶ 9.
\textsuperscript{128} Id. at ¶ 6.
\textsuperscript{129} Tan, supra note 25, at 354.
\textsuperscript{130} 2009 ILO Report, supra note 1, at 37.
\textsuperscript{131} Id.
\textsuperscript{132} 2003 ESCAP Report, supra note 3, at 3.
\textsuperscript{133} Id. (describing how the honorary distinction of mga bagong bayani, translates into new heroes in Tagalog).
\textsuperscript{134} The Philippines Experience, supra note 37, at 7.
\textsuperscript{135} See generally 2011 ILO Report, supra note 34, at 5 (describing why the current system needs to evaluated so as to better understand the full impact it has on the overall welfare of FDHs).
\textsuperscript{136} The Philippine Experience, supra note 37, at 1 (noting 10 percent of the Philippines Gross National Product is based on annual remittances).
\textsuperscript{137} Id. at 5.
\end{flushleft}
struggling families. In Hong Kong, there is a need for workers to fill the menial jobs no one else wants to take. Thus, the demand for FDHs will only increase. Therefore, real solutions are needed to protect the interests of the FDHs, their families, and both the sending and receiving countries.

Hong Kong is a leader in developing strong labor laws. However, the current laws can be improved to better protect FDHs. Increased protection can occur through better communication and mutual understanding between sending countries and Hong Kong. Although Hong Kong and sending countries are currently cooperating with each other, each had differing policies, which leads to confusion and loopholes in the system. Consequently, FDHs rely heavily on the private recruitment agencies that bring these women to Hong Kong, but many of them are abusive, corrupt, and simply inadequate.

The problems that the vast majority of FDHs face today can be significantly reduced if private recruitment agencies are eliminated. Many of these agencies are not properly licensed and there is no uniform standard when it comes to recruitment fees and working conditions. In Indonesia the welfare of FDHs is a major concern because recruitment agencies make it difficult to set employment standards. The recruitment and placement of Indonesian FDHs is entirely controlled by private agencies and their Hong Kong affiliates. For both Filipinos and Indonesians, recruitment agencies often overcharge for their services, even though Hong Kong has restrictions in place, because the penalties are insignificant as compared to the potential earnings. It is difficult to regulate any overcharging because for those private agencies that are properly licensed, it ends up being the word of the FDH against the established agency.

When comparing these recruitment agencies to some of the new government regulated programs of the Philippines, it is clear

\[138\] 2011 ILO Report, supra note 34, at 17.
\[139\] 2009 ILO Report, supra note 1, at 11.
\[140\] 2011 ILO Report, supra note 34, at 38.
\[141\] 2009 ILO Report, supra note 1, at 37.
\[142\] Id. at 9.
\[143\] See generally id. at 37 (noting how FDHs are vulnerable because of loopholes in Hong Kong’s labor laws).
\[144\] See generally id. at 38 (describing how sending and receiving countries largely operate independently of each other).
\[145\] See generally id. (stating how cooperation exists between sending and receiving countries, but there are no formal signed accords).
\[146\] Id.
\[147\] See generally id. (stating that sending and receiving countries should prosecute abusive agencies).
\[148\] The Philippine Experience, supra note 37, at 3.
\[149\] 2009 ILO Report, supra note 1, at 16.
\[150\] Id.
\[151\] Id. at 38.
\[152\] Id.
that when the government takes a vested interest in their FDHs, their safety and well being becomes a priority.\textsuperscript{153} This is because the Philippines has made the remittances from these FDHs a priority in an effort to stimulate their national economy.\textsuperscript{154} Therefore, if these private recruitment agencies were to be eliminated, and the government took an interest to ensure the safety of its FDHs, then many of the problems would be significantly reduced.\textsuperscript{155}

B. GROUP FACILITATION SHOULD BE USED TO IMPROVE FDHS’ WORKING CONDITIONS

Implementing such changes will be a difficult and onerous task because it requires greater government involvement; further challenges arise given that the private agencies are very powerful.\textsuperscript{156} Consequently, a facilitation should (and must) take place that involves all the stakeholders so that open communication, mutual understanding, and the perspectives of each party can be developed.\textsuperscript{157} Group facilitation is a process where a neutral party, acceptable to all members, intervenes by helping group members identify and solve their problems through group collaboration.\textsuperscript{158} Facilitators are not responsible for the group’s decision nor do they offer an opinion.\textsuperscript{159} Yet, because they are involved in the process facilitators help groups contemplate effective decisions in light of their core values.\textsuperscript{160}

Generally speaking, people depend on groups to accomplish what they cannot do on their own.\textsuperscript{161} In the instant case, the interested stakeholders have reached a point where they can no longer act independently.\textsuperscript{162} Since groups may find it difficult to openly examine their behavior, the need for a facilitator becomes very important.\textsuperscript{163}

There are essentially two types of facilitation, basic and developmental.\textsuperscript{164} Although each technique looks to solve the problem, the biggest difference is that basic facilitation temporarily solves the problem whereas developmental facilitation empowers

\textsuperscript{153} See generally The Philippine Experience, supra note 37, at 9-10 (describing how the Philippines government is continuously adjusting programs in order to improve overseas employment).

\textsuperscript{154} See generally id. at 5 (describing how FDH remittances account for a large part of the country’s gross national product).

\textsuperscript{155} See generally 2009 ILO Report, supra note 1, at 38 (describing loose regulation over private agencies).

\textsuperscript{156} See generally id. (stating how FDH’s have become dependent on private agencies for placement).

\textsuperscript{157} Id. at 37.

\textsuperscript{158} ROGER M. SCHWARZ, THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS 4 (1994).

\textsuperscript{159} Id. at 11.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 3.

\textsuperscript{162} 2009 ILO Report, supra note 1, at 38.

\textsuperscript{163} Schwarz, supra note 161, at 4.

\textsuperscript{164} Id. at 6.
groups to solve future problems on their own.\textsuperscript{165} Although developmental facilitation takes time, stability, and commitment, this facilitation approach is the best for the stakeholders discussed in this paper because of the complexity of the situation.\textsuperscript{166}

In order for a facilitation to be effective, trust among the stakeholders must be developed because that trust enables action, commitment, and a strong working relationship.\textsuperscript{167} For the stakeholders in this situation to be successful, it is imperative that an increased level of trust is developed so the parties may feel empowered to create ideas, opportunities, and solutions.\textsuperscript{168} This requires members of the group to become leaders because leaders can help facilitators direct and support the efforts of the group.\textsuperscript{169} If this facilitation approach is embraced, group leaders will help resolve both the current problems and any others that may develop long term.\textsuperscript{170} Therefore, for the FDH situation to improve, it needs a facilitator who embraces the developmental facilitation approach and a group of stakeholders representing the interests of the FDHs, employers, and countries: this allow for leaders to emerge and direct effective solutions.\textsuperscript{171}

IV. CONCLUSION

This Article discussed the plight of the Filipino and Indonesian FDH in Hong Kong.\textsuperscript{172} It further discussed the complicated economic and social relationship that exists between the FDH, their families, and the receiving and sending countries.\textsuperscript{173} The Article further pointed out that although Hong Kong has taken legal steps to protect FDHs, private recruitment agencies and loopholes in the system allow for continued abuse.\textsuperscript{174} This Article suggested that private recruitment agencies should be eliminated and that stakeholders should come together to facilitate their independent problems into achieving a mutually beneficial solution.\textsuperscript{175}

If Hong Kong continues to address FDH concerns in the present manner, then the problems discussed in this Article will only escalate. It is essential that the Hong Kong government works with its counterparts in Indonesia and the Philippines to develop a mutually beneficial solution for all. Hong Kong officials have a unique opportunity to establish a precedent for how labor receiving and

\textsuperscript{165} Id. at 7.
\textsuperscript{166} Id. 7-9.
\textsuperscript{167} MARIA BEGONA RODAS-MEEKER & LARRY MEEKER, THE IAF HANDBOOK OF GROUP FACILITATION 89 (Sandy Schuman ed. 2005).
\textsuperscript{168} See generally id. at 97 (describing the effect of empowerment on business enterprises).
\textsuperscript{169} Id.
\textsuperscript{170} See generally id. (empowering relationships are likely to succeed as people begin to have a vested responsibility).
\textsuperscript{171} See generally SCHWARZ, supra note 161, at 6 (describing the benefits of developmental facilitation).
\textsuperscript{172} See supra notes 9-37 and accompanying text
\textsuperscript{173} See supra notes 48-116 and accompanying text.
\textsuperscript{174} See supra notes 144-152 and accompanying text.
\textsuperscript{175} See supra notes 153-168 and accompanying text.
sending countries work together. If Hong Kong, as the labor receiving country, fails to take the initiative in bringing interested parties together, one of two outcomes will likely occur: (1) the international community will become disgusted at the atrocities suffered by so many FDHs and Hong Kong will be scrutinized for its lack of action; or (2) FDHs will turn to other labor receiving countries leaving a void of FDHs in Hong Kong. Either way, Hong Kong's economy and image will likely be negatively affected. Therefore, it is in Hong Kong's best interest, for both the short and long-term, to be proactive in working with Indonesia and the Philippines to address its FDH concerns.