LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW

CONTENTS

VOLUME 18, ISSUE 2 SPRING 2022

CONTENTS

Featured Articles

Student Articles

Published semi-annually by Loyola University Chicago School of Law
Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611

Cite as 18 LOY. U. CHI. INT'L L. REV. __ (2022)

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW

Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611
E-mail: InternationalLawReview@luc.edu
Phone: (312) 915-7490

SUBSCRIPTIONS: **two issues per year at $10.**

Please start my subscription to Loyola University Chicago International Law Review.

_____

Name

_____

School

_____

Address

_____

City, State Zip Code

_____

E-mail Address

If you would like to subscribe, please complete the information above, include a $10 check payable to **Loyola University Chicago International Law Review**, and send to:

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW
Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611

International Focus at
Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

Acknowledgments

We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

Cara A. Boyle
Karen and John Calhoun
Chicago International Dispute Resolution Association
Chicago Branch of the Chartered Institute of Arbitrators
William Cannon
Ellie Carey
Freddi L. Greenberg
Hanh Diep Meyers
Carol and Terry Moritz
Silvia and Fabio Pettanati
Susan Walker
Margaret Moses
Michael Brandenberg
Mark Calaguas
Shirley Chen
Christina Cotter
Caroline Driscoll and Samuel Barancik
Michael Eurich
William Eveland
Brian Fahrenbach
Sean Farrell
Elisabeth Fiordalisi
Elizabeth Hanford
Kevin Harris
Joshua Heffernan
Chantal Kazay
Elizabeth and Kevin Kearney
Kelsey Leingang
Katherine and Kyle Lennox
Bradley Lorden
Patrick McFadden
Kelly O'Brien
Geoffrey Robilotto
Barry Sullivan
Kristen and Michael Viglione
Erin Wenger
Brandon Wurzinger

THE TEMPORALITY OF LAW IN TRADITIONAL CHINA AND ITS CONTEMPORARY IMPLICATIONS

Tao Wang*

Abstract

Temporality of law is of great significance in traditional Chinese juridico-political thought, and its influence plays a crucial role in China's state building and governance. The existing temporal phrases from the West are not sufficient for explaining the symbol-oriented legal system in traditional China. Formalist law overlooks the temporal elements intrinsic to the legal system and results in the failure of governance. This Article applies a historical culture paradigm to analyze the temporality of law in traditional China by using plurality, sociality, and rhetoric as indicators to demonstrate the contestation of temporal categories in penality, socialization of seasonal time, and the transcending moral discourse in law, as well as by examining the temporal relevance in the classical textual and cultural context of traditional China. The Article further shows that the intertemporal dynamism in law facilitated the formation of a unified and stable system of order over China's long imperial period. The intertemporality in traditional Chinese law still exerts huge influence on legal governance in contemporary China.

Keywords

Law, Time, Tradition, China, Society, Culture

Table of Contents

* Associate Research Professor, Ph.D. in Law, Chevening Scholar, Institute of Legal Civilization Histories, East China University of Political Science and Law. I deeply thank John Harrington and He Qinhua for their stimulating and congenial mentoring during my postgraduate and doctoral studies, which inspired this research. The views expressed in this Article are my own and do not purport to reflect the position of any organizations and other persons. All the errors, of course, are my own too. The names of the Chinese figures discussed in the Article are spelled according to the Pinyin Romanization system except for Confucius and Mencius.

I. Introduction

Temporality is an indispensable part of law. When one seeks to analyze law in a comprehensive manner, one finds that temporality permeates the popular understanding of law.[1] However, temporality of law, or law as temporality, is not a topic that has attracted much academic attention from legal commentators. Legal studies often assume, and examine the conception of time, as if time were a natural phenomenon, unfolding itself as the background for socio-legal interaction.[2] Historians do not often start their investigations by targeting and defining time. While certain legal historians have demonstrated that law unfolds in time, few have examined how law connects with specific ideas of time. Although legal sociologists often claim that legal professionals are engaged in legal analysis through doctrinal terms, few discuss legal temporality through symbolic concepts.

In her examination of the history of the Indian settlers in early twentieth-century South Africa, author Renisa Mawani demonstrates law's claims to authority, legitimacy, and universality in a colonial context, conceptualizing law as temporality through a dynamic view of past, present and future.[3] Khan offers a systematic analytical model to explore law's temporality in society by distilling its four general principles of correlation, inertia, triggers, and cooperation, all of which build on the precision of temporal symbols.[4]

The limited literature on the temporality of law often follows Greenhouse's perception of time as linear and cyclical to display the construction and repro-

---

[1] Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1631 (1989).

[2] Mary L. Dudziac, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1670 (2010) (arguing that time is important but not much problematized and theorized, regarding both the research on wartime in legal thought, as well as the broader scope of legal literature).

[3] *See* Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65, 93 (2014).

[4] *See* Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55 (2009).

duction over time of normative orders and their social significance.[5] Nevertheless, when it comes to the scenario of traditional China, mere conceptions of time's linearity and cyclicality are not sufficient to explain the way that Chinese law unfolds itself in history.

Moreover, while Legal Orientalism still haunts the research on Chinese law to a certain extent,[6] temporality of law in traditional China seems to be an integral part of an oxymoron that is also unworthy of serious consideration.[7] According to Hegel, Oriental States "belong to mere space," while the West exists in the "form of time."[8] In Marx's eyes, China "vegetates in the teeth of time."[9] Meanwhile, Foucault holds:

> [T]he Chinese culture is the most meticulous, the most rigidly ordered, the one most deaf to temporal events, most attached to the pure delineation of space; we think of it as a civilization of dikes and dams beneath the eternal face of the sky; we see it, spread and frozen, over the entire surface of a continent surrounded by walls.[10]

Foucault's description echoes what Parker opined in 1879: "[w]ith the Chinese law, as with the Chinese language, we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men."[11]

Very few commentators have attempted to investigate the temporal dimension of law in traditional China. In his article *Sociology of Time*, Young first observes that, although the linear and cyclical conceptions of time were both original to Western culture, the linear conception of time and history prevailed when Church and State united under the Emperor Constantine; second, the concept of time in traditional China is cyclical because of the strong agricultural aspect of the society.[12] However, Young's exploration into law's temporality stops at the point where he claims that the Chinese looked backward to the ideal state which Confucius spoke about, in which the best and most just, harmonious relationship

---

[5] *See* Greenhouse, *supra* note 1, at 1634-38.

[6] *See generally* Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002), and TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW (2013), for a close examination of legal Orientalism; *cf.* Donald Clarke, *Anti Anti-Orientalism, Or Is Chinese Law Different?*, 68 AM. J. COMP. L. 55 (2020).

[7] *See* Teemu Ruskola, *Law Without Law, Or Is Chinese Law an Oxymoron,* 11 WM. & MARY BILL RTS. J. 655, 655, 660 (2003), for a critique of the western view of Chinese law as a normative order short of "real" law.

[8] GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF HISTORY 105-06 (J. Sibree trans., 1956).

[9] KARL MARX ON COLONIALISM AND MODERNIZATION 323 (Shlomo Avineri ed., 1968).

[10] MICHEL FOUCAULT, THE ORDER OF THINGS xix (1994).

[11] Edward Harper Parker, *Comparative Chinese Family Law*, 8 CHINA REV. 67, 69 (1879).

[12] *See* Peter Young, *The Sociology of Time: Histories and Historians in the Cultures of the West and of China*, 9 LEONARDO 205 (1976).

prevailed at all levels of society.[13] He could hardly offer a deep analysis on temporality of law in traditional China within a short article of four pages.

It is crucial that this subject be explored with renewed urgency. The goal of this Article is to show that the temporality of law is of immense significance in juridico-political thought in traditional China, and its influence plays a crucial role in China's state-building and governance.

Mere onto-epistemological interpretation of temporal dynamism does not suffice for explaining the symbol-oriented legal system in traditional China even with the existing temporal phrases from the West in hand. In his temporal research on English medical law, Professor John Harrington has offered a threefold model that takes plurality, sociality, and rhetoric as indicators in explaining the intertemporal struggles within the legal system.[14] Albeit employed in the specific context of English medical law, Harrington's model can be drawn upon to construct a new historical culture paradigm to analyze the temporality of law in traditional China. On the one hand, this new paradigm makes use of the three indicators of plurality, sociality, and rhetoric to reflect the importance of temporal dynamism in traditional Chinese law. On the other hand, it examines the intertemporality in the classical textual context and against a concrete cultural backdrop of traditional China. This Article attempts to utilize the historical culture paradigm to facilitate the understanding of Chinese law. Such understanding is not only of philosophical interest but is of practical importance as well. In his *Interpretation of Cultures*, Geertz observes:

> [I]f you want to understand what a science is, you should look in the first instance, not at its theories or its findings, and certainly not at what its apologists say about it; you should look at what the practitioners of it do.[15]

It is in the examination of the actual operation of law in traditional China, with a historical and cultural consciousness, that we can discover how its temporality has been guiding intelligent human action. Culture, as Geertz puts it, though ideational, does not exist in someone's head; though unphysical, is not an occult entity.[16]

In addition, this Article demonstrates that the intertemporality of law in traditional China facilitated the establishment of a unified and stable system of law which anchors decision making about present actions, and projections in respect of future actions, in past decisions and actions of common people and officials. The intertemporality in traditional law still exerts a huge influence on contemporary China through its temporally extended legislative dynamics.

---

[13] *See* Peter Young, The Sociology of Time: History and Historians in the Cultures of the West and of China, 9 LEONARDO 207 (1976).

[14] *See* John Harrington, *Time as a Dimension of Medical Law*, 20 MED. L. REV. 491 (2012).

[15] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (2000).

[16] *Id.* at 10.

Part II of the Article discusses the threefold analytical model put forward by Harrington on the temporality of law. It demonstrates that the temporal mode of a formalist law renders the legal system static, punctual, and detached from the social environment. Part III explores the temporal dynamism in traditional Chinese legal thoughts with textual decoding and historical interpretation. Part IV employs the historical culture paradigm to establish the understanding of law's temporality in traditional China in its culturally concretized context. Part V considers the influence of the traditional legal temporality over the law of contemporary China, using the 2018 Constitutional Amendment, the Chinese Civil Code, and the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region as symptoms. After Part V, a conclusion follows.

II. The Sociological Analysis of Time in Law

Since Sorokin and Merton published their groundbreaking article on the sociology of time, examining its qualitative and meaningful features in 1937,[17] time as a dimension of sociology has become an important theme attracting considerable academic enthusiasm. The temporalization of sociology should have brought with it the temporalization of the sociology of law. However, most legal sociologists do not include time as a crucial variable in their studies, or if they do, they only examine the temporal dimensions of legal institutions and interaction in an *ad hoc* fashion to assist explanation of legal behavior. At the end of his work *Sociological Justice*, Black envisions a sociological society which, he claims, is a new stage of human evolution.[18] Such an evolutionary process, if fully elaborated, entails taking into account the temporal dimension of law. Not only is law inevitably situated in time and inevitably affected by time's passing, caught up in the flow of a nation's vital activity; it also profoundly affects that nation's life, weaving temporal parts of its activity into practically meaningful wholes.[19]

A. Three Indicators of Time in Sociology of Law

In his pioneering article on temporality in the domain of English medical law, Professor John Harrington contends that time, as a dimension of law, is understood as social, plural, and rhetorical.[20] Time is social in that it is not an ever-present, neutral medium within which events simply take place.[21] Typical tem-

---

[17] *See generally* Pitirim A. Sorokin & Robert K. Merton, *Social Time: A Methodological and Functional Analysis*, 42 AM. J. SOCIO. 615 (1937).

[18] DONALD BLACK, SOCIOLOGICAL JUSTICE 103 (1989).

[19] Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 RATIO JURIS 203, 205 (2004).

[20] *See* Harrington, *supra* note 14, at 491-92.

[21] *See generally* GEORGES GURVITCH, THE SPECTRUM OF SOCIAL TIME (1964).

poral demarcations are the concepts of past, present, and future. It is plausible to define these temporalities with physical or social points of references.

As far as physical time is concerned, people rarely refer to it except for those demarcations such as a million years ago or a century in the future. In contrast to physical time that might mostly be used to account for astronomical events, people make use of social time to mark temporal references to social events. Physical time-reckoning invariably marches on in quantitative, uniform, homogeneous, and one-dimensional units, while social time proceeds with qualitative, localized, differentiated, and multi-dimensional rhythms of social activities.[22] Sorokin and Merton maintain:

> [T]he search for social periodicities based upon the unquestioned adoption of astronomical criterions of time may have been largely unsuccessful precisely because social phenomena involve 'symbolic' rather than 'empirical' equalities and inequalities; social processes which at present seem to lack periodicities in terms of astronomical measures may be found to be quite periodic in character in terms of social time.[23]

Therefore, time can be conceived of being actively produced by various social practices. For example, the expansion of the railways in the nineteenth century led to the adoption of a uniform official time in European States.[24] People often make use of social practices to indicate points of time. Certain phrases – like, "shortly after the World War," "I'll meet you after the concert," "when President Hoover came into office" – all use social, rather than astronomical frames of reference to indicate specific points in time.[25]

Time is plural in that social practices are specific to different activities, peoples, cultures, and ideologies. Temporalities in the fields of astronomy, psychology, and economics are all differentiated, as well as in agricultural, hunting, fishing, nomadic pastoral tribes, and various peoples such as Chinese, Muslims, Jews, and Greeks.[26]

Time is rhetorical in that its production is in fact a strategic process of persuasion, *i.e.*, that a specific time frame should govern in a specific context.[27] The success of a given temporality is substantially due to its plausible representation, whether visually (*e.g.*, the clock) or verbally (*e.g.*, the origin story of a nation).[28]

---

[22] *See* Sorokin & Merton, *supra* note 17.

[23] *Id.* at 628.

[24] THOMAS HYLLAND ERIKSEN, TYRANNY OF THE MOMENT: FAST AND SLOW TIME IN THE INFORMATION AGE 43 (2001).

[25] Sorokin & Merton, *supra* note 17, at 618.

[26] *See id.* at 616-22.

[27] Harrington, *supra* note 14, at 492.

[28] Teresa Bridgeman, *Time and Space*, *in* THE CAMBRIDGE COMPANION TO NARRATIVE 52 (David Herman ed., 2007).

Time, for this reason, is both a resource and a stake in social struggles of all kinds.[29] For instance, in modern society, time has become a commodity that can be sold by the employee to the employer. In the process, a period of private time transforms into public time, reflecting and reinforcing the temporal rigidity of work schedules and the employee's right to claim control over his social accessibility during his private time as a sort of possession.[30] Rhetoric is a process of arguing by means of reasonable reasons, either to account for results already produced or to seek adherence to the production of results in the future.[31]

B. Rethinking of the Formalist Law

Competing modes of temporality have been used to produce various opinions on how the law should grow. In examining time as a product of social practices, one is thus required to take seriously the discourse on the temporality of the law. As Cardozo insists, "The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[32]

Foundationalism believes in basic truths from which unequivocal answers to legal problems can clearly be arrived at by rational procedures.[33] The rise of positivism in the law and jurisprudence immunizes juridical rationality against other methods and approaches in defining and interpreting the law, be they religion, customs, history, or ethics. Positivism is the consciousness of knowledge-as-regulation, a philosophy of order over chaos both in nature and society – order is regularity, logically or empirically established through systematic knowledge.[34] Law, in Weber's view, is an act of will, and the agent of such will is the legal rational state.[35] Bureaucratic administration fundamentally means the exercise of control on the basis of knowledge, a feature that makes it specifically rational.[36]

The conception of the unlimited will of a supreme legislator has served as the irrefutable justification for absolute power, first of monarchs, later of democratic assemblies; it appears self-evident only if the term *law* is restricted to the rules guiding the deliberate and concerted actions of an organization.[37] Positivist theo-

---

[29] Mike Baynham, *Narratives in Space and Time: Beyond "Backdrop" Accounts of Narrative Orientation*, 13 NARRATIVE INQUIRY 347, 351 (2003).

[30] Eviatar Zerubavel, *Private Time and Public Time: The Temporal Structure of Social Accessibility and Professional Commitments*, 58 SOC. FORCES 38, 46 (1979).

[31] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 44 (1995).

[32] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 20 (1924).

[33] ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NON-FOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 10-11 (2000).

[34] DE SOUSA SANTOS, *supra* note 31, at 73.

[35] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 33 (Talcott Parsons ed., A. M. Henderson & Talcott Parsons trans., 1997).

[36] *Id.* at 339.

[37] F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 87 (2013).

ry views legislation as the center of the legal system.[38] Statutory law subsists in an "eternal present," once enacted, it remains in force unchanged until repealed.[39] Therefore the bounded atemporality of each individual enactment indicates that the legal system as a whole partakes of "alternating time."[40] The legal system changes, but only by way of punctuality and apparently delineated actions, *e.g.*, when the legislator intervenes. Otherwise, it exists in a motionless present.

Austin holds that law is laid down by an intelligent being having power over another intelligent being and that there can be no law without a legislative act.[41] Law is to be understood as a unity, a system of norms or rules or doctrinal principles, which can be studied at any given moment in time as a static, coherent system and a logical whole.[42] The truths of law are correspondingly analytical rather than temporal: the past of law is conceived as no more than the continuous succession of its states of presence.[43]

Time here is represented spatially as a series of discrete containers, helping to realize the positivist goal of sharply distinguishing law from its wider social environment.[44] The will and energy of the state are provided by formal rational law. Through positivistic order, society can be controlled so that it can be made predictable and certain.

Nevertheless, in his renowned work *The Common Law*, Oliver Wendall Holmes emphasizes that "the life of the law has not been logic: it has been experience." The text accompanying this well-known maxim reflects his concern over the formal rationality of the legal system and elaborates persuasively on the temporality of law:

> [T]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy...have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the

---

[38] RICHARD NOBLES & DAVID SCHIFF, A SOCIOLOGY OF JURISPRUDENCE 68 (2006).

[39] PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 88 (2001).

[40] GURVITCH, *supra* note 21, at 33.

[41] 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 88 (Robert Campbell ed., 4th ed.1879); 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 555 (Robert Campbell ed., 4th ed.1879).

[42] Peter Goodrich, *Poor Illiterate Reason: History, Nationalism and Common Law*, 1 SOC. & LEGAL STUD. 7, 8 (1992).

[43] *Id.*

[44] FITZPATRICK, *supra* note 39, at 93.

> law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.[45]

On this point, Geertz warns with a similar metaphor that regarding culture as the writing out of systematic rules (an ethnographic algorithm) runs the danger of marrying extreme subjectivism to extreme formalism.[46] To look at law as a symbolic dimension of social action is not to turn away from the existential dilemmas of life for some idealized realm of de-emotionalized forms; rather, it is to plunge into the midst of them.[47]

III. Temporal Dynamism in Traditional Chinese Legal Thought

In Chinese history, there exist two major models of thought, which are central to the classical legal discourse. The first one relates to the Confucian ideology of social order, which stresses man's worldliness and governance in the style of the legendary sage-kings, taking human-heartedness or *ren* (仁), righteousness or *yi* (义), and ritual or *li* (礼) as the core values of society; the second one relates to the Legalist ideology of social control, which devotes much attention to the methods for governing large areas, leaving a high concentration of power in the person of the ruler and providing the techniques of governance with rational justification or theoretical expression.[48]

A. Confucianist Legal Thought and Its Temporal Element

Shû King (书经，尚书), or the Book of History, is one of the earliest text of historiography in China. It is conceived of as the one of the six liberal arts that the Confucian School holds as classics.[49] The paragraph titled "*The Counsels of Gao Yao*" in the *Books of Yü* in *Shû King* reads: "If [the sovereign] sincerely pursues the course of his virtue, the counsels [offered to him] will be intelligent, and the aids [of admonition that he receives] will be harmonious."[50]

Confucius (孔子)(551-479 B. C.) said: "He who rules by virtue is like the polestar, which remains unmoving in its mansion while all the other stars revolve

---

[45] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1-2 (1923).

[46] GEERTZ, *supra* note 15, at 11.

[47] *Id.* at 30.

[48] *See generally* FUNG YU-LAN, A SHORT HISTORY OF CHINESE PHILOSOPHY (Derk Bodde ed., 1997).

[49] These are the Yi or Book of Changes, the Shi or Book of Odes, the Shu or Book of History, the Li or Book of Rites, the Yue or Music (no longer preserved as a separate work), and the Chunqiu or Spring and Autumn Annals, a chronicle history of Confucius' state of Lu extending from 722 to 479 B.C.

[50] *See* THE SACRED BOOKS OF CHINA: THE TEXTS OF CONFUCIANISM 53 (James Legge trans., 1879).

respectfully around it."[51] He followed that with: "Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation."[52]

Confucius clearly contends that virtue plays a decisive role in political life, and morals should become the principle of state-governing, while penalties should be used as a last resort. Confucius said: "...When the rites and music wither, punishments and penalties miss their target. When punishments and penalties miss their target, the people do not know where they stand."[53]

Lord Ji Kang (季康子)(?-468 B.C.) asked Confucius about government, saying: "Suppose I were to kill the bad to help the good: how about that?" To which Confucius replied: "You are here to govern; what need is there to kill? If you desire what is good, the people will be good. The moral power of the gentleman is wind, the moral power of the common man is grass. Under the wind, the grass must bend."[54]

This reply reflects Confucius's conviction in morals and rites instead of penal law. He even said: "I could adjudicate lawsuits as well as anyone. But I would prefer to make lawsuits unnecessary."[55] The necessity of law, in Confucius's opinion, could be utterly negated if morals and rites were revived.

Mencius (孟子) (c. 372-289 B.C.) was linked with Confucius through his study under a disciple of Zi Si (子思) (c. 483-402 B.C.), who in turn was Confucius' grandson.[56] Mencius had been worshiped by the School of Literati in traditional China as *Ya Sheng* (亚圣) (the Sage Minor). From a more pragmatic perspective, he regards law as a supplement to morals and righteousness:

> [E]ven if you knew the way of Yao and Shun, you could not rule the Empire equitably except through benevolent government. Now there are some who, despite their benevolent hearts and reputations, succeed neither in benefiting the people by their benevolence nor in setting an example for posterity. This is because they do not practice the way of the Former Kings. Hence it is said, 'Goodness alone is not sufficient for government; the law unaided cannot make itself effective'...When those above have no principles and those below have no laws, when courtiers have no faith in the Way and craftsman have no

---

[51] CONFUCIUS, THE ANALECTS OF CONFUCIUS 6 (Simon Leys trans., 1997).

[52] *Id.*

[53] *Id.* at 60.

[54] *Id.* at 58.

[55] *Id.* at 57.

[56] FUNG, *supra* note 48, at 68.

faith in measures, when gentlemen offend against what is right and common people risk punishment, then it is good fortune indeed if a state survives.[57]

The third greatest figure in Confucian School is Xun Zi (荀子) (c. 313-238 B.C.). Among the Literati, Xun Zi's thought is the antithesis to that of Mencius. The former emphasized social control rather than individual freedom, which is at the core of latter's propositions.[58] Xun Zi furthers Confucius's theory of ritual, stressing that: "Men cannot live without *li*, affairs cannot be fulfilled without *li*, and a state cannot be in peace without *li*."[59] He views law as an instrument for the ruler to govern the people: "Officials and members of the upper strata must be controlled by rites and music, while the common people must be subdued by the law and the rules."[60]

Xun Zi contends that the good governance of a state all depends on the rule by man instead of the rule by law:

> [S]tatutes cannot be enacted and enforced automatically, precedents and regulations cannot be created and applied spontaneously either. It should be the able and virtuous who make and enforce the law, which would become obsolescent otherwise. The law is just the beginning of good governance, the class of Jun Zi (the wise political rulers, landlords, and their officers) is the foundation of the law. With Jun Zi, plain law will be enough to cover all the parts of the social life; without Jun Zi, though complicated, the law will be implemented in such a chaotic manner that it fails to cope with the changing circumstances and thus brings about ill governance.[61]

The utility of law had been recognized by the Confucian School through a gradual process with the development of times. It is plausible to say that this recognition evolved along a dynamic conceptual line with temporal continuity, from Confucius's preference to make lawsuits unnecessary,[62] to Mencius's view of law as the supplement to morals and righteousness,[63] and further to Xun Zi's emphasis on law's role in restraining and preventing crimes.[64] Such a process of acceptance of law by the Confucianists is defined as the Confucianization of

---

[57] MENCIUS, MENCIUS 76-77 (D. C. Lau trans., rev. ed. 2004).

[58] Fung, *supra* note 48, at 143.

[59] *See* THE GROUP OF EXPLANATORY WORK FOR XUN ZI, PEKING UNIVERSITY, XUN ZI WITH NEW EXPLANATORY NOTES (荀子新注) 17 (1979).

[60] *Id.* at 141.

[61] *Id.* at 190.

[62] CONFUCIUS, *supra* note 51, at 57.

[63] MENCIUS, *supra* note 57, at 76-77.

[64] THE GROUP OF EXPLANATORY WORK FOR XUN ZI, *supra* note 59, at 288-89 ("The purpose of punishments is to restrain violence, to hate evil, and to be a warning against occurrence of violence and evil in the future.").

law.[65] The Confucianists never totally rejected the use of law, but rather objected to the Legalists' replacing morals with legal sanction.

According to historical records, the so-called Five Punishments (tattooing, cutting off the nose, cutting off the leg, castration, and death penalty) were all institutionalized by the sage-king, Yü (禹), and his official, Gao Yao (皋陶),[66] who were both worshiped by the Confucianists as the virtuous legends. Although Confucius wished to make lawsuits unnecessary, he still admitted that he could adjudicate lawsuits as well as anyone.[67]

The Confucianists hold that moral influence is fundamental, and punishment is supplementary. Since Xun Zi pointed out the inherent badness of human beings,[68] the Confucianists have recognized the utility of legal punishment to warn those ignorant of moral principles.

Until the time of Emperor Wu of Han (汉武帝) (156-87 B.C.), doctrinal arguments had ceased due to the dominant official position achieved by the Confucian School. The Erudites and other officials of the Later Han Dynasty opined that a sage employed legal punishment for the purpose of supplementing virtue and aiding the governance.[69] The belief that punishments were supplementary to morals became increasingly popular among Han Confucianists. During the Han Dynasty (202 B. C.-220 A.D.), many laws formulated by the Legalists in the Qin Dynasty (221-207 B. C.) were actually adopted and kept in operation.

With the need for governance, the Confucianists tried to introduce into the law the principle and spirit of the *li* together with its concrete rules of behavior and to enforce them by legal punishment. During Han Dynasty, explanatory notes to the law were written by Confucian scholars such as Shusun Xuan (叔孙宣), Guo Lingqing (郭令卿), Ma Rong (马融), Zheng Xuan (郑玄), and others, whose commentaries, applicable in adjudications, were composed of 26,272 articles and more than 7,732,200 words.[70] Fairbank and Goldman call this Legalist-Confucian amalgam "Imperial Confucianism," which is distinct from the original teachings of Confucius, Mencius, and their successors.[71] Such amalgamation is not a punctual and ephemeral switch in social control but a durational normative cultivation for the nation as a whole.

---

[65] *See* T'UNG-TSU CH'Ü, LAW AND SOCIETY IN TRADITIONAL CHINA 363-80 (2011).

[66] *Id.* at 364.

[67] CONFUCIUS, *supra* note 51, at 57.

[68] THE GROUP OF EXPLANATORY WORK FOR XUN ZI, *supra* note 59, at 389-403.

[69] *See* CHEN LI, THE EXPLANATORY NOTES TO BAI HU TONG (白虎通疏证) 437 (Wu Zeyu ed., 1994).

[70] *See* ZHANG JING, THE EXPLANATORY NOTES TO JIN SHU-XING FA ZHI (晋书刑法志注释) 48 (1994).

[71] JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 62 (Enl. ed. 1998).

B. Legal Thought of Legalism and Its Temporal Element

In contrast to the position of the Confucianism, Legalism denies that a state can be governed by the force of morals. Guan Zi (管子) (c. 723-645 B.C.) was a famous politician of Qi state in Spring and Autumn period (770-476 B.C.), who was deemed a pioneer of Legalism. He said: "A sage king relies on the law not the wits, and on the regularity not the comments."[72] Shen Zi (慎子) (c. 390-315 B. C.), another founder of Legalism from Qi state, said: "The ruler should make law to govern the state rather than administer everything in person so that all disputes can be adjudicated according to law."[73]

Han Fei Zi (韩非子) (c. 280-233 B.C.) was the greatest synthesizer of the Legalist School. He was an able writer and composed a lengthy work bearing his name in fifty-five chapters. It was Qin, the state which more than any other applied his principles and thus conquered the other states, that established the first empire in China's history. Han Fei Zi combines *shi* (势) (power or authority) stressed by Shen Zi, *Shu* (术) (statecraft) stressed by Shen Buhai (申不害) (c. 385-337 B.C.), and *Fa* (法) (law or regulation) stressed by Shang Yang (商鞅) (c. 395-338 B.C.) in his theory. He thinks that these three together are "the implements of emperors and kings," no one of which can be neglected.[74]

Nonetheless, it is wrong to associate the thought of the Legalist School with jurisprudence. In modern terms, what this school taught was a theory and method of organization and leadership. If one wants to organize people and be their leader, one will find that the Legalist theory and practice are still instructive and useful, but only if one is willing to follow totalitarian lines.[75] For the Legalists, by faithfully applying their methods, a person of mere average intelligence could govern, and govern well.

As regards the law, Han Fei Zi maintains that it is one of the tools that a mediocre ruler can make use of in his governance. He said: "The law is not used to guard against those with virtues, but to help a mediocre ruler to curb robbers and bandits."[76] He also stresses: "If an average ruler can wield the law and statecraft, a clumsy artisan can follow the rules and measurements, then nothing will go wrong."[77]

Han Fei Zi holds that rule by law is better than rule by virtue:

---

[72] *See* GUAN ZI, GUAN ZI (管子) 312 (Fang Xuanling & Liu Ji eds., 2015).

[73] *See* GAO LIUSHUI & LIN HENGSEN, TRANSLATION AND ANNOTATION TO SHEN ZI, YINWEN ZI, AND GONGSUN LONG ZI (慎子、尹文子、公孙龙子全译) 42 (Gao Liushui & Lin Hengsen trans., 1996).

[74] FUNG, *supra* note 48, at 157-58.

[75] *Id.* at 157.

[76] *See* HAN FEI ZI, HAN FEI ZI (韩非子) 298 (Gao Huaping et al. eds., 2015).

[77] *See id.* at 302.

> [A]lthough taking the law as the foundation of state-governing is beset with difficulties at the beginning, it will benefit the governance in the long run. Although taking morals as the foundation of state-governing appears imbued with momentary joyfulness at the beginning, it will inevitably encounter sufferings and hardships in the future. The sage king will weigh the pros and cons, thus choose the restraints of law instead of the love of those with virtues.[78]

Han Fei Zi sets out the definition of law as follows:

> [T]he law is a system whose content is established and publicized by the government, and whose punishment goes deep into the mind of the people. Those who abide by the law should be rewarded, and those who violate the law should be penalized.[79]

The School of Legalism had experienced its stages of birth and development from the Spring and Autumn Period to the Warring States Period (475-221 B.C.) and reached its acme of political recognition in the Qin Empire (221-207 B.C.). In this process, the legal thought of the Legalist School had transformed from a dynamic and evolutionary philosophical system into a stagnant and rigid disciplinary system. In 207 B.C., the Qin Empire, taking Legalism as its governing ideology, finally collapsed due to its deviation from the social environment.

In the times prior to Han Fei Zi, one finds that another pioneering figure of the Legalist School, Shang Yang (also known as Lord Shang) holds a diachronic view on the law. He said:

> [H]ence, whenever it is possible to strengthen his state, the sage does not emulate the past; whenever it is possible to benefit the people, he does not follow rituals...The [founders of the] Three Dynasties did not use the same rituals but still became monarchs; the Five Hegemons did not employ the same laws but still became hegemons. Hence, the wise [man] creates laws, whereas the ignorant is restricted by them; the worthy revises rituals, whereas the unworthy is bound by them. A man who is bound by rituals is inadequate to debate undertakings; a man who is restricted by laws is inadequate to discuss changes.[80]

Lord Shang continued to say:

> [F]ormer generations did not adopt the same teaching: So which antiquity should one imitate? Thearchs and Monarchs did not repeat one another: so which rituals should one conform to? Fuxi and Shennong taught but did not punish; the Yellow Thearch, Yao, and Shun punished but did not implicate [the criminals'] families; and Kings Wen and Wu both established laws appropriate to the times and regulated rituals according to their undertakings. Rituals and

---

[78] See HAN FEI ZI, HAN FEI ZI (韩非子) 660 (Gao Huaping et al. eds., 2015).

[79] *See id.* at 620.

[80] SHANG YANG, THE BOOK OF LORD SHANG: APOLOGETICS OF STATE POWER IN EARLY CHINA 121 (Yuri Pines ed. & trans., 2017).

> laws are fixed according to the times; regulations and orders are all expedient; weapons, armor, utensils, and equipment, all are used according to their utility. Hence, I say: there is no single way to order the generation; to benefit the state, one need not imitate antiquity.[81]

Lord Shang emphasizes that a sage ruler must investigate the history, customs and roots of a state's affairs in order to make effective laws, which will facilitate order; otherwise, laws will lead people astray, and undertakings will be to no avail.[82] Clearly, Lord Shang believes that law should be evolutionary; that law should reflect a character which takes into account time, history, and social change.

Regarding legal temporality, Shen Zi contends that the ruler should not maintain the law as a fixed and synchronic system. He said:

> [G]overning a state without law entails chaos, but a state will decline if its ruler renders law unchangeable. If the ruler cannot enforce the law impartially, he loses the legitimacy of governance. It is the business for the people to abide by the law strictly, for the officials to defend the law with life, for the sovereign to change the law according to the times.[83]

In Han Fei Zi's opinion, the law should evolve at the same pace as the times to keep the society in order; governance must fit in with social realities to ensure its efficacy. He points out:

> [T]he state will be in chaos if the way to govern doesn't respond to the changes of the times; the state will decay if the penalties and prohibitions do not adjust according to the increasing numbers of those clever tricksters. So in the governance of a sage king, the law develops with the times, and penalties changes with the behaviors of tricksters.[84]

In the famous chapter titled "The Five Vermin" in *Han Fei Zi*, Han Fei Zi tells a story about "a man who stayed by a stump waiting for hares to come and dash themselves against it." It is stated as follows:

> [I]n Song State, one day a farmer plowing in the field found that a blind hare hashed itself headlong against the stump of a dead tree in his field and died. That day, he ate his fill. From that day on, he no longer went in for farming. From morning till night, he stayed by that stump, waiting for miracles to

---

[81] SHANG YANG, THE BOOK OF LORD SHANG: APOLOGETICS OF STATE POWER IN EARLY CHINA 122 (Yuri Pines ed. & trans., 2017).

[82] *Id.* at 164.

[83] GAO & LIN, *supra* note 73, at 57.

[84] HAN FEI ZI, *supra* note 76, at 759.

take place again. However, he waited in vain and became a laughingstock of the Song State.[85]

Han Fei Zi uses this fable to warn the rulers in a new age not to envy the ancient times and imitate word by word the old laws as eternal rules. Rather, they should investigate the realities of the present age and take corresponding measures of governance. If a ruler plans to govern his contemporary people with the ancient kings' institutions, in Han Fei Zi's view, he will be as ridiculous as that Song farmer. Such a metaphor vividly demonstrates the significant difference between the diachronic and synchronic views about law and governance.

However, the emphasis on temporality of the Legalist School was thoroughly eradicated by their own patron, the Qin Empire, after Han Fei Zi was persecuted to death in prison in 233 B.C. by Li Si (李斯) (?-208 B. C.), his fellow student of one and the same Confucian master, Xun Zi.[86] When Li Si became the Prime Minister of the First Emperor of Qin Dynasty, he submitted a memorial to Ying Zheng (嬴政) (the Emperor's name), which said:

> [O]f old, the world was scattered and in confusion...Men valued what they had themselves privately studied, thus casting into disrepute what their superiors had established. At present, Your Majesty has united the world, distinguished the black and white and established the highest authority. Yet there are those who with their private teachings mutually abet each other, and discredit the institutions of laws and instructions... If such conditions are not prohibited, the imperial power will decline above, and partisanships will form below.[87]

Then Li Si made a most drastic suggestion: all historical records, save those of Qin, all writings of the "hundred schools" of thought, and all other literature, save that kept in custody of the official Erudites, or works on medicine, pharmacy, divination, agriculture, and arboriculture, should be delivered to the government, and burned. As for any individuals who might want to study, they should follow the officials as their teachers.[88]

The aim of Li Si is transparent. He wanted to ensure that there should be but one eternal world, one authoritative government, one orthodox history, one undisputed way of thought, one fixed system of laws and institutions. With the implementation of this recommendation, in which an extreme example was described by later generations as the notorious "burning of books and burying of

---

[85] HAN FEI ZI, *supra* note 76, at 698.

[86] *Id.* at preface 1-2. (Despite the fact that Han Fei Zi and Li Si used to study under the mentoring of Xun Zi, the two didn't follow the Confucian doctrines in their political career. Rather, they both became a Legalist and are deemed as the great promoters of Legalism. However, it is still apparent that Xun Zi's stress on law's utility has made significant influence on his two students).

[87] *See* SIMA QIAN, SHI JI (史记) 81 (An Pingqiu ed., 2004), in TRANSLATION OF THE TWENTY-FOUR HISTORIES (二十四史全译) (Xu Jialu & An Pingqiu eds., 2004).

[88] *Id.*

Confucian scholars alive" (焚书坑儒), Qin Dynasty artificially negated the temporality of law and severed the link between history, tradition, and law.[89] The evolution and development of law were hence hampered in Qin, resulting in the final collapse of the Empire in 207 B. C. Since then, the School of Legalism has declined. However, the spirit of Legalism continues to recur, as the theory and examples discussed below indicate.

IV. Temporality in Chinese Jurisprudence under a Historical Culture Paradigm

Harrington's understanding of time as plural, social, and rhetorical furnishes a useful calibration in interpreting English medical law. However, law is local knowledge as to place, time, class, and a variety of issues.[90] Building on Harrington's understanding of time with the indicators of plurality, sociality, and rhetoric, this Article seeks to develop a historical culture paradigm through interpreting symbolic time-related sources from Chinese classics, and against China's imperial background, in order to further our understanding of the temporality of law in traditional China.

A. Temporal Plurality

Sally Engle Merry, in her well-known piece *Legal Pluralism*, points out that one who engages in historical study should throw away the notion that the pasts of traditional societies were unchanging when one engages in historical study.[91] She divides legal pluralism into categories of classic legal pluralism and the new legal pluralism. The former is derived from the research on the intersections of indigenous and European law in colonial and post-colonial societies, and the latter from the analysis of the law of advanced industrialized societies.[92] Although the traditional societies to which Merry refers therein are colonized ones, the classic legal pluralism should also apply to traditional China as well; that is to say, pluralism or "integral plurality" (using Fitzpatrick's term),[93] exists in the law of traditional China. Integral relations of mutual support between law and other social forms tend toward convergence, *i.e.*, elements of law are elements of other social forms. In traditional China, social forms such as custom and ideology when penetrated by state law change their nature fundamentally and become part of state law. Law is not a unitary phenomenon but constituted by a plurality of social forms. Hence, Fitzpatrick holds that law is an unsettled product of rela-

---

[89] *See* FAIRBANK & GOLDMAN, *supra* note 71, at 54-57.

[90] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 215 (1983).

[91] Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988).

[92] *Id.* at 872-74.

[93] *See* Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115 (1984).

tions with a plurality of social forms, and that therefore law's identity is constantly and inherently subject to challenge and change.[94]

Temporality as an integral part of law inevitably possesses such plurality. Santos contends that legal life is constituted by an intersection of different legal orders, namely, inter-legality, which is the phenomenological counterpart of legal pluralism.[95] Different customs and ideologies achieve legitimacy through law that is structured with cross-temporal and narrative contestation under different historical and cultural circumstances. It is plausible to say that intertemporality is a manifestation of inter-legality. Such temporal plurality in traditional Chinese law is not a product of legal doctrines, but a social fact of traditional China.

The scope of the Article does not allow for comparison in detail of the codes of traditional China to consider the various temporalities therein. Nevertheless, it is instructive to take the clan extermination and the corvée labor[96] in Qin and Han laws as examples for us to understand how conflicting temporalities expressed themselves in the penalties in traditional China.

Clan extermination in traditional China is a penalty that can be traced back to King Pan Geng (盘庚) of the Shang Dynasty (c. 1600-1046 B.C.). He once addressed his people as follows:

> [O]h! I have now told you my unchangeable purpose; — do you perpetually respect [my] great anxiety; let us not get alienated and removed from one another; share in my plans and thoughts, and think [only] of following me; let every one of you set up the true rule of conduct in his heart. If there be bad and unprincipled men, precipitously or carelessly disrespectful [to my orders], and taking advantage of this brief season to play the part of villains or traitors, I will cut off their noses, or utterly exterminate them. I will leave none of their children. I will not let them perpetuate their seed in this new city.[97]

The Book of Rites notes as well that those who betray Heaven and Earth shall be punished with clan extermination across five familial generations.[98]

According to Cai Shuheng, wiping out the clan of a convict is the relic of a blood feud that was commonplace in primitive societies.[99] Such penalty not only eliminates the offender's physical existence in space, but also eradicates both his ancestral and descendant lineage in time. This is what Pan Geng means by de-

---

[94] See Peter Fitzpatrick, Law and Societies, 22 OSGOODE HALL L.J. 115, 138 (1984).

[95] Boaventura de Sousa Santos, *Law: A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279, 298 (1987).

[96] Corvée labor is a form of unpaid, forced labor, which is generally intermittent and lasts limited periods of time.

[97] CONFUCIUS, *supra* note 50, at 110.

[98] WANG PINZHEN, DA DAI LI JI WITH EXPLANATORY NOTES (大戴礼记解诂) 256 (Wang Wenjin ed., 1983).

[99] CAI SHUHENG, THE HISTORY OF CHINESE CRIMINAL LAW (中国刑法史) 152 (1983).

claring "I will... exterminate them. I will leave none of their children. I will not let them perpetuate their seed in this new city." Clan extermination carries more significant temporal penality than any other punishment in traditional China.

Li Si, the aforementioned Prime Minister of Qin, ended up being executed under the order of Hu Hai (胡亥) (230-207 B.C.), the Second Emperor of Qin, with the Five Punishments, plus chopping at the waist and clan extermination in 208 B. C. Before the punishments, he turned his head and said to his son who was about to be executed with him: "I wish we could go out of the east gate of Shangcai City with the yellow dog on the leash, and hunt together the cunning hares like we did in the old days. Is it possible anymore?"[100]

The early Han Dynasty inherited Qin's apparatus and institutions. Hence, clan extermination was kept in Han law. Liu Bang (刘邦) (256-195 B.C.), the First Emperor of the Han Dynasty, also used clan extermination to punish rebels.[101] However, due to the temporal perishing effect of clan extermination, it is conceived of as the very symbol of cruelty of the Legalist Qin law, which demonstrates a sanction method that seeks to eradicate the condemned's past, present, and future.

With the Huang-Lao rehabilitation policy being taken by later Han rulers, the legal system evolved toward, to a certain extent, penal leniency, one consequence of which was that the temporal extermination of the prisoner appeared less legitimate in the legal norms.

Emperor Wen of Han (汉文帝) (202-157 B.C.), the fourth son of Liu Bang, in the second year of his reign issued a decree repealing clan extermination.[102] Even if the offender committed open rebellion, only he himself was put to death without implicating his family or clan.[103] Therefore, Qin law's temporal punitiveness was diminished by a legal system that removed corporal extinction on the lineal dimension from its sanction spectrum. However, in order to guard against threats to their throne, the imperial monarchs chose to resurrect clan extermination from time to time to eliminate political rivals and rebels, so that clan extermination can be found in the imperial codes such as *Wei Code (魏律)*, *the Northern Qi Code (北齐律)*, *Kaihuang Code (开皇律)*, *Tang Code (唐律)*, *Ming Code (明律)*, and *Qing Code (清律)*.[104]

The abolishment and resurrection of clan extermination in law imply that the intertemporality of penality in traditional China unfolds with the change of ruling strategies. It switched from the utter atemporality in lineage destruction to

---

[100] SIMA QIAN, *supra* note 87, at 1126.

[101] *Id.* at 138-39.

[102] CAI, *supra* note 99, at 154.

[103] *Id.*

[104] *Id.* at 154-55.

the preservation of the convict's lineal temporality in the relative mercy of execution without implication, and *vice versa* at different historical stages.

Another instance to showcase temporal plurality in law of traditional China is compulsory servitude. The Legalist Qin law prescribes that any adult male who doesn't follow the timetable to report his arrival at the location of corvée labor or border garrison should be beheaded.[105] The first nationwide peasant uprising in China's history, the Uprising of Daze Town in 209 B. C, which is also known as the Uprising of Chen Sheng (陈胜) (?-208 B.C.) and Wu Guang (吴广) (?-208 B.C.), can be conceived as resulting directly from such temporal norms in Qin law.[106]

According to Sima Qian (司马迁) (145 or 135-? B.C.), Chen Sheng and Wu Guang were forced to lead a team of some 900 laborers to garrison a borderline spot. In the middle of their long travel to the destination, the troop was blocked by heavy rain, which would definitely make them late for commencement of their labor service. In accordance with Qin law, they all would be beheaded.[107] As a result, they desperately rose in revolt against Qin Dynasty, leading to the eventual collapse of the Empire.

It is apparent in this scenario that the state law and people's everyday life were marked by diverse temporalities. Regardless of any reasonable excuses, the Legalist Qin law prescribes a cruel and fierce penalty for those who miss the corvée timetable. In reality, however, those peasants in 209 B.C. were unable to do anything to carry on their scheduled march in the face of torrential rain. In other words, the death penalty without exceptions is against human nature, or law of nature. The Qin law's temporal norms conflicted with the actual temporality of everyday life of the people in that time.[108] Contradictory temporalities are not uncommon in many societies. A similar example was demonstrated by Henrike Rau in her account of the work practices of former East and West Germans in a reunified Germany. Rau shows that East German workers (coerced into the temporal strictures of the West) provoked criticism from the state regard-

---

[105] *See* SIMA QIAN, *supra* note 87, at 769.

[106] *Id.*

[107] Although scholars don't find such harsh stipulations in the bamboo slips excavated in 1975 from Qin Tombs in Yunmeng County, Hubei Province, upon which parts of the Code of the First Emperor of Qin Dynasty was written, we cannot rule out the possibility that such a harsh law existed in the rule of the first, and more likely the second Emperor of Qin; and Shi Ji by Sima Qian, the prime authority of the Qin-Han histories, unequivocally records the existence of such a law. *See* SIMA QIAN, *supra* note 87, at 769; *cf.* Yu Jingmin, *A Query About the Law of "Being Beheaded for Corvée Registration Behind Schedule"* ("失期，法皆斩" 质疑) 1 J. CHINESE HIST. STUD. (中国史研究) 161 (1989).

[108] For the relationship of everyday life and national temporalities, see Tim Edensor, *Reconsidering National Temporalities: Institutional Times, Everyday Routines, Serial Spaces and Synchronicities,* 9 EUR. J. SOC. THEORY 525, 529-531, 540 (2006).

ing their slow pace of working and the length of time they take for breaks, practices to which an East German worker had been accustomed.[109]

Neither was the Taoist tendency in the earlier law of Han Dynasty congruent with the severe legalist temporality, nor was the Confucianized law since the rule of Emperor Wu. As a lenient ruler, apart from abolishing the four corporal punishments save the death penalty, Emperor Wen in light of the temporal penality of Qin law particularly reformed the system of servitude. Common people's compulsory labor was relieved, and offenders' penal servitude was fixed in time. A convict's lifelong corvée labor was replaced by a fixed-term servitude, based on the nature of his crime.[110] The transformation of the explicit temporal norms in law reflects the fact that the society of the early part of Han Dynasty was immersed in the Learning of Huang (the Yellow Thearch (黄帝)) and Lao (Lao Zi (老子)), which served to undo what the Qin government had done, and to give the country a chance to recuperate from its long and exhausting wars.[111] It is in this way that the different temporalities between Qin and the early stage of Han unfold themselves in the law. It corroborates Foucault's view that the penalty transforms, modifies, establishes signs, and arranges obstacles on a temporal axis.[112]

When Emperor Wu, the grandson of Emperor Wen, came to the throne, the Confucianization of law manifested itself through the so-called "incorporation of the essentials of Confucianism (*li*) into codes."[113] The law by that time had evolved onto a temporal dimension with a mixed ideology, which Fung defined as "being Confucianists in appearance but Legalists in reality."[114] However, such summary only establishes a superficial narrative of the process. The effect of combination of *li* and law will be examined in the subpart C *infra* to demonstrate how *li* brought into full play the rhetoric of virtue after the socialized temporality is discussed in the following subpart.

B. Temporal Socialization

Incorporation of *li* into law brought an atmosphere of equity and mollification to the governance of Han, as opposed to the turmoil and disorder in Qin caused by its draconian law. Suffice it to say that the legal system of Han was invigorated by the need of the people and the trend of the times.

---

[109] *See* Henrike Rau, *Time Divided-Time United? Temporal Aspects of German Unification*, 11 TIME & SOC'Y 271, 274-275, 278, 281-282 (2002).

[110] HAN SHU-XING FA ZHI WITH EXPLANATORY NOTES (汉书刑法志注释) 37 (Xin Ziniu ed., 1984).

[111] FUNG, *supra* note 48, at 213-14.

[112] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 107 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

[113] *See* T'UNG-TSU CH'Ü, *supra* note 65, at 373-76,

[114] FUNG, *supra* note 48, at 215.

Before turning to the examination of temporal socialization, it is necessary for us to recapitulate the distinction between physical time and social time. Physical time is used to indicate astronomical movements and sequence of natural phenomena happened on earth, while social time is used to mark the process of social events and mankind's activities of production.

In fact, a temporal philosophy had been developed earlier to link natural dynamics with human affairs in China's history. The *Book of Changes* (the *I Ching*) reads:

> XVI. 1. In Yü we see the strong [line] responded to by all the others, and the will [of him whom it represents] being carried out; and [also] docile obedience employing movement [for its purposes]. [From these things comes] Yü [the Condition of harmony and satisfaction].
>
> 2. In this condition we have docile obedience employing movement [for its purposes], and therefore it is so as between heaven and earth; how much more will it be so [among men] in 'the setting up of feudal princes and putting the hosts in motion!'
>
> 3. Heaven and earth show that docile obedience in connection with movement, and hence the sun and moon make no error [in time], and the four seasons do not deviate [from their order]. The sages show such docile obedience in connection with their movements, and hence their punishments and penalties are entirely just, and the people acknowledge it by their submission. Great indeed are the time and significance indicated in Yü![115]

Regarding paragraph 2, translator James Legge supposes that the analogy between natural phenomena, and human and social experiences comes into play.[116] However, as regards paragraph 3, Legge does not comprehend "why does the writer introduce the subject of punishments and penalties?"[117] The answer can be provided by this subpart.

Confucius also said: "To Govern a state of middle size, one must dispatch business with dignity and good faith; be thrifty and love all men; mobilize the people only at the right times [so as not to interfere with the seasonal tasks of agriculture]."[118]

The term *shi* (时) in Chinese originally derived from ancient astrology and was used to indicate the seasonal calendar of a year.[119] Therefore, it is plausible to say that the initial conception of temporality in China relates deeply to seasons

---

[115] THE SACRED BOOKS OF CHINA: THE I CHING 227 (James Legge trans., 2d ed. 1963).

[116] *Id.* at 228.

[117] *Id.*

[118] CONFUCIUS, *supra* note 51, at 4, 109.

[119] SUN XINGYAN, SHANG SHU WITH EXPLANATORY NOTES (尚书今古文注疏) 10-12 (Chen Kang & Sheng Dongling eds., 1986).

and nature. The philosophy of nature is treated by scholars as the School of *Yin* and *Yang* with the "Five Elements ((五行) *wu xing*)" theory, which Schwartz termed as "correlative cosmology," and Needham "symbolic correlations."[120]

It goes beyond the ambit of the Article to elaborate the School of *Yin* and *Yang*, of which both Schwartz and Needham have offered detailed analyses in their works. It is sufficient for my purpose to say that the *Yin* and *Yang* are conceived of as two mutually complementary principles or forces, of which *Yang* represents masculinity, light, warmth, dryness, hardness, activity, etc., while *Yin* represents femininity, darkness, cold, moisture, softness, passivity, etc. All natural phenomena result from the ceaseless interplay of these two forces. The Five Elements theory centers on the mechanism of the unvarying uniformity which came to be known as Mutual Conquest or Cyclical Conquest: wood overcoming earth, metal overcoming wood, fire overcoming metal, water overcoming fire, and earth overcoming water, at which point the cycle commences all over again.

The cyclical recurrence of the elements according to the order of their mutual production through the seasons of the year became much more stylized since the Han Dynasty. Such correlative thinking was the key to the socialization of time in traditional China. In Needham's view, while the pre-Qin School of *Yin* and *Yang* as "naturalists", had been favorable to scientific enterprise, the Han Confucians as "phenomenalists" employing the correlative cosmology were basically concerned with human and sociopolitical affairs.[121] Within nature, in the cycle of elements and the cycle of the four seasons, we can have the resonances of ongoing harmony. However, human beings have the power to destroy the harmonic system by creating dissonant resonance, that is, the disordering acts of rulers and of humans in general.[122] With the development of correlative cosmology, which I would rather call "socialized cosmology," one finds the most detailed and architectonic synthesis made by the scholar-official under the Emperor Wu of Han, Dong Zhongshu (董仲舒) (179-104 B.C.), what might be called "cosmological Confucianism," in his great work *Chunqiu Fan Lu (春秋繁露)*.

Dong Zhongshu said:

> [C]ollected together, the ethers of the universe constitute a unity; divided, they constitute the *Yin* and *Yang*; quartered, they constitute the four seasons; sundered, they constitute the Five Elements. These elements represent movement. Their movement are not identical. Therefore, they are referred to as the

---

[120] *See* BENJAMIN I. SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA 350, 352, 357, 360 (1985); 2 JOSEPH NEEDHAM, SCIENCE AND CIVILISATION IN CHINA 232-78 (1956). For the relationship of cosmology and power in the political process of traditional China, *see generally* AIHE WANG, COSMOLOGY AND POLITICAL CULTURE IN EARLY CHINA (2000).

[121] NEEDHAM, *supra* note 120, at 247.

[122] SCHWARTZ, *supra* note 120, at 365-66.

> Five Movers. These Five Movers constitute five officiating powers. Each in turn gives birth to the next and is overcome by the next but one in turn.[123]

In Dong Zhongshu's opinion, wood, fire, metal, and water each preside over one of the four seasons, while earth, occupying the central position, gives assistance to all of them. The alteration of growth and decay as one season passes into another results in a yearly cycle of change. This alteration, furthermore, is caused by the operations of *Yin* and *Yang*.[124]

Dong Zhongshu observes:

> [W]ood produces fire, fire produces earth, earth produces metal, metal produces water. Water represents winter, metal represents autumn, earth represents late summer *i. e.* the third and last month of summer, fire represents summer, wood represents spring. Spring presides over birth; summer presides over growth; late summer presides over rest; autumn presides over harvest; winter presides over storage, which is the achievement of winter.[125]

He further opines:

> [A]ll the evil are *Yin*, all the virtuous are *Yang*; *Yang* is virtue, *Yin* is punishment. Punishment is amoral but submissive to morals so that it is analogous to adaption [to circumstances] ...Heaven takes *Yin* as adaption, and *Yang* as principle; *Yang* moves southward, *Yin* moves northward; principle is used in the times of prosperity, adaption is used in the times of chaos. The display of principle and concealment of adaption indicate that Heaven prefers virtue to punishment. Hence *Yang* is the virtue of Heaven, *Yin* is the punishment of Heaven...The ether of *Yang* breeds, the ether of *Yin* kills.[126]

With these correlations, on the one hand, Dong Zhongshu linked natural time with the theory of Five Elements, which itself had been socialized with the human activities and dynastic alterations by the Naturalists;[127] therefore, social significance was injected into the seasonal temporality for agriculture through the theory of Five Elements. On the other hand, Dong Zhongshu deepened the socialization of cosmology by imposing disorder and order of human society on the ethers of *Yin* and *Yang*. With the socialized cosmology underpinned by the theories of Five Elements and *Yin* and *Yang*, Dong Zhongshu created an ideological instrument to introduce the temporality of cosmological Confucianism into the law of Han. Before he could complete this chain, however, he needed to take

---

[123] DONG ZHONGSHU, CHUNQIU FANLU (春秋繁露) 487 (Zhang Shiliang et al. eds., 2012); 2 FUNG YU-LAN, A HISTORY OF CHINESE PHILOSOPHY 21-22 (Derk Bodde trans., 1953).

[124] FUNG, *supra* note 123, at 23.

[125] *See* DONG, *supra* note 123, at 394.

[126] *See* DONG, *supra* note 123, at 417.

[127] NEEDHAM, *supra* note 120, at 238.

human activities as the medium, through which seasonal temporality could transform into a legal element.

He maintains:

> [S]pring is the symbol of love, summer is the symbol of happiness, autumn is the symbol of harshness, and winter is the symbol of grief. Therefore, it is the law of the four seasons to demonstrate these four attributes...The *Yang* of spring and summer and the *Yin* of autumn and winter are not only reflected in Heaven but also in human. Without the ether of spring, how can a man exercise universal fraternity and tolerance? Without the ether of autumn, how can a man establish his authority and achieve success? Without the ether of summer, how can a man enjoy a prosperous and restful life? Without the ether of winter, how can a man mourn the dead and arrange the funeral?[128]

Now that Dong Zhongshu had attached social behaviors to seasonal times as symbols, he would spontaneously emphasize a legal system that does not contradict such temporal narratives. He further holds:

> [T]he sage, in his governing, duplicates the movements of heaven. Thus, with his beneficence he duplicates warmth and accords with spring, with his conferring of rewards he duplicates heat and accords with summer, with his punishments he duplicates coolness and accords with autumn, and with his executions he duplicates coldness and accords with winter. His beneficence, rewards, punishments, and executions are different in kind, but their work is same, all being instruments whereby the king completes his virtue. Beneficence, rewards, punishments, and executions match spring, summer, autumn, and winter respectively, like the fitting together of a tally. Therefore, I say that the king is co-equal with Heaven, meaning that Heaven in its course has its four seasons, while the king, in his, has his four ways of government. Such are what Heaven and man share in common.[129]

With this co-equalization, Dong Zhongshu realizes the socialization of temporality, by matching legal practice (*i.e.*, beneficence, rewards, punishments, and executions) with the properties of the seasons.

He prescribes:

> [T]he four ways of government have their respective positions like the four seasons have their respective time. The four ways of government cannot interfere with one another like the four seasons cannot interfere with one another; the four ways of government cannot change their positions like the four seasons cannot change their positions.[130]

---

[128] *See* DONG, *supra* note 123, at 433-34.

[129] *Id.* at 470; FUNG, *supra* note 48, at 198.

[130] DONG, *supra* note 123, at 471.

Dong Zhongshu's elucidation enables the administration of justice to traverse both the juridico-political sphere and the natural-philosophical one. He thereby established a Confucian system taking the Heaven and Earth, four seasons, *Yin* and *Yang*, and Five Elements as the main structures. Based on predecessors' theories of linking Five Elements (Five Virtues) with the four seasons,[131] Dong Zhongshu introduces into Confucianist governance the necessity of compliance with seasonal temporality, which can ensure the harmony among the Five Elements and ethers of *Yin* and *Yang*.

He reminds the rulers that they must, in their governance of the state, pay attention to the discrepancy among the phases of natural time so as to implement law correspondingly. Through the mystical co-equalization between physical and social perceptions, he establishes the parallel between cosmology and penal law. Henceforth the correlation of physical time and social time was explicitly formulated in the law of Han. This is the official start of the penal policy called "executions in autumn and winter" for Han and later dynasties in traditional China.

C. Temporal Transcendence of the Legal Rhetoric

Zou Yan (邹衍) (c. 305-240 B.C.), the pioneer of the School of *Yin* and *Yang*, who first posited a vast specific system of correlative categories embracing all phenomena both human and natural, was best known for his correlation of the Five Elements with the cyclical patterns of history. Zou Yan himself uses another term – the "Five Virtues ((五德) *wu de*)."[132] Zou Yan said:

> [E]ach of the virtues is followed by the one it cannot conquer:
>
> The Dynasty of Shun (one of the legendary thearchs) ruled by the virtue of Earth, the Xia Dynasty (c. 2070-1600 B.C.) ruled by the virtue of Wood, the Shang Dynasty (c. 1600-1046 B.C.) ruled by the virtue of Metal, and the Zhou Dynasty (1046-256 B.C.) ruled by the virtue of Fire.[133]
>
> When some new dynasty is going to arise, Heaven exhibits auspicious signs to the people. During the rise of Huang Di (the Yellow Thearch) large earthworms and large ants appeared. He said, 'this indicates that the element Earth is in the ascendant, so our color must be yellow, and our affairs must be placed under the sign of Earth.'[134]
>
> During the rise of Yü the Great (founder of Xia Dynasty), Heaven produced plants and trees which did not wither in autumn and winter. He said,

---

[131] *See* LÜ BUWEI, LÜSHI CHUNQIU (吕氏春秋) (Gao You et al. eds., 2014).

[132] SCHWARTZ, *supra* note 120, at 357 n.17. Though Schwartz chose the English word "power" to refer to the Chinese word *de* (德) which directly translates to "virtue", he notes that the word is used to refer to human spiritual and moral power.

[133] NEEDHAM, *supra* note 120, at 238.

[134] *Id.*

'this indicates that the element Wood is in the ascendant, so our color must be green, and our affairs must be placed under the sign of Wood.' [135]

During the rise of Tang (汤) (founder of Shang Dynasty), the Victorious metal sword appeared out of the water. He said, 'this indicates that the element Metal is in the ascendant, so our color must be white, and our affairs must be placed under the sign of Metal.' [136]

During the rise of King Wen of the Zhou (周文王) (founder of Zhou Dynasty), Heaven exhibited fire, and many red birds holding documents written in red flocked to the altar of the dynasty. He said, 'this indicates that the element Fire is in the ascendant, so our color must be red, and our affairs must be placed under the sign of Fire. Following Fire, there will come Water. Heaven will show when the time comes for the power of Water to dominate. Then the color will have to be black, and affairs will have to be placed under the sign of Water. And that dispensation will in turn come to an end, and at the appointed time, all will return once again to Earth. But when that time will be we do not know.' [137]

This was why, when Qin Shi Huang-Di (秦始皇帝) (the first Emperor of Qin Dynasty) came to the throne of the unified empire, Qin Dynasty was considered to have conquered by the virtue of Water.

Since the Han Dynasty under the rule of Emperor Wu took the suggestion of Dong Zhongshu to establish Confucianism as the official ideology, *Li* or ritual had become the basis for the persuasiveness of the Confucian temporality in Han law. As Confucius stresses that the ruler should mobilize the people only at the right times so as not to interfere with the seasonal tasks of agriculture,[138] a society based on cosmological Confucianism should comply with the temporal frame set up in its law.

How then did the Confucianists set up their discourse on the temporality of law? The crux of the question lies in the method, by which the Han Confucians adjudicated cases. It is the rhetoric of ritual (*li*) that facilitated a legal transcendence across the temporal dimensions of past, present, and future.

According to Sartre, temporality is an organized structure, whose three elements, past, present, and future, should be considered as the structured moments of an original synthesis, that is, temporal totality.[139] It is accepted that the early Han Code, to a large extent, inherited the laws of Qin.[140] It seems that the first

---

135 NEEDHAM, *supra* note 120, at 238.

136 *Id.*

137 *Id.*

138 CONFUCIUS, *supra* note 51, at 4, 109.

139 JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 107 (Hazel E. Barnes trans., 1993).

140 *See* YONGPING LIU, ORIGINS OF CHINESE LAW 259-66 (1998).

Han Emperor, Liu Bang, initially knew little about the importance of the laws employed by the royal court of Qin. It was Han's founding ministers such as Shusun Tong (叔孙通), Xiao He (萧何), and Zhang Cang (张苍), who aided Liu Bang in making Han Code by encompassing and building upon Qin Code. The laws of Qin can be deemed still alive in the early stage of Han with their harshness and cruelty basically unchanged. Therefore, the past Qin law subsisted in early Han's present and remained in force toward a certain future.

It was until the rule of the Emperor Wu that the Qin's penal influence were to be alleviated when those Confucianist officials transcended back to a more distant past, that is, the times of Zhou Dynasty. For Han law to reflect this transcendence, scholar-officials such as Dong Zhongshu had to employ the rhetoric of *li*, whose role was to conserve the ancient virtue.[141]

In such a process, Dong Zhongshu, the famous Confucianist scholar-official under Emperor Wu, invokes the principles set down in the *Chunqiu (春秋)* (*Spring and Autumn Annals*) to adjudicate cases. His work, the *Chunqiu Jue Yü* (春秋决狱) (*Judging Cases by Chunqiu*), in which 232 cases were included,[142] initiated the process of "incorporation of rituals into codes." This process was propelled by the legal argumentation and persuasion in terms of the virtue of the Zhou past.

Due to the limited space of this Article, the virtue rhetoric will be demonstrated through one of the six *Chunqiu Jue Yü* cases that have been preserved: A did not have biological offspring. He adopted as his son a boy B who he found abandoned by the roadside. After A brought up B, one day, B was suspected of murder. When A received the indictment of B, he harbored B. The legal question here was what kind of crime A had committed. According to Han code, a man should be severely punished for his hiding murderers. But Dong Zhongshu cited a verse from the Book of Odes: "The Mulberry insect has young ones, and the sphex carries them away" to declare that there should be no legal difference between a natural child and an adopted one. On that basis, Dong Zhongshu further adjudicated that A should not be punished by law citing a principle established in the *Chunqiu* that a father should be allowed to shelter his son.[143]

In *The Analects*, Confucius maintains that a farther covers up for his son, a son covers up for his father, and there is integrity in what they do.[144] Such rhetoric constitutes a communication form and a decision making strategy based on

---

[141] CH'Ü, *supra* note 65, at 368.

[142] Unfortunately, this work was lost long ago. Only six cases can be found scattered in historical records. *See* CHENG SHUDE, RESEARCH ON THE LAWS OF THE NINE DYNASTIES (九朝律考) 212-13 (2010). However, Dong Zhongshu explained in his work *Chunqiu FanLu* the main principle of judging cases by the *Chunqiu*, the Book of Changes, the Book of Odes, the Book of History, and the Book of Rites.

[143] *Id.* at 212.

[144] CONFUCIUS, *supra* note 51, at 63.

persuasion or conviction through the mobilization of the argumentative potential of accepted verbal and nonverbal sequences and artifacts.[145] This argumentative potential conformed to the political needs of the Emperor Wu to establish a single unitary authority for the whole empire, which had to mobilize the Confucian ethics as its exclusive ideology to ease the fierce social conflicts arising in the country due to his ambitious ruling.

It is plausible to regard *Chunqiu Jue Yü* as the way, in which Han Dynasty connected past, present, and future in its legal system. Since the Han Code was still harsh and rigid, Dong Zhongshu made use of adjudication to introduce the past's *li* into the present's law so as to make right the statute's rigidness and improve the state governance for the future. Henceforth the judicial practice of *Chunqiu Jue Yü* was in operation until the formulation of the Code of Tang Dynasty (618-907 A.D.), which comprehensively absorbed the Confucian classics into its articles. Through *Chunqiu Jue Yü*, Han law transcended present, past, and future. The past at its very source is bound to a certain present and to a certain future, to both of which it belongs.[146]

The advantage of *Chunqiu Jue Yü* is its flexibility, which alleviated the rigidness and cruelty of the Han statute law. On the one hand, *Chunqiu Jue Yü* initiated the Confucianization of the law; on the other hand, it promoted the diversion of traditional justice in China from harshness to harmony. *Chunqiu Jue Yü* corresponds to the doctrine of precedent in the common law which reflects an "enduring time," requiring lawyers to be mindful of what went before when deciding for the future.[147] Both the common law and *Chunqiu Jue Yü* depend on a system of *stare decisis*: one is of the antecedent case law, the other the antecedent moral law.

The Confucianization of law brought by *Chunqiu Jue Yü* started a temporal transformation of the concept of law from Qin's synchronic Legalism to Han's diachronic Confucianism. The connection of the past, present, and future formed in Confucianized law was conducive for imperial China's sustained existence for over two thousand years as an ideologically stable society, in which the Confucian ideology was coupled with the imperial political structure of a single unitary authority. The diachronic coupling of *li* and law over the whole imperial period of China defined for scholar-officials the purpose of their judicial duties, which was not arbitrary punishment but moral persuasion.[148]

---

[145] DE SOUSA SANTOS, *supra* note 31, at 112.

[146] In the scenario of traditional China, the source is the rhetoric of the Confucian ideology. *Cf.* SARTRE, *supra* note 139, at 110.

[147] GURVITCH, *supra* note 21, at 31.

[148] CH'Ü, *supra* note 65, at 341.

V. Temporal Continuity in the Law of Contemporary China

The Nationalist Government (1925-1949 A.D.) established a Western-style legal system, which was composed of the so-called Six Laws – the Constitution, the Civil Code, the Criminal Code, the Codes of Civil and Criminal Procedure, and administrative law. The Six Laws served as subject-matter headings under which other laws could be placed. When the war was won by the Communist Party of China (CPC) in 1949, one of the first acts of the new government was to abolish all the laws of the reactionary Nationalist government.[149] Shortly thereafter, the Law of China entered an age of overall Sovietization. Regrettably, during the Great Proletarian Cultural Revolution from 1966 to 1976, Chinese traditional legal culture was disrupted with Confucianism being repudiated as the main target.[150]

However, as Jones points out, it is true that the only overt references in the new China to the law of the old were negative, but it is not easy to escape one's past, particularly for Chinese, and there was much of old China hidden in the new, whether the new leaders recognized it or not.[151] The linking of past and future is part of the structure of human experience and intellectual human action in law.

In 2011, the National People's Congress of the People's Republic of China (PRC) declared:

> [B]y the end of August 2011, the Chinese legislature had enacted 240 effective laws including the current Constitution, 706 administrative regulations, and over 8,600 local regulations. As a result, all legal branches have been set up, covering all aspects of social relations; basic and major laws of each branch have been made; related administrative regulations and local regulations are fairly complete; and the whole legal system is scientific and consistent. A socialist system of laws with Chinese characteristics has been solidly put into place.[152]

China had accomplished a formalist rule of law system, which was imposed on the society through a top-down approach dominated by the CPC.[153] Under the

---

[149] *See* HE QINHUA, AN OUTLINE HISTORY OF LEGAL SCIENCE IN CHINA 407-09 (Fu Junwei et al. trans., 2016).

[150] *See id.* at 421-23.

[151] William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 21 (C. Stephen Hsu ed., 2003).

[152] *The Socialist System of Laws with Chinese Characteristics*, NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 28, 2011), http://www.npc.gov.cn/englishnpc/c2761/201110/cea25fcbc9894e51861732d15bacb163.shtml.

[153] RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 153 (2002).

influence of legal formalism, China has launched numerous reforms particularly aimed at the judicial field.[154]

Over the past nine years, however, the whole landscape of the reforms in China has regressed to a gloomy one.[155] It is claimed that China's "reform era" has ended, and its legal and political future are likely no brighter than its Maoist past.[156] While it appears that the commitment to legality is destined to weaken again, some scholars hold a contrarian opinion, that even if China is deepening its dictatorship, it is nonetheless doing so through harnessing the organizational and legitimizing capacities of law such as empowering courts against other state and Party entities, and bringing political powers that were formerly the exclusive possession of the Party under legal authorization and regulation.[157]

Such a turn toward law, in my opinion, is similar to what Xingzhong Yu called "state legalism," which is a combination of authoritarian ideology and distorted liberal legal institutions.[158] According to Postema, law as command is a normative ordering for subjects, which purports to guide their deliberations and actions by pre-empting other reasons they may have to act.[159] It is the command model that has played a dominant role in Chinese legal development since 2013. Law as a system of commands accords with the Chinese version of legal positivism, which is a form of constructivist pragmatism. It is to remove all limitations on the power of the legislator that would result from the assumption that he is entitled to make law only in a sense which substantively limits the content of what he can make into law.[160]

In a key publication released on August 26, 2021, the Publicity Department of the CPC Central Committee claims:

> [R]especting and practicing the rule of law are essential to good governance and the implementation of the Party's policies. The CPC is committed to law-based governance and always applies law-based thinking and approaches to consolidate its governing status, improve its approach to governance, and strengthen its governance capability...The Party provides guidance for legislation, guarantees law enforcement, supports judicial justice, and plays an exem-

---

[154] *See, e.g.*, Tao Wang, *China's Pilot Judicial Structure Reform in Shanghai 2014-2015: Its Context, Implementation and Implications*, 24 WILLAMETTE J. INT'L L. & DISP. RES. 53, 54 (2016).

[155] *See, e.g.*, CARL MINZNER, END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE (2018).

[156] See, e.g., CARL MINZNER, END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE 14 (2018).

[157] Taisu Zhang & Tom Ginsberg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 309-10 (2019).

[158] Xingzhong Yu, *State Legalism and the Public/Private Divide in Chinese Legal Development*, 15 THEORETICAL INQ. L. 27, 34 (2014).

[159] *See* Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 PHIL. ISSUES 470, 474 (2001).

[160] HAYEK, *supra* note 37, at 217.

> plary role in abiding by the law. It holds that respecting the Constitution is essential to law-based governance. The Party is improving its working mechanisms for exercising law-based governance to ensure effective implementation of its policies through the law, and to modernize China's governance system and capacity.[161]

The instrumentalist attitude toward law in post-1978 China cannot be more prominent, in light of the fact that over a spread of a mere two years, the Constitution of the PRC was substantially amended in March 2018, the Civil Code of the PRC originally enacted in May 2020, and the Law on Safeguarding National Security in Hong Kong Special Administrative Region (HKSAR) resolutely promulgated in June 2020 under the command and dominance of the top leadership of China.[162] I have time enough only to sketch some implications for our understanding of the temporalities of the three laws. To analyze the comprehensive impacts of the three legal documents upon the Chinese state and society must be left to another occasion.

Commentators have demonstrated some significant temporal dynamics of the three laws for China's legal development. Zhai concludes that:

> [T]he 2018 amendment, together with the unprecedented institutional reforms it aims to archive, has altered the reforming identity of the 1982 Constitution of the PRC in its original sense, ...[and] that the reforming identity of the 1982 Constitution lacks a normative bound, leaving only fluidity within the 1982 Constitution in both theory and practice.[163]

---

[161] *The CPC: Its Mission and Contributions*, STATE COUNCIL INFORMATION OFFICE, THE PEOPLE'S REPUBLIC OF CHINA, http://english.scio.gov.cn/topnews/2021-08/26/content_77715570.htm (Aug. 26, 2021).

[162] In January 2018, the CPC Central Committee moved the 2018 amendment to the Constitution to the Standing Committee of the National People's Congress. *See Suggestions of the Central Committee of the Communist Party of China on Amending Parts of the Constitution*, COMMUNIST PARTY OF CHINA CENTRAL COMMITTEE (Feb. 25, 2018, 5:46 PM), http://www.gov.cn/xinwen/2018-02/25/content_5268679.htm. In October 2014, the Fourth Plenary Session of the Eighteenth CPC Central Committee publicized the "Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law," in which the top leadership clearly commanded that the civil law should be codified. *See Decision of the Central Committee of the Communist Party of China on Several Major Issues in Comprehensively Promoting the Governance of the Country by Law*, PEOPLE'S DAILY ONLINE (Oct. 28, 2014, 7:01 PM), http://politics.people.com.cn/n/2014/1028/c1001-25926121-3.html.The 20th Session of the Standing Committee of the 13th National People's Congress adopted the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region in light of intermittent civil disobedience movements resulted from the relevant legislative attempts made by the HKSAR Government since 2003. *See National Security Law of the Hong Kong Special Administrative Region of the People's Republic of China*, NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (July 1, 2020, 7:17 AM), http://www.npc.gov.cn/npc/c30834/202007/3ae94fae8aec4468868b32f8cf8e02ad.shtml.

[163] Han Zhai, *A Reforming Constitution Never Fails?: The Latest Evolution of China's 1982 Constitutional Order in the "New Era"*, 6 CONST. STUD. 81, 86 (2020).

Clearly, this unbounded constitutional fluidity allows the Amendment to transcend the temporality of the 1982 Constitution, enchaining past and future in China's constitutional order.

Among the institutional arrangements in the Amendment, removal of the term limit of the state president and the establishment of the Supervisory Commission system ("SC system") are the most controversial.[164]

The term limit of state president was enshrined in the original version of the 1982 Constitution as a remarkable result of the limited political reform led by Deng Xiaoping after the Cultural Revolution.[165] It is the first time in Chinese history that the reign of the top leader was placed within a temporal framework of the law, that is, a term limit of no more than two consecutive terms (ten years).

With the term limit in the Constitution, China had established a sort of legal convention that applies to the power structure of China's politics, realizing the transfer of the top power on a generally accepted temporal basis. Nevertheless, removal of the term limit in the Constitution may cause the diachronic power dynamics in China's leadership to regress to synchronically alternating reigns for life.

The establishment of the SC system is the embodiment of the CPC's political supervision over the entire bureaucratic system of the state at all levels. This reform was initiated in connection with the broad anti-corruption campaign, together with the CPC's tradition of internal supervision. The substantial authority of the SCs at all levels is defined in the Supervision Law of the People's Republic of China, which was promulgated shortly after the 2018 Constitutional Amendment, as the authority to "conduct supervision of public officials exercising public power."[166]

Merging with the CPC's Discipline Inspection Committees at all levels, the SCs have also absorbed the anti-corruption force of the Procuratorates and have become the only anti-corruption agency in China.[167] The 2018 Amendment has *de facto* created a more powerful organ than any other, one authorized with the power to check the rest in the sense of "full-coverage" supervision.[168] A Censorate system therefore has been revived in modern China.

---

[164] *See* Xianfa [Constitution] art. 79, art. 123-27 (2018 amend.) (China).

[165] *See* Xianfa [Constitution] art. 79 (1982) (China).

[166] Supervision Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 20, 2018) art. 3, 2018 STANDING COMM. NAT'L PEOPLE'S CONG. (China).

[167] *See generally* Jinting Deng, *The National Supervision Commission: A New Anti-Corruption Model in China*, 52 INT'L J. L., CRIME & JUST. 58, 59-61 (2018) (providing a detailed account of the Supervisory Commission System).

[168] Zhai, *supra* note 163, at 96.

The Censorate as an organ for surveillance over bureaucrats was originated by the Legalist-influenced Qin Dynasty.[169] However, despite an ambivalent posture, Confucianism also supported such a legitimated system of universalistic, rationalistic, mild, and changeable sanctions applied to officials.[170] The establishment of the SC system reflects a regression to the traditional disciplinary mode of China's legal institutions.[171] At the present day, as Stephens observes, for practical purposes the reconciling of the Chinese and the Western systems remains as much in the realm of wishful thinking as it was to the Mixed Court in the 1920s.[172] The establishment of the SC system shows that Chinese legal development has not been able to break through the temporal cycle in an almost static social structure, a pattern of conventions, customs, traditions, and regularities in the application of disciplinary enforcement procedures.

As regards the first Civil code of the PRC, Jiang argues that certain rules that embody traditional Chinese moral philosophy have been stipulated in it, and they will surely clash with the principles of Western private law of the modern world.[173]

For example, a liability in equity regime has become a part of the China's tort law in the Civil Code. Article 1186 of the Code provides for a liability without fault. It states: "If the damage is through no fault of both the victim and the tortfeasor, the loss may be borne by both parties according to the law."[174] Under this rule, the defendant who has no fault for causing a harm can be liable for a partial loss suffered by the victim. Therefore, the defendant may be liable if he has the financial capacity to pay and if the judge deems it appropriate.

Where a harm that is not subject to strict liability is suffered but neither party has fault, there would be no recovery in Western tort law. However, this doctrine is not compatible with the Confucianist principle of even distribution of losses. Confucius said: "I have always heard that what worries the head of a state, or the chief of a clan is not poverty but inequality...For if there is equality, there will be no poverty..."[175]

---

[169] Charles O. Hucker, *On Confucianism and the Chinese Censorial System*, *in* CONFUCIANISM IN ACTION 187-88 (David, S. Nivison & Arthur F. Wright eds., 1959).

[170] THOMAS A. METZGER, THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY 247 (1973).

[171] *See* THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911-1927 (1992) (explaining the theory of disciplinary systems of order).

[172] *See* THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911-1927 (1992).

[173] Hao Jiang, *The Making of a Civil Code in China: Promises and Perils of a New Civil Law*, 95 TUL. L. REV. 777, 812-19 (2021); *cf.* Yi Jun, *The Civil Code Roots in Chinese Culture and Demonstrates National Wisdom* (民法典：植根中华文化 彰显民族智慧), GUANGMING DAILY (July 15, 2020).

[174] *See* Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) art. 1186, 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China).

[175] CONFUCIUS, *supra* note 51, at 80-81.

It is evident that the Confucianist recurrence in private law of China has not been ceased since the reign of the former CPC Secretary General Hu Jintao, who advocated populist justice and social harmony.[176] In the "New Era" under the current leadership of Xi Jinping, a tendency toward promoting traditional culture of China has become more apparent. Xi Jinping once said:

> [T]he excellent traditional Chinese culture is the cultural root of the Chinese nation. The ideology, humanistic spirit, and moral norms it contains are not only the core of our Chinese people's thinking and spirit, but also have important value in solving human problems. It is necessary to extract and display the spiritual identity of excellent traditional culture, and extract and display the cultural essence of excellent traditional culture with contemporary world significance.[177]

It is plausible to observe that the once-eager pursuit of social harmony in Hu's time has been revived in the area of private law since the second term of Xi. It reflects what Confucius believes: when practicing the ritual, what matters most is harmony.[178]

Through the intertemporality among the present of Xi's reign, the near past of Hu's reign and the Confucianist reign in ancient China, the Civil Code absorbs traditional doctrines into its regulation of legal acts in China's contemporary era.

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("the National Security Law," or "NSL") is a law of huge controversy. Scholarly criticism on the NSL includes that the creation of hybrid Mainland-Hong Kong national security bodies by the Law directly threatens the "One Country, Two Systems" framework; that the NSL is being used to punish the exercise of basic political rights by the government's peaceful political opponents and its critics;[179] and, that Hong Kong is no longer operating a truly separate legal system from Mainland China.[180]

From a temporal perspective on the NSL, however, the effect of its Article 46, though not in much debate yet, is definitely worth probing. Article 46 reads:

> [I]n criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may

---

[176] *See* Wang, *supra* note 154, at 64-67.

[177] *Xi Jinping Attends the National Propaganda Ideology Work Conference and Gives an Important Speech* (习近平出席全国宣传思想工作会议并发表重要讲话), PEOPLE'S DAILY, Aug. 22, 2018, http://www.gov.cn/xinwen/2018-08/22/content_5315723.htm.

[178] CONFUCIUS, *supra* note 51, at 5.

[179] *See* LYDIA WONG & THOMAS E. KELLOGG, HONG KONG'S NATIONAL SECURITY LAW: A HUMAN RIGHTS AND RULE OF LAW ANALYSIS (2021).

[180] *See* Carole J. Petersen, *The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong*, 50 H.K. L.J. 633, 633-34 (2020).

> issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges.
>
> Where the Secretary for Justice has issued the certificate, the reference to 'a jury' or 'a verdict of the jury' in any provision of the laws of the Hong Kong Special Administrative Region applicable to the related proceedings shall be construed as referring to the judges or the functions of the judge as a judge of fact.[181]

Article 46 of NSL is an unprecedented legislative action that removes the right to trial by jury in criminal justice of the Supreme Court or the later High Court since the English jury system was introduced to Hong Kong in 1845.[182]

The right can be traced back to the Magna Carta, which states:

> [N]o freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.[183]

Although the definition of what constitutes a person's "peer" has a varied history, the jury system is deemed the foundation of the common law. The way the right to trial by jury developed has been a major factor that has distinguished the common law from other legal systems (including Chinese law).[184] It is true that in almost every sphere, from the role of the civil service to the functions of the courts to the government's role in the economy, mainland experience and norms bear little likeness to those in Hong Kong.[185]

What concerns me here is the potential conflict between the temporal dimension of the common law and that of Chinese law. Different temporalities of the law lead to different perceptions and practices of the law, that cultivate discordant legal cultures. The English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day.

---

[181] The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region art. 46..

[182] *See generally* PETER DUFF ET AL., JURIES: A HONG KONG PERSPECTIVE (1992) (providing a general account of the jury system in Hong Kong).

[183] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 436 (1905).

[184] *See* R. C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS 33-38 (1987).

[185] Kenneth Lieberthal, *Post-July 1997 Challenges*, *in* HONG KONG UNDER CHINESE RULE: THE ECONOMIC AND POLITICAL IMPLICATIONS OF REVERSION 231 (Warren I. Cohen & Li Zhao eds., 1997).

The immemorial character of the common law as a customary law strengthens the English tendency to read existing law into the remote past, of which the jury system is one of the most important parts. The English believe that the common law is the most advantageous law to make and preserve a commonwealth, unlike written laws which are made by the rulers and imposed on the subjects before any trials are made. A custom never becomes a law to bind the people, until it has been tried and approved without the consideration of time, during which time there did thereby arise no inconvenience.[186]

The common law was by definition immemorial custom, and the function of the courts was to declare the ancient custom of the realm. Therefore, one found that Lord Coke identified the law of his own day with the law of the earliest records, just as he established the doctrine that the latter contained what had been law since before the Norman Conquest.[187]

The temporal character of the common law reminds one of what Confucianism puts forward in the contest with other schools of thought in China that the real and best *li* was existing in the time of Duke Zhou (周公), the fourth son of King Wen of Zhou Dynasty; and the later rulers should discover and restore the remote Zhou rites, which equals the Confucian morals. Through the analogy, one can find the subtle parallel between the common law and the Confucian morals.

The jury system in Hong Kong inherited the temporality of the common law. Hong Kong people's perception of the jury system reflects such a common-law mind, which regards the jury trial as the fairest method for disposing of a criminal case, and as a safeguard against the arbitrary power of the state.[188] Removal of the trial by jury in the High Court's criminal proceedings concerning offenses endangering national security will result in the break of the temporal coherence of the law in Hong Kong, which is incompatible with the punctual constructivist actions of the legislator that always triggers the changes in legal control by way of delineated interventions.

VI. Conclusion

The temporality of law in traditional China must be explored at the level of the philosophical and cosmological concepts of the nature and purpose of order in the universe. Differentiated temporal frameworks in law can be deduced from references to traditional classics of major ancient schools of thought. It is reasonable to maintain that temporality is an important dimension for law to have a

---

[186] J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32-33 (1987) (citing SIR JOHN DAVIS, REPORTS DES CASES & MATTERS EN LEY, RESOLVES & ADJUDGES EN LES COURTS DEL ROY EN IRELAND (1674)).

[187] *Id.* at 45.

[188] *See id.* at 30-55; *cf.* Franklin Koo, *Power to the People: Extending the Jury to the Hong Kong's District Court*, 2 CITY UNIV. H.K. L. REV. 301, 318 (2010); BERRY FONG-CHUNG HSU, THE COMMON LAW IN CHINESE CONTEXT 90-91 (1992).

desirable effect in traditional China. Overlooking law's temporality will lead to static governance that causes damage to any sovereignty. Using the historical culture paradigm, one can broaden the approach to understanding and interpreting Chinese legal development.

In traditional China, the law is made up of a plurality of ideologies such as Legalism, the Learning of Huang Di and Lao Zi, and Confucianism. Law's temporality is continually subject to changes. Inter-legality is manifested by intertemporality in terms of penal severity. Temporal plurality in traditional Chinese law can be inferred from penalties such as clan extermination and compulsory servitude.

Temporal socialization in traditional Chinese law was realized through symbolic correlations made by the Han cosmological Confucianists. Their interpretation of the pre-Qin naturalist Five Elements according to the order of successive production through the seasons and the enchainment of the natural phenomena with the two mutually complementary forces of *Yin* and *Yang* were used in a phenomenalist manner so as to direct the intellectual enterprise from a scientific one to a sociopolitical one, through which the temporality of the cosmological Confucianism was imported into the law.

The incorporation of *li* into codes indicates the start of a gradual process of Confucianization of law in China's imperial history, which itself remained in a diachronic coupling momentum maintained by the ruling ideology and sociopolitical environment of traditional China. Through the judicial practice of *Chunqiu Jue Yü*, with the rhetoric *li* at its core, traditional China could connect its past, present, and future. The rhetoric of *li* promoted the formation of a temporal totality, that is a meaningful whole in Chinese law, which helped sustain a stable imperial sociopolitical structure of a single unitary authority.

Temporality of traditional law still holds sway in the law of contemporary China, no matter whether the legislators recognize it or not. The enchainment of past and future has always been a part of the dynamism of present Chinese law. Communist China in the twenty-first century has restored a formalist and rationalist system of law, which bears an apparent resemblance to the past Legalism, bringing political powers under legal authorization and regulation in order to strengthen the power operation of the top leadership in the future. Removal of the term limit of the President of the PRC in the Constitution switches the temporality of the power structure within the CPC from a durational and dynamic one to an ephemeral and static one. The establishment of the SC system by the constitutional amendment indicates a further regression of China's legal institutions to the traditional disciplinary mode, showcasing how Chinese legal development repeats its history within the temporal cyclicality. The newly promulgated Civil Code of the PRC provides one with a perspective to discover the intertemporality of the private law in China, which relies heavily on the Confu-

cian ethics back in ancient times to realize its instrumentalist purpose of establishing a stable and common prosperous society in contemporary era.[189] The Secretary for Justice of HKSAR has the authority under certain circumstances to issue a certificate under NSL 46(1) to deprive the accused of their right to jury trial in the High Court. The Court of Appeal of Hong Kong has also made it clear that as a prosecutorial decision, it is only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances as explained in the case law.[190] With the common law city becoming subjected to the NSL framework, the immemorial diachronicity of customs is suppressed by the synchronicity of formalist positive legislation. The situation in Hong Kong arguably displays the painful intertemporal friction between the two sources of law.

Temporality of law or law's continuity over time, for Hale, was thought to be the essential character of the unwritten law, which is not set down in writing by any legislators or rulers – the law acquires its binding power or force by a long and immemorial usage.[191] Hence law's continuity is accepted through not only compliance, active consent, or endorsement by court and community, but also incorporation of the norms into the common law and common life of the society.[192] China has become a state established on statutory law since the Qin Dynasty. Each individual code in traditional China can be considered bounded in its own eternal present unless a legislative change occurred. However, such atemporality of individual statutes does not mean that the whole legal system of traditional China remained thoroughly in a synchronic and static status. The incorporation of moral norms into the formalist legal system worked as one of the most important frameworks of Chinese cultural interaction over time. This legal philosophy entailed making use of the past ethical narratives as bases for projection of normative guidance across time. The identity, unity, and persistence of Chinese law over time was a matter of all the moral and legal norms fitting together into a practically coherent system of order that matched and shaped the people's life in Chinese society.

By seriously taking temporality of law into account, one can discover that although China has been a country with a formalist system of written law since the very beginning of its imperial history, the law in China at different stages of its legal development has reflected a meaningful diachronic dynamism, which deserves further attention from theorists of Chinese law.

---

[189] *See Xi Jinping Presides at the 10th Meeting of the Central Financial and Economic Commission* (习近平主持召开中央财经委员会第十次会议), XINHUA NEWS (Aug. 17, 2021), http://www.gov.cn/xinwen/2021-08/17/content_5631780.htm (defining the so-called common prosperity and its difference from egalitarianism).

[190] Tong Ying Kit v. Sec'y for Just., [2021] H.K.C.A. 912, ¶ 71.

[191] MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 21-22 (Charles Runnington ed., 6th ed. 1820).

[192] Postema, *supra* note 19, at 224.

Israel's Nation-State Law and the Resulting Violations of the Convention on the Rights of the Child

Darlene M. Burker*

Abstract

This article argues that through the institution of the Nation-State law by Israel's parliament, the Knesset, and Israel's Supreme Court subsequently finding the law to be constitutional, Israel has violated the United Nation's ("U.N.") Convention on the Rights of the Child ("Convention"). Specifically, the Nation-State law violates seven articles of the Convention through two declarations: Israeli settlements shall now be recognized as a national value, and the right of self-determination will be unique to the Jewish people, to the exclusion of Palestinian people. The articles within the Convention that are most blatantly violated are Articles 8, 27, and 28 which provide for the right have an adequate standard of living for proper mental and physical development, to receive an education, and to preserve one's identity. Israeli settlements subject Palestinian children to housing insecurity and higher rates of violence against both their family as well as the children themselves, which interferes with their right to an adequate standard of living. The consequence of Israeli settlements also causes children to have a longer and more difficult journey getting to school, which interferes with their right to an education. Self-determination is defined as a group of people having the ability to form their own state and choose their own government. The existence of a Palestinian state is the source of Palestinian children's national identities. Thus, self-determination being declared as unique to the Jewish people deprives Palestinian children of their right to preserve their identity and makes them foreigners in their homeland. However, these violations may be remedied through actions within the U.N. which could trigger the Knesset to strike the offending portions of the Nation-State law.

Table of Contents

* Loyola University Chicago School of Law, Class of 2023.

I. Introduction

Over the past seven decades, the Israeli-Palestinian conflict has consistently been a hotly debated and contentious topic of international news.[1] While war and human rights atrocities are often part of this conversation, the issue of how the conflict specifically affects children is discussed far less often. Israel is in direct violation of the Convention on the Rights of the Child through its enactment of the "Nation-State" law, which the Supreme Court of Israel recently found to be constitutional.[2]

The Nation-State law violates seven articles of the Convention on the Rights of the Child, hereinafter referred to as "the Convention," which Israel ratified in 1991.[3] The Nation-State law contains two declarations that contravene the Convention: (1) Israeli settlements shall now be recognized as a national value and (2) the right of self-determination will be unique to the Jewish people, to the exclusion of Palestinian people.[4] These provisions of the law have had detrimental effects on Palestinian children, which cause it to be in direct violation of the Convention.

This article will analyze how the Nation-State law violates the Convention. It will provide a background of the Israeli-Palestinian conflict by looking specifically at the legislative history surrounding the law.[5] The article will then discuss the legal progression of the Nation-State law itself, as well as the language within the law and how it violates the Convention.[6] Finally, this article will provide a proposal based on the policy provided by the U.N. for violations of the Convention and the Israeli legislative and judicial process, for how Israel and the international community should proceed to most effectively remedy Israel's violations.

II. History of the Israeli-Palestinian Conflict

The modern-day Israeli-Palestinian conflict, which has resulted in oppressive legislation such as the Nation-State law, is the consequence of decades of conflict between the two peoples, primarily centering around each party's belief that the land of historical Palestine is rightfully theirs. In 1917, in the midst of World War

---

[1] *The Arab-Israeli War of 1948*, OFFICE OF THE HISTORIAN, FOREIGN SERVICE INSTITUTE: UNITED STATES DEPARTMENT OF STATE, https://history.state.gov/milestones/1945-1952/arab-israeli-war (last visited Apr. 25, 2022).

[2] *Israel: Supreme Court Affirms Constitutionality of Basic Law: Israel – Nation State of the Jewish People*, LIBRARY OF CONGRESS (2021), https://www.loc.gov/item/global-legal-monitor/2021-07-27/israel-supreme-court-affirms-constitutionality-of-basic-law-israel-nation-state-of-the-jewish-people/.

[3] Philip Veerman & Barbara Gross, *Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank, and Gaza*, 3 INT. J. CHILDREN'S RTS 295, 295-96 (1995); *see also* U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

[4] LIBRARY OF CONGRESS, *supra* note 2; *see also* יסוד חוק: ישראל- מדינת הלאום של העם היהודי *translated in* BASIC LAW: ISRAEL- THE NATION STATE OF THE JEWISH PEOPLE (July 8, 2021), https://perma.cc/9PZN-DJGY.

[5] Nadera Shalhoud-Kevorkian, *Childhood: A Universalist Perspective for How Israel is using Child Arrest and Detention to further its Colonial Settler Project*, 12 INT'L J. APPL. PSYCHOANAL. STUD. 223, 224-39 (2015).

[6] CRC, *supra* note 3.

I, British Foreign Secretary Arthur James Balfour submitted a letter of intent supporting the establishment of a Jewish homeland in Palestine.[7] When World War I ended, the Ottoman Empire fell, and Great Britain took control over what was then known as Palestine.[8] The Balfour Declaration and the British mandate over Palestine were approved by the League of Nations in 1922.[9] Arab Palestinians strongly opposed the Balfour Declaration because they were concerned they would lose control of their homeland and wary of possible subjugation.[10] However, their opposition did not deter this shift in power from occurring.[11] The British retained control of Palestine until Israel became an independent state after WWII.[12]

In 1948, Israel announced its independence, which caused, causing a war to break out between it and its neighboring countries.[13] Egypt, Jordan, Iraq, Syria, and Lebanon invaded Israel in what became known as the 1948 Arab-Israeli War.[14] 1949 brought a cease-fire agreement, with a condition that the West Bank would fall under Jordanian rule and that the Gaza Strip would fall under Egyptian rule, leaving the Palestinian people stateless.[15] However, Israel was slowly able to regain this land beginning in 1956 when Israel attacked the Sinai Peninsula, capturing the Suez Canal from the Egyptians.[16] Next, in the Six-Day War of 1967, Israel defeated Egypt, Jordan, and Syria, thereby capturing the West Bank, the Gaza Strip, and other Arab territories.[17]

In 1974, the Palestinian Liberation Organization adopted a two-state policy, whereby a Palestinian state and Israeli state would exist simultaneously on the same land, and the discussion of the establishment of a single democratic state in a historic Palestine was left undetermined.[18] In the 1990s, Palestinian and Israeli leaders held a convention in Oslo, Norway, where they set out a mutually negotiated two-state solution to be implemented by the end of the decade.[19] However, as the conflict raged on and both resentments and ambitions grew, more peace deals fell apart, and this solution became exponentially less feasible.[20]

---

7 History.com Editors, *Israel*, HISTORY (June 30, 2017), https://www.history.com/topics/middle-east/history-of-israel.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 History.com Editors, *Israel*, HISTORY (June 30, 2017), https://www.history.com/topics/middle-east/history-of-israel.

15 Adam Zeidan, *Two State Solution*, Encyclopedia Britannica, https://www.britannica.com/topic/two-state-solution (last visited Apr. 25, 2022).

16 History.com Editors, *supra* note 7.

17 *See* Zeidan, *supra* note 15; *see also* History.com Editors, *supra* note 7.

18 Elizabeth Mavroudi, *Imagining a Shared State in Palestine–Israel*, 42 ANTIPODE 152, 152 (2010).

19 Zeidan, *supra* note 15.

20 *Id.*

A large segment of the Israeli population believes that it is necessary to have a Jewish state to protect themselves from the violent traumas that they and/or their ancestors have had to endure, ranging from pogroms to the Spanish Inquisition to the Holocaust.[21] Many Israelis also feel that they have a right to call this land their home due to the ties that the Ancient Israelites had to the land.[22] For their part, Palestinians assert their right to the same land as many feel that their ancestor's land was unjustly ripped from them with the establishment of the Israeli state. Ichilov describes the sentiment as follows:

> [M]ost Israeli Palestinian Arabs subscribe to the Palestinian national narrative, arguing that they are the descendants of the ancient people that inhabited the region in Biblical times. . .They see themselves as the indigenous people that were displaced and occupied by the Israelites. . . and by those who claim to be their descendants. . .in recent years.[23]

As Palestinians and Israelis both believe that the land that is historic Palestine is rightfully theirs, there is little room for compromise.[24] This impasse has led to harsher laws and acts, dividing the two nations further and culminating in the Nation-State law, as described below, a continuation of the Basic Laws.[25]

This division may have been further enforced through compulsive military service for Israeli youth. All Israeli citizens over the age of 18 of any gender, with a few exceptions, are required to serve in the army for a period of time.[26] This policy allows the current government to indoctrinate young people with the belief that Israel has a superior right to occupy the land and that the Palestinians are the enemy, as was openly done until 1970.[27] This indoctrination allows for laws that follow this political ideology to continue to be passed.[28] An example of this can be easily seen in a 2009 article published in the Washington Post, ana-

---

[21] Michael Lipka, *7 Key Findings About Religion and Politics in Israel*, PEW RSCH. CTR. (March 8, 2016), https://www.pewresearch.org/fact-tank/2016/03/08/key-findings-religion-politics-israel/; *see also* Sivan Hirsch-Hoefler et al., *Conflict Will Harden your Heart: Exposure to Violence, Psychological Distress, and Peace Barriers in Israel and Palestine*, 4 BRIT. J. POL. SCI. 845, 855 (2016).

[22] Lipka, *supra* note 21.

[23] Orit Ichilov, *Pride in One's Country and Citizenship Orientations in a Divided Society: The Case of Israeli Palestinian Arab and Orthodox and Non-Orthodox Jewish Israeli Youth*, 1 COMPAR. EDUC. REV. 44, 45-59 (2005).

[24] *Id.*

[25] The Constituent Assembly and the First Knesset were unable to put a constitution together, so the Knesset started to legislate "basic laws" on various subjects such as governmental powers, the army, and human rights. After all the basic laws are enacted, they will comprise the constitution of the State of Israel.

[26] *Our Soldiers*, Israel Defense Force, https://www.idf.il/en/minisites/our-soldiers/ (last visited Apr. 25, 2022).

[27] Until 1970, the IDF had a policy of encouraging hatred towards Palestinians, stating that the Jewish tradition sanctioned eradicating invading armies and fostered indifference towards the fate of Palestinians. *See* Shay Hazkani, *Political Indoctrination of Soldiers in the IDF, 1948-1949*, 30 ISRAEL STUD. REV. 20, 35-36 (2015).

[28] Uri Avnery, *Israel's New Right-Wing Government: A Little Red Light*, The Washington Report on Middle East Affairs (2009).

lyzing the new right-wing government of Israel. [29] Avigdor Lieberman, who is a proponent of displacing any Palestinian living in Israel to create a "pure Jewish state," has garnered such a large base of support, primarily composed of young Israelis who recently took part in the Gaza war, that his party has become the third-largest faction in the Knesset.[30] The article notes that this isn't an extremist faction of Israeli society but rather a large segment of the regular population; "These are not marginal people, fanatical or underprivileged, but normal youngsters who finished high school and served in the army."[31]

The idea for some Israelis that Palestinians are their enemies has extended to Palestinian children. The treatment that Israeli children enjoy is not afforded to Palestinian children.[32] This difference is apparent in examples such as the differing ages of majority.[33] Israeli children are defined as someone under the age of eighteen under the 1962 Legal Capacity Law, whereas Military Order 132 defines children in occupied Palestinian territories as people under the age of sixteen.[34] There have also been numerous allegations against Israeli police officers, accusing them of inhumane arrests and interrogations of Palestinian children.[35]

The Basic Laws came into existence as a way to combat the growing power of the Palestinian citizens of Israel.[36] Palestinians residing within Israel's borders in 1948, the year of Israel's founding, were granted Israeli citizenship and on the surface were able to enjoy the same rights as Jewish Israeli citizens.[37] While Palestinian citizens of Israel have been able to participate in Israel's governmental systems, they have been unable to meaningfully alter the State's institutions, which favor Jewish culture and values.[38] To guarantee that this imbalance of power persists, Israel passed a series of laws known as "Basic Laws."[39] These laws allowed Palestinian citizens of Israel to continue to participate in the gov-

---

29 Uri Avnery, *Israel's New Right-Wing Government: A Little Red Light*, The Washington Report on Middle East Affairs (2009).

30 *Id.*

31 *Id.*

32 Shalhoud-Kevorkian, *supra* note 5.

33 Comm. On the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-third Session (27 May - 14 June 2013)*, ¶ 35, U.N. Doc. CRC/C/ISR/CO/2-4 (July 4, 2013), *available at* https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf.

34 Comm. On the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-third Session (27 May - 14 June 2013)*, ¶ 35, U.N. Doc. CRC/C/ISR/CO/2-4 (July 4, 2013), *available at* https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf.

35 Shalhoud-Kevorkian, *supra* note 5; *see also* Mark Regev, *Bound, Blindfolded and Convicted: Children Held in Military Detention*, THE GUARDIAN (2012).

36 Amal Jamal & Anna Kensicki, *Theorizing Half-Statelessness: A Case Study of the Nation-State Law in Israel*, 24 CITIZENSHIP STUDIES 769, 772 (2020), https://doi.org/10.1080/13621025.2020.1745152.

37 *Id.*

38 *Id.*

39 *Id*; *see also* Hana Levi Julian, *Basic Law: Israel as the Nation-State of the Jewish People' Approved by Knesset 62-55* (July 19, 2018), https://www.jewishpress.com/news/israel/the-knesset/basic-law-israel-as-the-nation-state-of-the-jewish-people-approved-by-knesset-62-55/2018/07/19/

ernment without ever gaining any real power, which allowed for the continual passage of new laws in the interest of Israeli political priorities.[40] The Nation-State law is the latest addition to the "Basic Laws."[41]

The Nation-State law is comprised of eleven clauses which establish "Jewish settlements as a national value" and mandates that the state "will labor to encourage and promote its establishment and development."[42] It also de?nes the State language as Hebrew, downgrading Arabic to a special status, and a?ords only Jewish citizens the right to exercise the right to self-determination.[43] This law passed was in 2018 by a narrow margin and The Supreme Court of Israel found the law the be constitutional in 2021 after it was challenged by numerous human rights organizations.[44] The Nation-State law directly conflicts with the values outlined in the Convention, stripping away the rights of children that the Convention guarantees.

III. The Progression of the Nation-State Law

The conception of the Nation-State law occurred in 2011 when Avi Dichter, then-Chairman of the Foreign Affairs and Defense Committee, filed a Basic Law proposal, joined by thirty-nine other Knesset members.[45] The proposed law sought to define Israel as the "Nation-State" of the Jewish People.[46] While there was support for the proposal among many members of Israeli society, its opponents were not just liberals who openly described this proposal as an "apartheid law."[47] Opposition to the Basic Law came from the left, the center, and the more liberal members of right-wing parties.[48] The opponents raised numerous objections to the Nation-State law such as to "Section 7," which clearly prioritizes Jewish settlements over the housing of non-Jews.[49] The demotion of the Arabic language is also regarded as so unacceptable that the President of the Knesset threatened to sign the law in Arabic as a form of protest.[50] In addition to moral arguments, members of the Knesset also raised pragmatic arguments such as the

---

[40] Amal Jamal & Anna Kensicki, *Theorizing Half-Statelessness: A Case Study of the Nation-State Law in Israel*, 24 CITIZENSHIP STUDIES 769, 772 (2020), https://doi.org/10.1080/13621025.2020.1745152; *see also* Hassan Jabareen, *The Origins of Racism and the New Basic Law: Jewish Nation-State*, VERFASUM BLOG (Nov. 11, 2018), https://verfassungsblog.de/the-origins-of-racism-and-the-new-basic-law-jewish-nation-state/.

[41] *Id.*

[42] Jamal & Kensicki, *supra* note 36; *see also* חוק יסוד: ישראל- מדינת הלאום של העם היהודי *translated in* Basic Law: Israel- The Nation State of the Jewish People (July 8, 2021), https://perma.cc/9PZN-DJGY.

[43] *See* חוק יסוד: ישראל- מדינת הלאום של העם היהודי, *supra* note 42.

[44] LIBRARY OF CONGRESS, *supra* note 2.

[45] Alon Harel, *Basic Law: Israel as the Nation State of the Jewish People*, 49 NATIONALITIES PAPERS, 262, 265 (2020).

[46] *Id.*

[47] *Id.* at 270.

[48] *Id.*

[49] *Id.* at 272.

[50] *Id.* at 266.

law causing further strain on the already-volatile relationship between Israelis and Palestinians.[51]

The bill ultimately passed despite the substantial opposition on July 19, 2018, with sixty-two Knesset members voting in favor of the legislation, fifty-five opposing it, and two abstaining.[52] The law also has special status due to it being passed as a Basic Law.[53] In a 1995 Supreme Court decision, the judiciary was empowered to strike down laws that conflict with the two existing Basic Laws.[54] It follows that any Basic Law passed after 1995 would benefit from the same protected status.[55] Many Basic Laws also contain a provision that ensures the law's permanency.[56] The Nation-State law states, "This Basic Law shall not be modified except by a Basic Law, passed by a majority of the members of the Knesset."[57]

In 2018, various groups submitted petitions against the Nation-State law to the courts.[58] While the Supreme Court did not affirm the constitutionality of the Nation-State law until 2021, in 2020 a lower court utilized the law to justify a ruling.[59] The court refused to reimburse Arab children in the city of Karmiel for bus fares to Arab schools outside the town since there are no Arab schools in Karmiel due to it being a "Jewish city."[60] The court cited the Nation-State law in their justification for their ruling, "Karmiel, a Jewish city, was founded to strengthen Jewish settlement in the Galilee."[61] "Establishing an Arabic-language school. . . [and] funding school transportation for Arab students, for anyone who needs it anywhere, could change the demographic balance of the city and damage its character."[62] This ruling clearly demonstrates a consequence of the Nation-State law, which violates the Convention.[63]

In 2021, the Supreme Court of Israel ruled that the Nation-State law was constitutional in a 10-1 ruling and stated that it was not within the Court's power to

---

51 Alon Harel, *Basic Law: Israel as the Nation State of the Jewish People*, 49 NATIONALITIES PAPERS, 262, 268 (2020).

52 Jonathan Lis & Noa Landau, *Israel Passes Controversial Jewish Nation-state Bill After Stormy Debate*, HAARETZ (July 19, 2018), https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048.

53 *Id.*

54 Harel, *supra* note 45, at 3.

55 *Id.*

56 *Basic Laws*, https://m.knesset.gov.il/en/activity/pages/basiclaws.aspx.

57 חוק יסוד: ישראל- מדינת הלאום של העם היהודי, *supra* note 42.

58 Harel, *supra* note 45, at 268.

59 Lis & Landau, *supra note* 52.

60 *Id.*

61 Orly Shpigel, *The Palestinian Children of Karmiel Know What Israeli Aapartheid Is*, MIDDLE EAST EYE (Dec. 30, 2020), https://www.middleeasteye.net/opinion/israel-apartheid-explained-court-arab-children-karmiel.

62 *Id.*

63 *Id.*

strike down the law.[64] Regarding the intent of the law, the Court determined as long as Israel does not have a complete constitution, it cannot be denied that in the Basic Law, it is stated that Israel is both a Jewish and a democratic state.[65] The Court further indicated that denial of either one of these pillars would lead to a collapse of Israel's constitutional structure.[66]

The Court also addressed the petitioners' concerns that the Nation-State law conflicts with a fundamental principle in Israeli law – that is, equality.[67] Although the majority agreed that the law should have reflected this principle; nevertheless, the Court states that its absence does not detract from the principle's status, nor its importance as a foundational principle in Israel's legal system.[68] It reasons that the law does not detract from these principles as it does not legalize discrimination or diminish the rights of the Palestinian population.[69] The court further declared:

> [T]he law is another component of Israel's emerging constitution that is intended to anchor the components of the identity of the state as a Jewish state, without diminishing from the components of the state's democratic identity that are anchored in the other Basic Laws and constitutional principles that institute the legal system in Israel.[70]

The High Court's holding here goes hand in hand with the rest of the legislation and justification regarding the Nation-State law on behalf of the Knesset.[71] The Court has stated that the law does not harm Palestinians and other non-Jews in Israel but rather protects Jewish identity.[72] However, the consequences of protecting Jewish identity and demographics in "Jewish cities" have already had detrimental effects on the Palestinian population, including Palestinian children, which is violative of the Convention.

IV. The Nation-State Law and its Violations of the Convention on the Rights of the Child

The Nation-State law violates seven articles of the Convention.[73] The Convention, which was opened for ratification in 1989, has become the most widely

---

[64] Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, *translated in* ADALAH – THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (Jul. 8, 2021), https://www.adalah.org/uploads/uploads/Translation_of_Summary_of_JNSL_Judgment.pdf.; *see also* Jerusalem Post Staff, *High Court Rejects Petitions Against Nation-State Law*, JERUSALEM POST (July 8, 2021), https://www.jpost.com/breaking-news/high-court-rejects-petitions-against-nation-state-law-673252.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Jerusalem Post Staff, *supra* note 64.

[69] *Id.*

[70] *Id.*

[71] The Supreme Court of Israel is often referred to as the "High Court."

[72] Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, *supra* note 64.

[73] Veerman & Gross, *supra* note 3.

adopted human rights treaty.[74] The Convention's purpose is to provide special safeguards for children and ensure they are brought up "in an atmosphere of happiness, love and understanding. . .in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."[75] Countries who ratify this Convention commit to "taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, recognizing the importance of international co-operation for improving the living conditions of children. . ."[76]

The Nation-State law has violated the Convention in a multitude of ways due to its adverse impact on Palestinian children.[77] The declarations in the Nation-State law which violate the Convention most clearly are Israeli settlements becoming a recognized national value and the declaration that self-determination is unique to the Jewish people.[78] The Nation-State law has resulted in the violation of upwards of seven articles enshrined in the Convention.[79] However, it most explicitly and egregiously violates Articles 8, 27, and 28 of the Convention.[80]

Article 8 of the International Convention on the Rights of the Child states, "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[81] The Nation-State law makes self-determination unique to the Jewish people, which clearly violates the Convention.[82] It states, "The State of Israel is the nation-state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination; and that exercising the right to national self-determination in the State of Israel is unique to the Jewish People."[83] Through this declaration, Palestinian children's right to preserve their identity and nationality is compromised.

Self-determination is defined as the process by which a group of people form their own state and choose their own government.[84] The existence of a Palestinian state is the source of Palestinian children's national identities.[85] It is the ancestral home of the Palestinian people. The Nation-State law rips away a Palestinian child's chance to have their nationality preserved as it states that the

---

74 CRC, *supra* note 3; *Convention on the Rights of the Child*, UNICEF, https://www.unicef.org/child-rights-convention (last visited Apr. 25, 2022).

75 CRC, *supra* note 3, at pmbl.

76 *Id.*

77 LIBRARY OF CONGRESS, *supra* note 2.

78 *Id.*

79 CRC, *supra* note 3, at art. 8, 27-8; *see also* LIBRARY OF CONGRESS, *supra* note 2.

80 CRC, *supra* note 3, art. 8, 27-28.

81 *Id.*

82 LIBRARY OF CONGRESS, *supra* note 2.

83 Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, *supra* note 64.

84 The Eds. of Encyclopedia Britannica, *Self-Determination*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/self-determination (last visited Apr. 25, 2022).

85 Shalhoud-Kevorkian, *supra* note 5.

right to form a state is unique to the Jewish people. It calls for the classification of Palestinian children as foreigners in their ancestral homeland.[86]

Article 27 states, "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."[87] The declaration in the Nation-State law that Israeli settlements in primarily Palestinian areas are a national value has encouraged an environment in which Palestinian children do not have an adequate standard of living.[88] As of 2021, approximately 700,000 Israeli settlers are living in settlements in East Jerusalem and the West Bank.[89] A U.N. Human Rights expert stated, "The Israeli settlements. . .are responsible for a wide range of human rights violations against the Palestinians, including land confiscation, resource alienation, severe restrictions on freedom of movement, mounting settler violence, and racial and ethnic discrimination."[90] The seizure of land for Israeli settlements results in an insufficient amount of land available for Palestinians to develop adequate housing and basic infrastructure and services.[91] These measures have contributed to the displacement of Palestinian families and communities.[92] A U.N. Human Rights expert found that in 2021 more than seventy families in the Karm Al-Ja'buni area of Sheikh Jarrah in East Jerusalem experienced forced eviction due to the new settlements.[93] These measures undermine Palestinian children's right to an adequate standard of living.[94]

Beyond displacement, the Nation-State law stating that Jewish settlements are a national value has led to an uptick in violence against Palestinians in heavily settled areas which has a disastrous effect on the mental health of Palestinian children.[95] According to the U.N. Office for the Coordination of Humanitarian Affairs, in the first ten months of 2021, there were 410 attacks carried out by Israeli settlers against Palestinians, 302 against property, and 108 against individ-

---

[86] *Adalah's Position Paper: Proposed Basic Law: Israel - The Nation State of the Jewish People,* ADALAH (Jul. 16, 2018), https://www.adalah.org/uploads/uploads/Adalah%20Position%20Paper%20-%20Basic%20Law%20Jewish%20Nation%20State%20-%20ENGLISH%20-%2015072018%20-%20FINAL.pdf.

[87] CRC, *supra* note 3, art. 27.

[88] U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, UN Experts Say Israeli Settlement Expansion 'Tramples' on Human Rights Law (Nov. 3, 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27758&LangID=E.

[89] *Id.*

[90] *Id.*

[91] U.N. Off. for the Coordination of Humanitarian Affsairs Occupied Palestinian Territory, The Humanitarian Impact of Israeli Settlement Policies (Dec. 2012), https://unispal.un.org/pdfs/OCHA_HumImpact-Settlements.pdf.

[92] *Id.*

[93] Maha Kadadha, *Settler Violence is Rising in Occupied Palestinian Territory, Warn Experts*, U.N. NEWS: GLOB. PERSP. HUM. STORIES, (Apr. 14, 2021), https://news.un.org/en/story/2021/04/1089752.

[94] The Humanitarian Impact of Israeli Settlement Policies, *supra* note 91.

[95] *Id.*

uals.[96] Four Palestinians died in these attacks.[97] The Israeli military has done very little to stop this violence, having even been found guilty of hiring private security companies who are instructed by the military to take no action to prevent the violence.[98] The security and military's only consistent response to the violence is forcing Palestinians to leave the area.[99] Beyond the lack of interference with violent attacks when they occur, Yesh Din, an Israeli human rights organization, reported that ninety-one percent of investigations into settler attacks against Palestinians between 2005 and 2019 were closed by the Israeli authorities with no charges filed and that forty percent of the Palestinians who have contacted the organization since 2018 to report settler violence have chosen not to file complaints, "because they have no expectation that justice will be served."[100]

Growing up in a violent environment not only causes children to become traumatized through witnessing the violence, the potential of losing their parents to an attack, or becoming a victim of an attack themselves can have an extremely negative impact on a child's mental wellbeing.[101] U.N. experts have stated that settler violence continues to target young children.[102] A notable example of this is an incident that occurred in southern Hebron in which a Palestinian family, both parents, and children, were attacked by ten Israeli settlers.[103] The parents required medical treatment at a hospital and the children were traumatized.[104] In total, seventy-eight children have been killed due to Israeli military and settler presence in the Occupied Palestinian Territory in 2021.[105] There were noticeable upticks in this statistic both in 2021, the year the High Court affirmed the constitutionality of the Nation-State law and in 2018, the year the Nation-State law was passed.[106] These statistics point to the endorsement of Israeli settlements as a national value directly impacting the safety of Palestinian children.[107]

In a 2021 study aimed at showing the impact of living among Israeli settlements on the psychological wellbeing of Palestinian children, the results showed high levels of anxiety, distress, separation anxiety, hypervigilance, and PTSD,

---

96 Michael Lynk et al., *UN Experts Alarmed by Rise in Settler Violence in Occupied Palestinian Territory*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Nov. 10, 2021), https://reliefweb.int/report/occupied-palestinian-territory/un-experts-alarmed-rise-settler-violence-occupied-palestinian.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 Michael Lyn et al., *Israel/OPT: UN Experts Warn of Rising Levels of Israeli Settler Violence in a Climate of Impunity*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Apr. 14, 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26991&LangID=E.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Child Fatalities: Distribution of Palestinian Child Fatalities by Region*, DEF. FOR CHILD. INT'L PALESTINE (Sept. 20, 2021), https://www.dci-palestine.org/child_fatalities_by_region.

106 *Id.*

107 *Id.*

with younger children experiencing psychological problems at a higher rate.[108] For female children, there were particularly high rates of PTSD, and the study found that they are at a higher risk to develop psychological and behavioral problems, total difficulties, conduct, and peer relationship problems than male children.[109] This exposure to violence due to living among Israeli settlements and the resulting psychological trauma is likely to further the conflict, continuing the pattern of Palestinian children experiencing trauma for generations to come.[110]

A study analyzing how exposure to violence, perception of threat, and psychological distress among Israelis and Palestinians affected an individual's attitude toward peace, found that exposure to violence "can reduce individuals' willingness to compromise to the extent that it triggers psychological distress which intensifies threat perceptions."[111] While both sides experienced a fairly high level of violence, with forty-nine percent of all respondents experiencing at least one incident of violence, the Israeli respondents experienced a lower level of exposure and psychological distress than the Palestinian respondents, and thus had a more positive attitude towards peace and showed more willingness to compromise.[112] This correlation points to an impediment to the peace process where civilians are targets of violence and children are raised in this environment. "Only by changing those dynamics can we hope to create a psychological-societal infrastructure capable of sustaining formal political agreements in conflict-ridden regions of the world."[113]

Another way that Israeli settlements being declared a national value has a significant impact on the mental development of Palestinian children are the obstacles that settlements cause Palestinian children in regards to them receiving an education.[114] As mentioned previously, in 2020 Israeli courts refused to reimburse Arab children in the city of Karmiel for bus fares to Arabic-speaking schools outside the town, as there are not any Arabic schools in Karmiel due to it being a "Jewish city."[115] The court cited the Nation-State law in their justification for their ruling, arguing that the Jewish settlement was justified in their actions as providing an Arabic school would cause the demographics to no longer be primarily Jewish.[116]

---

[108] Amer Shehadeh, *The Psychological Wellbeing of Palestinian Children Living among Israeli Settlements in Hebron Old City*, 3 ACAD. J. RSCH. &SCI. PUBL'G 30, 33, 40 (2021).

[109] *Id.* at 39, 40.

[110] Hirsch-Hoefler et al., *supra* note 21, at 852.

[111] *Id.* at 855.

[112] *Id.* at 852.

[113] *Id.* at 855.

[114] Article 28 of the Convention of the Rights of the Child states that "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity;" *see* CRC, *supra* note 3.

[115] Noa Landau, *Israel Passes Controversial Jewish Nation-state Bill After Stormy Debate*, HAARETZ (July 19, 2018), https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048.

[116] *Id.*

Palestinian children being denied practical and easy access to an education violates Articles 27 and 28 of the Convention as it interferes with their mental development and their right to equal opportunities.[117] Palestinian children's right to an education is impeded by the Israeli military when they need to travel to go to school to such an extent that it results in an extreme disparity between Palestinian and Israeli children's educations.[118] Article 28 of the Convention states that children will be given an education on the basis of equal opportunity.[119] While in the West Bank, education is compulsory for children under age fifteen, this education is certainly not made easy to obtain.[120] When children are forced to travel outside of their town for school, they are subjected to Israel's military checkpoints, meaning that trips that should be relatively short, can take several hours which results in missed class time.[121] Palestinian children living near Israeli settlements have also reported experiencing harassment and violence from Israeli soldiers and settlers as they travel to and from school.[122] Settlers have also been known to attack schools with weapons and stone-throwing during the school day, creating an environment of fear at school that can impede the ability of children to learn.[123] These time impositions, harassment, and violence due to the Israeli settlements, significantly impact Palestinian children's right to access education.[124]

As previously stated, the Supreme Court of Israel holds that the Nation-State law does not harm or legalize discrimination against Palestinians in Israel, but rather protects Jewish identity.[125]This is obviously not the case. Pursuant to the principles outlined in the Nation-State law, Palestinian children are being cheated of their right to self-determination, robbed of easy access to education, and subjected to violence.[126] This goes far beyond what is justifiable to protect Jewish identity. However, there are steps that can be taken to correct the present violations.

V. Proposal

Due to the Nation-State law's Basic Law status as confirmed to be constitutional by the Supreme Court of Israel, the steps that could be taken to have it

117 Noa Landau, *Israel Passes Controversial Jewish Nation-state Bill After Stormy Debate*, HAARETZ (July 19, 2018), https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048.

118 *Id.*

119 CRC, *supra* note 3, art 28.

120 *Right to a Childhood,* DEF. FOR CHILD. INT'L PALESTINE, (2021), https://www.dci-palestine.org/right_to_a_childhood.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, *supra* note 64.

126 *Right to a Childhood, supra* note 120.

overturned are rather limited.[127] Israel has two choices of action that it could take independently. The U.N. also has the means to act.

The first and simplest way to overturn the Nation-State law would be for the Knesset to pass a successive Basic Law which nullifies the statements within the Nation-State law that violate the Convention.[128] Basic Laws are not entrenched, meaning that a simple majority can amend them through a standard legislative process.[129] This is likely the most straightforward course of action as the law only passed with a majority of sixty-two votes, only one vote more than a simple majority.[130] Beyond the law slimly passing, it has continued to provoke heated debate within the Knesset and in Israeli society as a whole.[131] Numerous petitions have been submitted in protest of this law, including by prominent members of Israeli society, such as a petition filed by forty Israel Prize winners.[132] This existing controversy and the slim margin could make a slight political push that addresses the children's rights abuses a very feasible way to address the offending portions of the Nation-State law.

If it did not choose the path of nullification of the Nation-State law, Israel could instead take legislative action to comply with its obligations under the Convention. This is the second method. As previously stated, after the Nation-State law was passed, petitions were submitted by various groups objecting to the law's constitutionality.[133] The most common objection was that the Nation-State law undermined the principle of equality outlined in previous Basic Laws. The lone dissenter, Justice Geroge Karra, echoed this sentiment, stating that some parts of the law harm the principle of equality, which he notes is not explicitly established in the law.[134] The Supreme Court of Israel generally sits in panels of three justices.[135] After a panel ruling, particularly one that conflicts with a prior decision or is especially important, difficult, or novel, the court may decide to hold a "further hearing" to review the panel's judgment with an expanded panel.[136] However, there was a ten-to-one ruling by the High Court in its decision

---

[127] Lis & Landau, *supra* note 52; *see also* Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, *supra* note 64.

[128] Basic Law: The Knesset, *supra* note 56.

[129] Yedidia Stern, *Too Many Changes to Israel's Basic Laws Can Erode Democracy*, (November 18, 2021), https://www.jpost.com/opinion/too-many-changes-to-israels-basic-laws-can-erode-democracy-opinion-685427.

[130] *Id*; *see also* Chaim Ben Yaakov, *Nation-State Law Important Part of Forming Israel's Constitution*, (July 13, 2021), https://www.jpost.com/opinion/nation-state-law-important-part-of-forming-israels-constitution-opinion-673743.

[131] Yaakov, *supra* note 130.

[132] *Id.*

[133] Harel, *supra* note 45, at 268; *see* Jerusalem Post Staff, *supra* note 64.

[134] Jerusalem Post Staff, *supra* note 64.

[135] Versa: Cardozo Law, About the Supreme Court of Israel, https://versa.cardozo.yu.edu/about-supreme-court-israel (last visited Apr. 25, 2022).

[136] Jerusalem Post Staff, *supra* note 64.

which causes one to conclude that there is a legal consensus that the law does not violate Israel's preexisting constitutional principles.[137]

Last, the U.N. could take action against Israel due to its Nation-State Law violating the Convention.[138] Articles 44 and 45 of the Convention outline potential reporting procedures and paths to resolution for a country's violation.[139] However, this process is based on making reports and recommendations to the State Parties through specialized agencies.[140] Article 45 subsection (d) states, "The Committee may make suggestions, and general recommendations based on information received . . . Such suggestions, and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly."[141] There is no stated path to hold an offending country responsible for their violations, even if they are numerous.[142] Even if there is a complaint and subsequent investigation, the state is under no obligation to implement the changes recommended by the U.N.[143] However, this complaint and investigation process does place international pressure on an offending country. This could push the Knesset to take action to prevent international embarrassment or greater controversy.

As discussed above, there are multiple ways to address the Nation-State law's violations of the Convention. The first would be for state parties to the Convention to put political pressure on Israel through complaints to the General Assembly regarding Israel's treatment of Palestinian children. This complaint triggers the U.N. to appoint experts to investigate.[144] This pressure from the U.N. and other state parties may trigger more awareness regarding the treatment of Palestinian children among members of an already profoundly divided Knesset.[145] As there were only two votes which decided the majority of the Knesset's position regarding the Nation-State law, this pressure and awareness regarding violations of the Convention would be likely to sway at least two members of the Knesset.[146] This could lead to the striking of the parts of the Nation-State law which violate the Convention of the Rights of the Child.

---

137 Versa: Cardozo Law, About the Supreme Court of Israel, https://versa.cardozo.yu.edu/about-supreme-court-israel (last visited Apr. 25, 2022).]

138 CRC, *supra* note 3.

139 *Id.* at art 44-5.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 Lahav Harkov, *Knesset Debates Nation-State Law: 'Stop Dividing Us'*, The Jerusalem Post (Aug. 8, 2018), https://www.jpost.com/israel-news/in-special-session-knesset-debates-nation-state-law-564373.

146 *Israel's Jewish Nation-State Law,* Adalah: The Legal Center for Arab Minority Rights in Israel (Dec. 20, 2020), https://www.adalah.org/en/content/view/9569.

VI. Conclusion

Through the Knesset's passing of the Nation-State Law, and the Supreme Court of Israel's subsequent ruling, Israel has violated the Convention of the Rights of the Child.[147] Specifically, the language within the Nation-State law, which denies Palestinians the right to self-determination and states that Israeli settlements are a national value, violates Articles 8, 27, and 28 of the Convention; a child's right to its nationality, an adequate standard of living, and an education.[148] The consequences for Palestinian children range from depriving them of their right to express their nationality, to subjecting them to violence and causing them to have an unduly difficult time receiving an education.[149]

By analyzing the background of the Israeli-Palestinian conflict, specifically legislative history, which led to this law's creation, and the legal progression of the law itself, one can deduce a feasible proposal for the reversal of this law.[150] The three avenues for remedies are not all likely to be achievable, but through the proposed three-step approach, that being international pressure, the pressure within the Knesset, and then a vote for another Basic Law, which would nullify the offending articles within the Nation-State law, there is a path forward in which Palestinian children would be afforded the protections provided to them by the Convention.[151]

---

147 Veerman & Gross, *supra* note 3.

148 CRC, *supra* note 3, art 8, 27-8.

149 *Right to a Childhood*, *supra* note 120.

150 *Child Fatalities*, *supra* note 105; *see also Adalah's Position Paper*, *supra* note 86.

151 *Israel's Jewish Nation-State Law*, *supra* note 147. *See also* CRC, *supra* note 3; *see also* חוק יסוד: ישראל - מדינת הלאום של העם היהודי, *supra* note 4.

Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn From International Supply Chain Regulations

Kellie R. Tomin*

Abstract

This comment addresses the United States' failure to pass comprehensive federal supply chain due diligence legislation. The United States presents itself as a global leader, but its failure to pass comprehensive supply chain due diligence legislation creates a gap in human rights due diligence that can lead to corporate human rights abuses. Although the United States has passed several human rights due diligence laws, a comprehensive federal law would be more effective at preventing corporate human rights abuses in the supply chains of business organizations that operate in the United States. This comment argues that American lawmakers should look to Germany's recently passed *Act on Corporate Due Diligence in Supply Chains* as a model for comprehensive human rights supply chain due diligence legislation. First, the comment reviews the history of business and human rights, previous attempts at supply chain due diligence legislation in the United States, and current European due diligence legislation. Next, the comment analyzes the strengths and weaknesses of Germany's *Act on Corporate Due Diligence in Supply Chains* and analyzes the recently enacted *Uyghur Forced Labor Prevention Act*. Finally, the comment argues that the United States should borrow the positive provisions from Germany's *Act on Corporate Due Diligence in Supply Chains*, improve upon its weaknesses, and pass comprehensive federal legislation to reaffirm its position as a global leader in the elimination of corporate human rights abuses.

Table of Contents

* Loyola University Chicago School of Law, Class of 2023.

I. Introduction

The German Parliament recently passed an act entitled, *Act on Corporate Due Diligence in Supply Chains* ("German Supply Chain Act" or "the Act").[1] The German Supply Chain Act is designed to protect against human rights abuses in supply chains.[2] Both German and certain foreign companies are required to identify human rights and environmental risks in their supply chains and establish an effective plan to manage those risks.[3] Importantly, the Act also references the United Nations Guiding Principles on Business and Human Rights ("Guiding Principles").[4]

In contrast, the United States ("U.S.") lacks a single, comprehensive federal law mandating human rights due diligence in supply chains, and although it has shown a strong commitment to the Guiding Principles, it has failed to introduce mandatory requirements for companies.[5] This lack of federal supply chain due

[1] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence in Supply Chains], Jul. 16, 2021, BGBL I Nr. 46 at 2959 (Ger.), http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=Bgbl121s2959.pdf, translation at https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 [hereinafter German Supply Chain Act]; *What the New Supply Chain Act Delivers – And What It Doesn't*, INITIATIVE LIEFERKETTENGESETZ 2 (June 11, 2021 https://germanwatch.org/sites/default/files/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf (also translated as "Supply Chain Due Diligence Act").

[2] *See* INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 2.

[3] *Id.* at 2-4 (stating that the Act currently applies to foreign business organizations that have a registered branch office in Germany and employ more than 3,000 people, and in 2024 will apply to companies that employ more than 1,000 people).

[4] *Id.* at 2.

[5] Tobias Koppmann et al., *The New German Supply Chain Due Diligence Act (With a View Across the Border)*, NAT'L L.R. at 1, 6 (Jul. 14, 2021), https://www.natlawreview.com/article/new-german-sup-

diligence legislation creates a gap in supply chain human rights due diligence in the U.S. that can result in human rights abuses.

In addressing this regulatory gap, the Act can serve as a model for federal supply chain human rights due diligence legislation in the U.S. While the U.S. has passed several human rights due diligence laws,[6] a comprehensive federal law would be more effective at addressing human rights abuses committed by domestic and foreign corporate organizations that operate in the U.S. The U.S. should implement the Guiding Principles, as discussed *infra*, and enact legislation that requires companies to conduct human rights due diligence reviews in their supply chains, using the Act as a model.

Part I of this comment will review the history of business and human rights, the Guiding Principles, previous attempts at supply chain due diligence legislation in the U.S., and current supply chain due diligence in select European countries. Part II will examine the German Supply Chain Act and discuss its human rights concern, due diligence requirements, and sanctions. Additionally, Part II will analyze the strengths and weaknesses of the Act. Part III will evaluate the *Uyghur Forced Labor Prevention Act* and examine current gaps in U.S. supply chain due diligence legislation. Part IV discusses key topics to include in any future federal U.S. supply chain due diligence legislation and lobbying concerns that might arise. Finally, Part V argues that the United States must pass comprehensive federal supply chain due diligence legislation in order to reclaim its role as a global human rights leader.

II. Background

A. The History of Business and Human Rights

From the 1950s through the end of the 20th century, international trade increased tremendously.[7] Supply chains became more complicated, made it difficult for new transnational corporations to identify problems.[8] For example, limited technology and other challenges in obtaining information prevented corporations from easily monitoring the people and materials in their supply chains.[9] In response to the growth of multinational enterprises, the Organization for Economic Co-operation and Development ("OECD") introduced the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") in 1976.[10] During the

ply-chain-due-diligence-act-view-across-border; Amy Lehr, *Taking Stock of Business and Human Rights in the United States: Reflections on Visit of U.N. Working Group*, INST. FOR HUM. RTS. & BUS. (Apr. 3, 2013), https://www.ihrb.org/other/governments-role/commentary-business-human-rights-united-states; *see also* ASSESSMENT OF THE UNITED STATES NATIONAL ACTION PLAN (NAP) ON RESPONSIBLE BUSINESS CONDUCT, INT'L CORP. ACCOUNTABILITY ROUNDTABLE 13 (2017) [hereinafter ICAR].

6 *See* Koppmann, *supra* note 5.

7 *Human Rights and Business: How The U.N. Guiding Principles Have Influenced Supply Chain Due Diligence Laws*, SEDEX (Jul. 6, 2021), https://www.sedex.com/human-rights-and-business-how-the-un-guiding-principles-have-influenced-supply-chain-due-diligence-laws/.

8 *Id.*

9 *Id.*

10 Organisation for Economic Co-operation and Development [OECD], *The OECD Guidelines for Multinational Enterprises*, at 2, OCDE/GD(97)40 (Mar. 24, 1997) [hereinafter *OECD Guidelines*].

late twentieth century, as multinational enterprise and transnational corporations continued to grow, supply chains also became more and more complicated.[11] The OECD Guidelines provide non-binding guidance for multinational enterprises to help them know how to operate responsibly in OECD territories.[12]

After several years of research and consultations with various stakeholders, the United Nations recommended the Protect, Respect, and Remedy Framework (the "PRR Framework") for business and human rights in 2008.[13] The PRR Framework acknowledges that both States and business organizations have responsibilities to protect against and prevent corporate human rights abuses.[14] Importantly, in order to comply with their obligations under international human rights law, States must protect against human rights abuses by business organizations by preventing them where possible, and providing a functional remedy for victims when instances do arise.[15] In 2011, the United Nations Human Rights Council sanctioned the Guiding Principles, which allowed the PRR Framework to be put into action.[16]

B. Overview of United Nations Guiding Principles on Business and Human Rights

The Guiding Principles have three pillars: first, the State's obligation to prevent and protect against corporate human rights abuses; second, the corporate responsibility to prevent and protect against the same; and third, the need for access to effective remedies.[17] The State's duty to protect human rights includes an obligation for States to clearly articulate the expectation that all business organizations protect against human rights abuses in both their domestic and international operations.[18] For their part, States must meet their duty to protect against human rights abuses, and Principle 3(a) specifically asserts that States should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such

---

[11] *See* SEDEX, *supra* note 7.

[12] *Id.*; OECD, *International Investment and Multinational Enterprises: Review of the 1976 Declaration and Decisions* 5 (1979), https://www.oecd.org/corporate/mne/50024869.pdf.

[13] *See generally* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); *The U.N. Guiding Principles on Business and Human Rights: An Introduction*, THE U.N. WORKING GROUP ON BUS. & HUM. RTS. 2, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Apr. 23, 2022).

[14] *The U.N. Guiding Principles on Business and Human Rights: An Introduction*, *supra* note 13.

[15] *Id.*

[16] *Id.*; *see* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 20011) [hereinafter Guiding Principles]; *see also* Human Rights Council Res. 17/4, U.N. DOC. A/HRC/RES/17/4 (July 6, 2011).

[17] Guiding Principles, *supra* note 16, Principle 3 Comment.

[18] *Id.* Principle 1.

laws and address any gaps . . ."[19] The Guiding Principles also articulate corporate responsibility, stating in Principle 17:

> [I]n order to identify, prevent, mitigate [sic] and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating [sic] and acting upon the findings, tracking responses, and communicating how impacts are addressed.[20]

Although the Guiding Principles were endorsed unanimously among U.N. Member States, they are not binding, and companies frequently disregard them or institute ineffective measures in lackluster attempts at compliance.[21]

C. Attempts at Supply Chain Due Diligence Legislation in the United States

In 2016, the United States produced a national action plan ("NAP") on business and human rights, but the plan required no federal legislation to implement the Guiding Principles.[22] Instead, the plan simply called for American companies "to implement the voluntary best practices contained in the . . . Guiding Principles . . . ."[23] Despite its failure to formally implement the Guiding Principles, the U.S. still has several regulations that apply to supply chain due diligence.

First, the California Transparency in Supply Chains Act of 2010 requires certain larger business organizations operating in California to include a disclosure on their websites detailing their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale."[24] But the law does not require actual supply chain due diligence mechanisms – it simply requires disclosure.[25]

Also, the Alien Tort Claims Act ("ATCA") provides federal courts with jurisdiction to hear cases with four elements: (1) a civil action, (2) taken by an alien, (3) for a tort, (4) "committed in violation of the laws of nations or a treaty of the United States."[26] In 1980, the Second Circuit held that non-U.S. citizens could access American courts by using the ATCA as a basis for claims relating to

---

[19] Guiding Principles, *supra* note 16, Principle 3(a).

[20] *Id.* Principle 17.

[21] *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, HUM. RTS. WATCH (May 30, 2016), https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence.

[22] *First National Action Plan for the United States of America*, U.S. SEC'Y OF STATE 1, 1 (Dec. 16, 2016), https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-USA.pdf; Lehr, *supra* note 5; ICAR, *supra* note 5, at preface, 8, 9-12 (explaining that the U.S.'s "NAP is heavily skewed towards voluntary measures, guidance, trainings, outreach, funding, and dialogue, and is severely lacking in commitments to new regulatory measures," *id.* at 8.).

[23] *First National Action Plan*, *supra* note 22, at 25.

[24] CAL. CIV. CODE § 1714.43(a), (b) (2010).

[25] *The California Transparency in Supply Chains Act: A Resource Guide*, CAL. DEP'T JUST. i (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

[26] Alien Tort Claims Act, 28 U.S.C. § 1350 [hereinafter ATCA].

violations of universally recognized norms of international human rights law, such as politically-motivated torture.[27] However, the Supreme Court recently limited the scope of the ATCA in *Nestle USA, Inc. v. Doe*, holding that "allegations of general corporate activity – like decision-making – cannot alone establish domestic application of the [ATCA]."[28]

Further, the United States Congress ("Congress") recently but unsuccessfully attempted to introduce several comprehensive federal statutes. First, in 2019, Congress introduced the draft Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act,[29] which aimed to require publicly listed U.S. companies to make mandatory human rights disclosures.[30] Under the proposed legislation, companies would be required to file an annual report with the Securities and Exchange Commission listing risks to human rights within their operations and providing information on prevention strategies.[31] However, the bill has not made any progress since it was originally introduced.[32]

Then in 2020, Congress again attempted to mandate human rights due diligence by introducing the Business Supply Chain Transparency on Trafficking and Slavery Act which aimed to "amend the Securities Exchange Act of 1934 to require certain companies to disclose information describing any measures the company has taken to identify and address conditions of forced labor, slavery,

---

[27] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 1, 2 (Jun. 6, 2018). In 1976, Joelito Filártiga was kidnapped, tortured, and murdered by Americo Norberto Pena-Irala ("Pena"). The Filártiga family filed a criminal complaint for Joelito's death in the Paraguayan court system, but the case did not make any progress. In 1978, Pena moved to the United States on a visitor's visa. Dolly Filártiga, Joelito's sister, learned that Pena was in the United States in violation of the term his visitor's visa and reported him to the Immigration and Naturalization Service. While Pena was being held in an immigration detention center in Brooklyn, New York, United States, the Filártigas served him with process. The district judge dismissed the case for lack of federal jurisdiction. However, the appellate court reversed, holding "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within [U.S.] borders, [the ATCA] provides federal jurisdiction." *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878-80, 887-88 (2d Cir. 1980).

[28] *Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021).

[29] The Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act was debated in the U.S. House of Representatives Committee on Financial Services but received no votes in Congress. *See* GIBSON DUNN, *Part Two – Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective* (Mar. 10, 2021) https://www.gibsondunn.com/part-two-mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective/; *see also* U.S. HOUSE COMM. ON FIN. SVCS., 116TH CONG., DISCUSSION DRAFT, CORPORATE HUMAN RIGHTS RISK ASSESSMENT, PREVENTION, AND MITIGATION ACT (2019), *available at* https://financialservices.house.gov/uploadedfiles/bills-116pih-corphuman.pdf.

[30] *Discussion Draft of Mandatory Human Rights Disclosure Legislation Introduced in US* [sic] *Congress*, BUS. & HUM. RTS. RES. CTR. (Aug. 9, 2019), https://www.business-humanrights.org/en/latest-news/usa-discussion-draft-of-mandatory-human-rights-disclosure-legislation-introduced-in-us-congress/.

[31] *Discussion Draft of Mandatory Human Rights Disclosure Legislation Introduced in US* [sic] *Congress*, BUS. & HUM. RTS. RES. CTR. (Aug. 9, 2019), https://www.business-humanrights.org/en/latest-news/usa-discussion-draft-of-mandatory-human-rights-disclosure-legislation-introduced-in-us-congress/.

[32] GIBSON DUNN, *supra* note 29.

human trafficking, and the worst forms of child labor within the company's supply chains."[33] However, the draft bill did not make it out of committee.[34]

Finally, the draft Slave-Free Business Certification Act was also introduced in 2020, whose purpose was to "require certain businesses to disclose the use of forced labor in their direct supply chain, and for other purposes."[35] However, the bill similarly made no progress in Congress.[36]

On the other hand, some federal U.S. legislation may apply to supply chain due diligence. Section 307 of the Tariff Act of 1930 prohibits the importation of any product that was "mined, produced, or manufactured" by forced labor, including forced child labor.[37] In 2015, Congress passed the Trade Facilitation and Trade Enforcement Act ("TFTEA"), which amended Section 307 and eliminated the "'consumptive demand' exception."[38] The consumptive demand exception made it easier to import certain goods that were in high demand but not domestically produced in sufficient enough quantities to meet that demand, regardless of forced labor concerns.[39]

Section 307 enforcement generally increased after TFTEA was enacted.[40] The United States Customs and Border Control ("CBP") has since issued dozens of withhold release orders ("WROs"), which prevent goods produced by or possibly produced by forced labor from entering into the United States.[41] Although WROs are normally only issued for certain products or manufacturers, CBP has recently started issuing WROs that apply to entire industries and countries.[42] Importantly, most WROs since 1990 have been issued in relation to Chinese-produced products, and recent Section 307 actions have followed the same trend.[43]

In response to the Chinese government's horrendous treatment of the Uyghur and other minorities, Congress recently passed crimes against humanity against Uyghurs and other ethnic minorities, Congress passed legislation specifically targeting goods produced in Xinjiang, China.[44] The *Uyghur Forced Labor Pre-*

---

33 Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. preamble (2020).

34 *H.R. 6279 (116th): Business Supply Chain Transparency on Trafficking and Slavery Act of 2020*, GovTrack, https://www.govtrack.us/congress/bills/116/hr6279 (the bill "did not receive a vote") (last visited May 2, 2022).

35 Slave-Free Business Certification Act of 2020, S. 4241 (116th) Cong. preamble (2020).

36 *S. 4241 (116th): Slave-Free Business Certification Act of 2020*, GovTrack, https://www.govtrack.us/congress/bills/116/s4241 (last visited May 2, 2022).

37 19 U.S.C. § 1307.

38 Cathleen D. Cimino-Issacs et al., Cong. Rsch. Serv., R46631, Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress preface (2021); Trade Facilitation and Trade Enforcement Act, 19 U.S.C. § 4301 [hereinafter TFTEA].

39 Cimino-Issacs, *supra* note 38, preface.

40 *Id.* at 7.

41 *Id.* at 1.

42 *Id.*

43 *Id.* at 7.

44 *See, e.g.*, United States Holocaust Memorial Museum's Simon-Skjodt Center for the Prevention of Genocide, "To Make Us Slowly Disappear:" The Chinese Government's Assault on the Uyghurs 36, 44, 50 (Nov. 2021) ("[T]he persecution, mass detentions, and enforced sterilizations of

vention Act ("Uyghur Act"), almost unanimously supported in Congress, is the first comprehensive effort to require certain supply chain due diligence.[45] The Uyghur Act is very broad and could impact a wide variety of products, including cotton, petroleum, minerals, and sugar, that pass through or derive from Xinjiang.[46]

As discussed *infra*, some provisions of the Uyghur Act mirror the German Supply Chain Act. For example, the burden of proof is placed on corporations, not customs officials, to prove that their Chinese factories and suppliers do not use forced labor.[47] If companies can provide clear and convincing evidence that their goods were not made using forced labor, CBP will allow the goods to enter the United States.[48]

D. Supply Chain Due Diligence Legislation in Europe

In July 2021, the European External Action Service, the diplomatic arm of the European Union ("E.U."), published guidance for E.U. companies on the prevention of human rights abuses, particularly forced labor, in supply chains.[49] The guidance provides information on how to implement supply chain due diligence procedures in accordance with relevant international standards.[50] This document is simply guidance and does not bind members of the E.U. to any specific procedures.[51] Prior to the issuance of this guidance, however, several current and former E.U. members, including France, Italy and the United Kingdom, had passed legislation addressing the risk of human rights abuses in supply chains.[52]

i. France

In 2017, France passed the Duty of Vigilance Act, which requires French-registered companies and foreign companies with French subsidiaries to publish an annual "vigilance plan" detailing their impact on human rights and the envi-

---

the Uyghur population are not only crimes against humanity, but also represent a serious risk of a genocide occurring or in progress. The persecution of the Uyghurs, and all of the underlying acts that comprise that persecution, show a clear pattern of discrimination against the Uyghurs on the basis of their ethnicity and religion," *id.* at 44).

45 Ana Swanson et al., *U.S. Effort to Combat Forced Labor Targets Corporate China Ties*, N.Y. TIMES (updated Jan. 5, 2022), https://www.nytimes.com/2021/12/23/us/politics/china-uyghurs-forced-labor.html.

46 *Id.*

47 *Id.*

48 Uyghur Forced Labor Prevention Act §3(b)(2), Pub. L. No. 117–78, 135 Stat. 1525 (2021).

49 *European External Action Services (EEAS)*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/eeas_en (last visited Apr. 23, 2022); European Commission Press Release IP/21/3664, New E.U. Guidance Helps Companies to Combat Forced Labour in Supply Chains (Jul. 13, 2021), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_3664/IP_21_3664_EN.pdf.

50 *On Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains*, E.U. EXTERNAL ACTION 1, 2 (Dec. 7, 2021), https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf.

51 *Id.* at 2, n.7.

52 *See* Koppmann, *supra* note 5.

ronment.[53] Business organizations subject to the Duty of Vigilance Act must also analyze the impact of their subsidiaries, suppliers, and subcontractors.[54] The vigilance plans will likely need to include information such as procedures for conducting regular human rights risk assessments, procedures for conducing regular reviews of the potential risks associated with "subsidiaries, subcontractors, and suppliers with which the company has a commercial relationship," certain mitigation and/or prevention actions, warning mechanisms, and mechanisms to analyze the plan's efficacy.[55] Additionally, the Duty of Vigilance Act provides a remedy mechanism – if a victim can show that a company's failure to institute a vigilance plan caused them harm, the company is liable.[56]

ii. Italy

Italy has not codified the Guiding Principles, but in 2016 the Italian government announced its NAP, which included its intent to implement corporate due diligence requirements.[57] Under this NAP, Italy is reviewing a 2001 law that assigned corporate responsibility for human rights abuses committed domestically and abroad.[58] However, this legislation is not perfect and would likely not meet the standards outlined in the U.N. Guiding Principle because it provides business organizations with the ability to avoid liability by simply creating a compliance program.[59] Despite the liability avoidance provision, it is theoretically possible that a corporation could be liable for human rights violations committed in its supply chains if human rights abuses were present and it did not have a compliance program.

iii. United Kingdom

In 2015, the United Kingdom passed the Modern Slavery Act.[60] Modern slavery is defined as "'slavery, servitude [sic] and forced or compulsory labor,' and

---

53 Neil Hodge, *France Adopts Multinational Duty of Care Law*, COMPLIANCE WK. (Apr. 25, 2017, 4:45 AM) https://www.complianceweek.com/france-adopts-multinational-duty-of-care-law/2696.article; Sarah A. Altschuller & Amy K. Lehr, *The French Duty of Vigilance Law: What You Need to Know*, GLOBAL BUS. & HUM. RTS. (Aug. 3, 2017), https://www.globalbusinessandhumanrights.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/.

54 Altschuller & Lehr, *supra* note 53.

55 *Id.*

56 INT'L TRADE UNION CONFED'N, TOWARDS MANDATORY DUE DILIGENCE IN GLOBAL SUPPLY CHAINS 8 (June 19, 2020) https://www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf [hereinafter ITUC].

57 Koppmann, *supra* note 5; EVIDENCE FOR MANDATORY HUMAN RIGHTS DUE DILIGENCE LEGISLATION, EUR. COAL. FOR CORP. JUST. 3 (2020), http://corporatejustice.org/wp-content/uploads/2021/03/evidence-for-mhrdd-september-2020-_1.pdf.

58 ITUC, *supra* note 56, at 9.

59 *Id.*

60 Modern Slavery Act 2015, c. 30 (UK).

'human trafficking.'"[61] The Modern Slavery Act requires certain business organizations to create an annual statement detailing their efforts to combat human rights abuses in their supply chains and post the report conspicuously on the homepage of their website.[62] Although the Modern Slavery Act does not prescribe what exactly must be provided in the statement, it provides a list of information that organizations may consider including in their statements.[63] This list suggests including information about the organization's business structure and supply chains, its human rights policies and due diligence procedures, areas of risk in their supply chains, and the effectiveness of their due diligence procedures.[64] Although the Modern Slavery Act represents significant progress in supply chain due diligence legislation, it is not as comprehensive as the German Supply Chain Act.

III. Discussion

A. Overview of Germany's *Act on Corporate Due Diligence in Supply Chains*

Germany passed the German Supply Chain Act in July 2021, and it will enter into force in 2023.[65] The Act references the Guiding Principles and aims to protect the human rights of people involved with global supply chains and increase compliance with certain environmental conventions.[66]

Initially, the Act will only apply to companies with 3,000 or more employees that "have their central administration, their principal place of business, their administrative headquarters, or their statutory seat in Germany."[67] Subsequently, starting in 2024 the Act's coverage expands to include German companies with 1,000 or more employees.[68] The employee headcount includes temporary workers who are employed for at least six months and employees who work outside of Germany.[69]

The Act will require relevant business organizations to conduct periodic supply chain risk assessments and publish annual reports on the status of their re-

---

[61] *Transparency in Supply Chains Etc.: A Practical Guide*, HOME OFFICE 17 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040283/Transparency_in_Supply_Chains_A_Practical_Guide_2017_final.pdf.

[62] *Id.* at 5, 14 (the Act requires such a statement from "[e]very organisation carrying on a business in the UK with a total annual turnover of £36m or more").

[63] *Id.* at 12.

[64] *Id.*

[65] Jenny Gesley, *Germany: New Law Obligates Companies to Establish Due Diligence Procedures in Global Supply Chains to Safeguard Human Rights and the Environment*, LIBR. OF CONG. (2021), https://www.loc.gov/item/global-legal-monitor/2021-08-17/germany-new-law-obligates-companies-to-establish-due-diligence-procedures-in-global-supply-chains-to-safeguard-human-rights-and-the-environment/.

[66] INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 2-4.

[67] German Supply Chain Act § 1.

[68] INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 2.

[69] German Supply Chain Act §§ 1(1), (2).

sponse to any risks identified.[70] If those entities fail to comply with the law, the German government can take administrative action or levy monetary penalties.[71]

B. Human Rights Concerns in the German Supply Chain Act

Section 2 of the Act defines a "human rights risk" as a factual situation in which a "sufficient probability" exists that would give rise to an "imminent" violation of one of a list of prohibited situations involving human beings.[72] That list includes: illegally employing an individual who is fifteen years of age or younger; using forced labor or slavery, including for children; illegal disregard of safety requirements; disregard of employees' rights to associate, including unionization; discriminatory employment or wage granting practices on specified grounds; and, using security forces to protect business projects if those forces commit human rights abuses, among others.[73] Some of the risks relating to human rights also overlap with the risks relating to the environment, as noted below.[74]

C. Environmental Concerns in the German Supply Chain Act

Similarly, the Act in Section 2 defines an "environment-related risk" as a factual situation in which a "sufficient probability" exists that would give rise to a violation of one of a list of prohibited environmental situations.[75] Some environmental risk prohibitions include: bans relating to mercury compounds and waste in accordance with the Minamata Convention; bans on the use and storage of chemicals in accordance with the Stockholm Convention and its Annex A on Persistent Organic Pollutants ("POPs Convention"); and, bans on the export and import of hazardous waste in accordance with the Basel Convention.[76] Additionally, human rights and environmental risks overlap, as the Act also prohibits:

---

[70] *Germany: New Supply Chain Law a Step in the Right Direction*, HUM. RTS. WATCH (June 11, 2021, 5:00 AM), https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction#.

[71] *Id.*; Gesley, *supra* note 65 (fines and penalties vary: "[l]arge companies with an annual global turnover of 400 million euros (about US$475 million) can be required to pay fines of up to 2% of their annual global turnover [and c]ompanies that have been fined a minimum of 175,000 euros (about US$208,000) can be excluded from public procurement for up to three years.").

[72] German Supply Chain Act § 2(2).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at § 2(3). Persistent organic pollutants, or compounds, known as POPs, are toxic chemicals that impact human health and the environment because they do not readily break down and can persist in and be passed through the food chain. Further, POPs can impact countries where they were not originally used because they are easily transported by wind and water. Consequently, in 2001 countries agreed to reduce the production, use, and release of certain POPs via the Stockholm Convention. The U.S. is a signatory. *See Persistent Organic Pollutants: A Global Issue, A Global Response*, U.S. ENVT'L PROT. AGENCY (updated Dec. 2009), https://www.epa.gov/international-cooperation/persistent-organic-pollutants-global-issue-global-response.

> [. . .] causing harmful soil alteration, water pollution, air pollution, harmful noise emission or excessive water consumption, which is likely to; (a) significantly affect the natural basis for the preservation and production of food, (b) deny a person access to safe drinking water, (c) impede or destroy a person's access to sanitary facilities, or (d) harm the health of a person.[77]

D. Due Diligence Requirements in the German Supply Chain Act

Companies falling under the Act must set up due diligence procedures to protect human rights and environmental considerations in their global supply chains. The due diligence obligations include:

1. establishing a risk management system. . . ,
2. designating a responsible person or persons within the enterprise. . . ,
3. performing regular risk analyses. . .,
4. issuing a policy statement. . . ,
5. laying down preventative measures in its own area of business . . . and vis-à-vis direct suppliers . . . ,
6. taking remedial action . . . ,
7. establishing a complaints procedure . . . ,
8. implementing due diligence obligations with regard to risks at indirect suppliers. . . and
9. documenting . . . and reporting. . ..[78]

In order to comply with the documentation and reporting requirements, business organizations controlled by the act must post a free-of-charge, publicly available due diligence report on their websites.[79]

E. Sanctions Under the German Supply Chain Act

Under the Act, business organizations that fail to comply with its provisions may be subject to financial penalties, administrative fines, or other sanctions.[80] Business organizations with an annual income of more than _400 million (approximately $475 million) can be fined up to 2% of that annual income.[81] Additionally, business organizations that fail to comply may be administratively punished by being prohibited from bidding on public contracts.[82] Unfortunately, companies that violate the Act cannot be held liable in civil court, but individuals

---

[77] Almut Schilling-Vacaflor, MDPI, *Integrating Human Rights and the Environment in Supply Chain Regulations*, 13, 9666 SUSTAINABILITY 1, 8 (Aug. 27, 2021) https://doi.org/10.3390/su13179666; German Supply Chain Act § 2(2)9.

[78] German Supply Chain Act § 3(1).

[79] Gesley, *supra* note 65.

[80] German Supply Chain Act §§ 23, 24.

[81] *Id.* § 24(3).

[82] *Id.* § 22(1).

may pursue a claim under other existing and independent civil liability provisions.[83]

F. Positive Takeaways from the German Supply Chain Act

The Act marks an overdue turn away from voluntary corporate self-regulation to legally binding supply chain due diligence regulation.[84] Now, relevant business organizations are legally required to account for human rights risks within their entire supply chains, which helps protect "paramount legal interests."[85] The Act also has an important preventative effect because it requires companies to take proactive measures to protect against human rights abuses and environmental destruction, rather than only addressing remedies for violations that have already occurred.[86] Finally, the Act carries substantial penalties,[87] which helps guarantee corporate compliance.[88]

G. Weaknesses in the German Supply Chain Act

However, the Act is not as effective as it could be.[89] First, the due diligence obligations do not apply to indirect suppliers.[90] Despite the fact that many human rights violations occur in indirect supply chains, relevant business organizations are only required to conduct a risk assessment for an indirect supplier if they have "substantiated knowledge" of potential human rights abuse.[91] This limitation is not in line with the Guiding Principles, because companies cannot fully prevent human rights violations if they are not routinely reviewing their indirect supply chains for potential risks.[92] Additionally, as mentioned *supra,* the Act

---

83 German Supply Chain Act § 3(3); *see also* Robert Grabosch, *The Supply Chain Due Diligence Act*, FRIEDRICH EBERT STIFTUNG 6 (2021), http://library.fes.de/pdf-files/iez/18755.pdf ("Due to the Rome-II-Regulation of the E.U. [dictating choice of law in transnational disputes], German law is rarely applicable to claims for damages, since foreign law regularly applies to damages sustained abroad. Civil liability under foreign law generally requires a finding of fault, [which] means a violation of due diligence duties. Thus, a civil court would have to at least consider [the German Supply Chain Act] due diligence duties which apply to the production facilities of German companies, since due diligence duties are rules of conduct under Art. 17 Rome-II-VO. An argument can be made that civil courts have to apply [German Supply Chain Act] duties as [an overriding rule] in the context of cross-border disputes (Art. 16 Rome-II-VO).").

84 INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 6.

85 *Id.* at 3.

86 *See* German Supply Chain Act § 6.

87 INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 3.

88 German Supply Chain Act §§ 21(1), 23, 24(3) (corporations not in compliance risk exclusion from government contract awards [§21(1)], financial penalties [§23], and administrative fines [§24(3)]).

89 *See* INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 4.

90 *Id.*

91 *Id.*

92 *See* INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 4; Guiding Principles, *supra* note 16, Principle 12 Comment. ("Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.").

does not create civil liability for business organizations that violate its provisions, and this limits the ability of injured parties to successfully bring a claim against a business organization and inhibits the Act's deterrent effect.[93] Further, the Act does not require covered business organizations to consult with relevant groups to evaluate their human rights risks, which does not reflect the Guiding Principles.[94]

Finally, the Act does not provide a comprehensive environmental due diligence obligation because it only requires relevant business organizations to comply with three conventions (as noted *supra*, the POPs Convention, Minamata Convention, and Basel Convention).[95] It also fails to address biodiversity loss and climate change, both of which are negatively impacted by the global supply chain.[96] Domestic civic groups also weighed in on the environmental due diligence portion of the Act, criticizing its failure to impose a general environmental protection obligation.[97]

The Act's shortcomings are partly attributable to the work of business interest groups who were able to the influence German lawmakers to weaken certain portions of the Act.[98] However, the Act is still an admirable step in the right direction,[99] and may serve as a model for comprehensive U.S. legislation, especially when considered in conjunction with certain aspects of the Uyghur Act and Guiding Principles.

IV. Analysis

A. Analysis of the Uyghur Forced Labor Prevention Act

The Uyghur Act directs the Forced Labor Enforcement Task Force ("Task Force")[100] to develop a plan to curtail U.S. importation of goods produced or manufactured using forced labor in the Xinjiang region of China.[101] The Task Force will submit a report following a planning period, which will include a list of business entities in Xinjiang that use forced labor, a list of entities working with the Chinese government to impose forced labor on minority populations in

---

93 INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 4

94 *Id.* at 5; Guiding Principles, *supra* note 16, Principle 18(b); Principle 18 Comment.; Principle 21 Comment.

95 German Supply Chain Act § 2(3).

96 INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 6.

97 Schilling-Vacaflor, *supra* note 77, at 8 (Germany's Green Party submitted an amendment to the Act, arguing that the amendment should be adopted because it "enable[d] comprehensive protection of the environmental goods soil, air, water, biodiversity and global climate in the sense of the precautionary principle [. . .]. This also [would have] provide[d] preventive protection of human rights arising from cumulative and creeping environmental degradation." The amendment was rejected by vote in the German Parliament).

98 *Id.* at 4.

99 INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 6.

100 The Forced Labor Enforcement Task Force already existed and was created under the United States-Mexico-Canada Agreement Implementation Act (19 U.S.C. § 4681). Uyghur Forced Labor Prevention Act, Pub. L. 117–78, 135 Stat. 1525 § 2(a)(1) [hereinafter Uyghur Act].

101 *Id.* § 2.

that region, a list of products made with forced labor, a list of entities that have previously exported into the United States products made using Chinese forced labor, and a list of facilities that obtain materials from the Xinjiang region.[102] The Task Force also must submit plans to identify additional facilities and sectors that might be covered by the Uyghur Act and create enforcement plans for the identified facilities and sectors.[103] Further, the Task Force will make recommendations as to how CBP can best prevent forced labor products from the Xinjiang region from entering the U.S.[104] Finally, the Task Force will provide guidance to importers, including due diligence recommendations, and supply chain tracing and management suggestions, to assist importers in complying with this mandate.[105] The Task Force has 180 days after ratification of the Uyghur Act to submit its report to Congress.[106]

The Uyghur Act also creates the rebuttable presumption that goods produced in or sourced from the Xinjiang region are assumed to be in violation of Section 307 of the Tariff Act (i.e., that they were produced with forced labor) and cannot be imported into the United States.[107] This presumption may be rebutted if CBP establishes that: (1) the importer has fully complied with the Act's guidance on effective due diligence measures for importers under Section 2(d)(6); (2) it has adequately responded to all CBP inquires; and, (3) CBP has clear and convincing evidence that the relevant goods were not produced using forced labor.[108]

Although the Uyghur Act shows that Congress is willing and able to produce meaningful supply chain due diligence legislation, it is, by definition, limited in its geographical application and will only prevent human rights abuses in this specific region.

B. Gaps in Current United States Supply Chain Due Diligence Legislation

Although businesses have a general responsibility to exercise reasonable care when importing goods into the United States, including a responsibility to take effective measures to ensure that imported goods were not produced with forced labor,[109] a number of prominent American companies still have forced labor in their supply chains.[110] For example, Apple and Nike have both been accused of

---

102 Uyghur Act, *supra* note 101, at § 2.

103 *Id.*

104 Amandeep S. Kahlon & Monica Wilson Dozier, *Uyghur Forced Labor Prevention Act: What It Means for the Solar Supply Chain*, NAT'L L. REV. Vol. XI., no. 361, Dec. 27, 2021.

105 *Id.*

106 Uyghur Act §2(e). This statutory period expires in June 2022.

107 *Id.* §3.

108 Uyghur Act §3.

109 *What Every Member of the Community Should Know: Reasonable Care*, U.S. CUSTOMS & BORDER PROT. 3, 14-15 (Sept. 2017), https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icprescare2017revision.pdf; Tariff Act, 19 U.S.C. § 1484(a)(1)(B)(3).

110 Vicky Xiuzhong Xu et al., *Uyghurs for Sale*, AUSTL. STRATEGIC POL'Y INST., Report No. 26/2020, at 5, https://www.aspi.org.au/report/uyghurs-sale (2020) (identifying 82 American companies as beneficiaries or possible beneficiaries of forced Uyghur labor, including Abercrombie & Fitch, Amazon, Apple,

sourcing from factories in China that utilize forced Uyghur labor.[111] Ideally, as a result of the passage of the Uyghur Act, the companies benefiting from forced Uyghur labor will begin shifting production out of Xinjiang to other countries or regions where forced labor is not present in the supply chain. However, simply shifting production or sourcing to another country will not resolve these human rights issues, as forced labor is present in the supply chain of many other countries.[112] For instance, Cargill, Nestlé, Hershey, and other large international chocolate companies were accused of supply chain human rights abuses and sued after they allegedly sourced cocoa beans from plantations in Ivory Coast that were harvested by child slaves.[113]

As discussed *infra*, some U.S. state and federal regulations apply to supply chain due diligence issues, but any existing legislation fails to fully guarantee that supply chains are free from human rights abuses, and further fails to assign responsibility to business enterprises.[114] State statutes, like the California Transparency in Supply Chains Act of 2010, are generally inefficient.[115] Creating comprehensive federal legislation would standardize guidelines, provide adequate notice, and ensure uniform enforcement.

V. Proposal

Act would significantly curb supply chain human rights abuses. Although the Act is not perfect, many of its provisions should be replicated in future United States federal statutes.

A. Key Topics to Include in Any Future Supply Chain Due Diligence Legislation

U.S. legislators looking to create federal due diligence legislation should look to the German Supply Chain Act, Uyghur Act, and Guiding Principles for direction. First, American lawmakers should look to incorporate the Guiding Princi-

Calvin Klein, Carter's, Dell, General Motors, Google, Nike, L.L. Bean, Polo Ralph Lauren, Skechers, Tommy Hilfiger, and Victoria's Secret).

111 Emma Cosgrove, *Nike, Retail Groups Respond to Report Documenting Forced Uighur Labor in Supply Chains*, SUPPLY CHAIN DIVE (updated Mar. 12, 2020), https://www.supplychaindive.com/news/nike-apple-supply-chains-forced-uighur-labor/573556/.

112 BUREAU OF INT'L LAB. AFFS., 2020 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 19-24 (2020) (finding that 155 goods from 77 countries are produced by child labor or forced labor, based on factors identified by the U.S. Trafficking Victims Protection Reauthorization Act).

113 Oliver Balch, *Mars, Nestle and Hershey to Face Child Slavery Lawsuit in US*, THE GUARDIAN (Feb. 12, 2021 5:31 PM), https://www.theguardian.com/global-development/2021/feb/12/mars-nestle-and-hershey-to-face-landmark-child-slavery-lawsuit-in-us.

114 *See* CIV. § 1714.43; ATCA § 1350; TFTEA § 4301; Uyghur Act §3.

115 *See generally* Annie Lowrey, *Are States Really More Efficient Than the Federal Government?*, THE ATLANTIC (Oct. 2, 2017), https://www.theatlantic.com/business/archive/2017/10/graham-cassidy-states-federal-efficiency/541599/ ("But there is little evidence that the states are more efficient administrators than Washington is, and some evidence that they might be less so. 'The basic argument for state efficiency is based more on hopes and prayers than on clear evidence, across the board,' said Don Kettl, a professor of public policy at the University of Maryland. Delegating programs to the states would likely result in greater disparities in what programs offer and slimmer budgets overall, more than any radical improvements in efficiency.").

ples into any new supply chain due diligence law. The German Supply Chain Act reflects the Guiding Principles,[116] and any future U.S. legislation should as well. Importantly, the U.N. Guiding Principle, Principle 17, states that "[h]uman rights due diligence (a) should cover adverse human rights impacts that [a] business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships."[117] This language, or similar language, must be included in legislation to indicate that the United States is incorporating the Guiding Principles.

Second, American lawmakers should replicate the applicability portion of the German Supply Chain Act, and explicitly state that both foreign and domestic companies that operate in the United States are required to conduct supply chain due diligence. Additionally, the American legislation should extend applicability to smaller companies. Creating a plan that mandates progressive compliance, such as requiring companies with 500 employees to comply by 2025, companies with 250 employees to comply by 2026, and so on, would help to capture more business organizations that operate in the United States.

Third, any proposed legislation should also include a comprehensive environmental due diligence component. This is an area where the German Supply Chain Act falls short. Specifically, the Act limits the number of environmental treaties with which corporations must comply to three.[118] American lawmakers must include a more comprehensive general clause relating to environmental damages. This general clause would require companies to consider any potential environmental risks in their supply chains, rather than focusing on only a few conventions. Further, the clause should establish a general requirement to protect the environment, rather than only covering environmental damages when they infringe upon human rights. Including a general clause ensures mitigation of more environmental risks and eliminates uncertainty about which conventions should be chosen.

Fourth, American lawmakers should review the Uyghur Act and use some of its more crucial provisions as a model. Lawmakers may follow the Task Force model outlined in the Uyghur Act[119] to focus on, for example, countries with the most slaves.[120] Any proposed legislation should create a Task Force focused on

---

116 FED. REPUBLIC OF GERMANY, FED. FOREIGN OFF., PROGRESS ON IMPLEMENTATION OF THE NATIONAL ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS (Aug. 13, 2021), https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/adoption-nap/2477156 (specifically, Germany's incorporation of its National Action Plan, or NAP, as mandated under the Guiding Principles was key to effectively implementing and monitoring implementation of the Guiding Principles, and that it was crucial to eventually creating the German Supply Chain Act).

117 Guiding Principles, *supra* note 16, Principle 17(a).

118 German Supply Chain Act § 2(3).

119 Uyghur Act § 2.

120 Arantxa Underwood, *Which Countries Have the Highest Rates of Modern Slavery and Most Victims?*, THOMSON REUTERS FOUND. NEWS (Jul. 30, 2018, 12:01 AM), http://news.trust.org/item/20180730000101-aj7ui/ ("North Korea has the world's highest rate of slavery, with about one in 10 people enslaved, followed by Eritrea (9.3%) Burundi (4%), Central African Republic (2.2%), Afghanistan (2.2%), Mauritania (2.1%), South Sudan (2%), Pakistan (1.7%), Cambodia (1.7%) and Iran (1.6%). India is home to the largest number of slaves globally, with 8 million, followed by China (3.86 million), Pakistan (3.19 million), North Korea (2.64 million), Nigeria (1.39 million), Iran (1.29 million), Indonesia

these and similarly compromised countries, mirroring the process outlined in the Uyghur Act. Further, future legislation should adopt the Uyghur Act provision that shifts the burden of proof to business enterprises. Corporations subject to such a provision would be required to prove that their supply chains, direct and indirect, do not contain human rights abuses, rather than placing the burden to prove the existence of human rights abuses on CBP or another governmental entity.

Fifth, Congress must also adopt some of the administrative measures that are outlined in the German Supply Chain Act. American lawmakers should require businesses to establish human rights risk management systems, conduct regular human rights risk assessments, and produce publicly available human rights policy statements.[121] Additionally, American lawmakers should improve upon the Act and include a provision extending applicability to indirect suppliers. This expansion will ensure that more human rights abuses and environmental risks are prevented because businesses will be required to review their entire supply chains. Ensuring that indirect suppliers do not have human rights abuses in their supply chains will be an arduous task for many companies, but the legislation can allow for more time to formulate a plan for recognizing, preventing, and mitigating human rights abuses and environmental risks related to indirect suppliers.

Finally, American lawmakers must include an effective remediation mechanism for affected parties. The Guiding Principles recommend that businesses create a remediation mechanism for any human rights abuses that they assist in perpetuating.[122] U.S. lawmakers may mirror other U.N. remediation mechanisms, such as those used by the U.N. Human Rights Committee, to submit complaints alleging supply chain human rights abuses or environmental destruction.[123] The complaint procedure would allow individuals, including non-U.S. citizens, to file complaints against American companies who have allegedly violated the supply chain due diligence legislation. An independent governmental committee within

(1.22 million), Democratic Republic of the Congo (1 million), Russia (794,000) and the Philippines (784,000).").

[121] Charlie Mahoney & Mona Patni, *Chart of the Week: Companies That Provide Human Rights Disclosure Outperform Those That Don't*, JUST CAPITAL (May 20, 2021), https://justcapital.com/news/chart-of-the-week-companies-that-provide-human-rights-disclosure-outperform-those-that-dont/ (explaining that in 2021, independent nonprofit Just Capital, an independent nonprofit that tracks large corporations on how they perform on the public's priorities, ranked 928 American corporations and found only 458 provide a supplier code of conduct or a human rights policy statement).

[122] Guiding Principles, *supra* note 16, Principle 22.

[123] The Human Rights Committee considers individual complaints that concern States who are parties to both the International Covenant on Civil and Political Rights and the Optional Protocol. The Human Rights Committee decides the petitions in closed door meetings, but the Committee considers the opinions of non-governmental organizations ("NGOs"). NGOs may comment on individual complaints before the Committee renders its decision, and are allowed to make suggestions. After the Human Rights Committee has made its final decision, the Special Rapporteur on Follow-up to Views requests information to determine whether the issue was actually addressed. Klaus Hüfner, GERMAN COMM'N FOR U.N. EDUC., SCI. & CULTURAL ORG. (UNESCO), *How to File Complaints on Human Rights Violations: A Manual for Individuals and NGOs*, 58-60, 64-65 (2010). For an overview of how human rights issues are raised with the U.N. pursuant to any of the nine "core" relevant human rights treaties, see *Individual Communications: Human Rights Treaty Bodies*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/treaty-bodies/individual-communications#overviewprocedure (last visited Apr. 23, 2022).

CBP would review the complaint and respond, and NGOs will be encouraged to participate. Decisions would mandate follow up with the business enterprise to determine whether they implemented the recommendations should a business enterprise be found guilty of violating the legislation.

Further, the remediation mechanism should provide for damages for victims, as well as the possibility of civil liability. A civil liability provision would ensure that injured parties have at least some opportunity to bring a successful claim against an American business enterprise for human rights violations or environmental harm. More importantly, such a provision would increase the deterrent effect of the legislation and subsequently increase preventative effect on businesses operating in the United States. Lastly, Congress should include a provision allowing fines to be levied against companies that violate the regulations. The German Supply Chain Act provides an example of proportional fines based on the size of the company that could be modeled.[124]

B. Other Concerns: Lobbyist and Special Interest Groups

Lobbying will likely play a role in the shaping of any new federal supply chain due diligence legislation in the United States.[125] Germany ran into special interest issues when certain business groups, the Christian Democratic Union Economic Council, and its Federal Minister for Economic and Foreign Affairs and Energy pressured the German Parliament to weaken certain portions of the German Supply Chain Act.[126] Considering the power of lobbying groups in the United States, it is inevitable that lobbyists and special interest groups will try to water down any supply chain due diligence legislation, and so American lawmakers should anticipate pressure from lobbyists.[127] Lobbying reform is not the focus of this article, but it is something that American lawmakers can think about in tandem with any future supply chain legislation. Until major reforms happen, Americans should vote for candidates who are committed to rebuffing

---

[124] German Supply Chain Act § 24(3) ("legal persons with an average annual [income] of more than 400 million euros, a regulatory offence . . . may be punished with an administrative fine of up to 2 percent of the average annual [income]. . ."); *id.* § 24(4) ("[t]he economic circumstances of the legal person or association of persons are to be taken into account in the assessment [of administrative fines to be levied].").

[125] AMNESTY INT'L, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY 180-83 (2014) (explaining that, while a lack of transparency makes the impact of corporate influence difficult to ascertain, the effects of lobbying can be seen even when there is no insight into the closed-door meetings between lobbyists and government officials. For example, in 2012, Shell Oil Company received approval for its plan to drill for oil in the Arctic after hiring retired senators as lobbyists. It repeatedly sent them to the White House, and "maintained a steady flow of visits, letters and calls" with the agencies whose permit approval was required).

[126] INITIATIVE LIEFERKETTENGESETZ, *supra* note 1, at 4.

[127] Mike Tanglis, *The Price of Zero: A Look at What $450 Million in Political Spending by 55 Corporations that Paid Zero Federal Corporate Income Tax*, PUB. CITIZEN 4, 7 (2021) (In 2021, Public Citizen released a report detailing the political spending of fifty-five of some of the largest corporations in the U.S. Between 2015 and 2020 these fifty-five corporations employed an average of 526 lobbyists and spent $408 million on lobbying the federal government. It is estimated that their efforts successfully allowed these corporations to avoid $8.5 billion in taxes through related implemented regulations.).

lobbyists and corporate special interest groups. Additionally, present and future members of Congress should consider addressing these issues in their campaigns.

Conclusion

President Barack Obama's Administration identified global development as "a core pillar of American power" and acknowledged it "as a . . . moral imperative for the United States."[128] After some backsliding during former President Donald Trump's Administration, current President Joe Biden reaffirmed that "restore[ing] American leadership on the global stage" meant overhauling strategic global development plans and increasing the foreign affairs budget by nearly $7 billion.[129] Despite this substantial commitment, the United States still lacks a single, comprehensive federal law mandating human rights due diligence in supply chains.[130] This lack of federal supply chain due diligence legislation creates a gap in human rights due diligence in the United States that not only leads to human rights abuses, but also allows them to continue in plain sight.

The U.S. presents itself as a global leader, but it will fail as such if it does not present the correct tone on supply chain human rights abuses.[131] If the U.S. wants to improve its record on corporate human rights abuses and continue in its global leadership role, Congress must pass federal supply chain due diligence legislation. The *Uyghur Forced Labor Prevention Act* is a positive development, but more comprehensive legislation, including legislation that applies to environmental destruction, is required. The United States should analyze Germany's *Act on Corporate Due Diligence in Supply Chains*, borrow its effective provisions, learn from its weaknesses, and pass comprehensive federal legislation to help the United States reclaim its position as a world leader in the elimination of human rights abuses.

---

[128] FACT SHEET: U.S. GLOBAL DEVELOPMENT POLICY & AGENDA 2030, THE WHITE HOUSE OFF. OF THE PRESS SEC'Y (Sept. 27, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/27/fact-sheet-us-global-development-policy-and-agenda-2030.

[129] Michael Igoe, *Is America Back? Grading One Year of Global Development Under Biden*, DEVEX (Jan. 20, 2022), https://www.devex.com/news/is-america-back-grading-one-year-of-global-development-under-biden-102251.

[130] Koppmann, *supra* note 5.

[131] FACT SHEET, *supra* note 128; David Hudson, *"America Must Always Lead":* [sic] *President Obama Addresses West Point Graduates*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA (May 28, 2014, 3:33 PM) https://obamawhitehouse.archives.gov/blog/2014/05/28/america-must-always-lead-president-obama-addresses-west-point-graduates; Joseph Biden, President of the United States, Remarks by President Biden on America's Place in the World (Feb. 4, 2021), *available at* THE WHITE HOUSE BRIEFING ROOM, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/.